

立法會
Legislative Council

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**Paper for the Bills Committee on
Domicile Bill**

List of legal and drafting issues on the Domicile Bill

Administration's response to questions raised during first Bills Committee meeting on 15 March 2007 (CB(2)1707/06-07(02))

In the Administration's response to the Bills Committee questions raised at its first meeting on 15 March 2007 (CB(2)1707/06-07(02)), it is stated in paragraph 3 that "By analogy, it can be argued 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." There may be some problems with this view for the following reasons -

- (a) Does the resort to analogy with section 2(4) of Cap. 115 mean there is a lack of a common law definition of "lawfully present" or "unlawfully present" in the context of domicile? The context of the section, although it refers to "landing unlawfully" in paragraph (a)(i), is in relation to the determination of the meaning of "ordinarily resident", rather than lawful or unlawful presence.
- (b) It seems to be intemperate to say that presence during imprisonment cannot be lawful when clearly the imprisonment has to be based on the lawful order of the court. It seems to violate equitable principles that a person coerced to stay by imprisonment in any place is regarded as unlawfully present in that place.
- (c) Clause 6(2) provides that an adult's presence in Hong Kong shall be presumed to be lawful unless the contrary is proved. It is difficult to see how that presumption can be rebutted by proving his lawful imprisonment. On the contrary, it should prove otherwise, i.e. the presumption should not be rebutted.
- (d) A view that has been expressed at the first meeting is that during his imprisonment, a person should not be able to form an intention to make a home there for an indefinite period. This view, if correct, could mean that the issue of whether an imprisonment period should be interpreted as lawful or unlawful would be made irrelevant because under clause 5(2)(b), a person only acquires a new domicile if he has

such an intention. Since a prisoner cannot form such an intention, he will in any event maintain his domicile before incarceration. There is no mention of this view in the written response of the Administration to the first question.

2. It is further stated that in paragraph 3 that "his imprisonment should not be able to legitimise his wrongs and turn his time spent in prison into "lawful presence". It is recognised by both Members and the Administration in paragraph 9 that the rules on domicile per se do not give rise to direct entitlement to benefits. Therefore, even if his time spent in prison is regarded as "lawful presence", that should not cause him any gain, as "legitimation of his wrongs" would seem to suggest.

3. On the need to have an unequivocal provision, it is stated in paragraph 4 that "it is questionable how often, and in the first place, how likely, Hong Kong Courts will be asked to determine such a person's domicile, such as his capacity to marry or devolution of his personal property". It may be worth pointing out that it would be much more often and much more likely that such questions may arise for the legal adviser to a prisoner who wishes to marry during his imprisonment or to him as testator or to his estate if he dies in prison.

4. Clause 6(3) provides the Court with the necessary discretion to consider whether the requirement for lawful presence would result in injustice. Paragraph 5 gives an example that where denying a man's domicile in Hong Kong may mean that his wife would suffer injustice through the inability to petition for divorce in Hong Kong. The question that must be asked is whether the operation of clause 6(3) would give rise to any anomaly. In the given example, if the man's domicile in Hong Kong is not denied to avoid injustice to his wife who may wish to petition for divorce, what if the denial of his domicile in Hong Kong would not result in injustice to the man's ability in relation to his other rights which are affected by his domicile. Does it mean that for the purpose of his other rights, his domicile in Hong Kong could still be denied? Is clause 3(2) applicable here to give an individual more than one domicile at the same time, provided that it is for a different purpose?

5. Paragraphs 6, 7 and 8 refer to common law rules and a number of cases relating to illegal residence and residence during imprisonment. To what extent are these rules and cases still applicable in the context of the new regime introduced by clause 5? Does clause 5 effectively provides for a domicile of choice so that those rules and cases in so far that they relate to domicile of choice are still valid under the savings provisions under clause 13?

6. Paragraph 14 states that "the court is required to take into account all relevant considerations to determine whether he is present there and he intends to make a home there for an indefinite period. Clause 7 makes it clear that "presence in that country or territory is lawful by the law of that country or territory" is a factor, that might not otherwise be thought relevant, should be

relevant”. The problem is “one of the factors that shall be considered” implies a set of mandatory factors that have to be considered. From the explanation given in the paragraph 14, the only factors that are required to be considered are clause 5(2)(a) and (b) and all relevant considerations (such considerations varying necessarily according to the circumstances of each case as long as they are relevant) under those two paragraphs plus “lawful presence” that might otherwise not be thought relevant. In other words, there are no other factors to be considered apart from what are specified, contrary to what the phrase seems to suggest. The drafting of that clause may need to be clarified to avoid the import that there are factors other than those specified that must be considered but somehow are not to be listed and have to be found out by readers themselves or are still extant from common law rules saved under clause 13.

Other issues

Clause 4

7. Since clause 4(3) and (4) provides that a child’s domicile will be dependent under certain circumstances upon a parent’s domicile, how is the latter determined if clause 3(2) seems to allow a parent to have more than one domicile at the same time provided it is for a different purpose. Would that parent assume a separate domicile for the purpose of clause 4 irrespective of his other domicile(s) at the same time for other different purpose(s)?

Clause 6

8. In subclause (2), one will assume that the public authorities will be best able to prove the contrary. Will there be problems if the public authorities are not involved as a party to the relevant proceedings or there is generally no opposing party who is likely to have an interest in proving the contrary?

Clause 8

9. For an adult lacking the intention necessary for acquiring a domicile, he would have a domicile satisfying the closest connection test. However, under clause 5, a normal adult seems to have a domicile of choice with actual presence. The two tests may well result in a different outcome, as in the example of an individual freshly arrived in a foreign country intending to set up his new home there while 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. When his capacity is restored to him while he is still in the foreign country, he retains under subclause (3) the domicile that he had immediately before the capacity was restored. What can he do to acquire a new domicile in that foreign country as he originally intended?

10. In the closest connection test, is lawful residence a factor for consideration?

11. For the closest connection test provided for in clause 4(1), it is stipulated in clause 4(2) that “the court shall take into account all relevant factors”. The same stipulation is absent from the closest connection test under this clause. Is the absence due to any policy or drafting considerations?

Clause 10

12. It would seem that this clause could have application to residents of Hong Kong who go to the Mainland to work and live from time to time. Would the operation of the clause create an uncertainty in the domicile of those who alternate his residence and workplace between Hong Kong and the Mainland frequently?

13. Similarly, in the closest connection test of the clause, is lawful residence a factor for consideration?

Clause 11

14. Does the fact that needs to be proved for the purposes of the Ordinance include the contrary evidence referred to in clause 4(3) and (4) and the matter referred to in clause 6(2) and (3). If not, are they also to be proved on a balance of probabilities or otherwise?

Clauses 12 & 13

15. In the case of a child who becomes an adult upon the commencement of the Bill as passed and his domicile falls to be determined on that commencement date, his domicile on that commencement date, according to clause 13(1), “shall be determined as if this Ordinance had always been in force”. Under clause 5(1), “On becoming an adult, an individual retains the domicile that he had immediately before he becomes an adult”. So how should the domicile that he had immediately before he becomes an adult be determined: under clause 12 or clause 13(1)?

16. Is there any significant difference in effect were clause 13(1) to say “in accordance with this Ordinance” instead of “as if this Ordinance had always been in force”?

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