立法會
Legislative Council

立法會LS82/08-09號文件

《在囚人士投票條例草案》委員會文件

以監獄地址作選舉登記用途

在法案委員會2009年6月1日的會議席上，委員討論與在囚人士的登記地址有關的事宜。本文件旨在協助委員進一步商議下述事宜：根據現有選舉法例，監獄地址是否合條件成為囚禁於該監獄內的人士的住址，以作選民登記用途。

居所要求

2. 《立法會條例》(第542章)第28條規定，申請登記為選民的人必須呈報住址，而該住址是他在香港唯一或主要的居所。根據第28(3)條，"在香港唯一或主要的居所"的定義為："該人所居住的並屬該人唯一或主要家居的在香港的居住地方"(下稱"居所規定")。"居住"一詞隱含一定程度的永久性質(*Brokelmann v Barr* [1971] 2 QB 602, 3 All ER 29)。"居所"一詞指某人選擇在特定地方或國家居住，而這一選擇乃出於自願和為了某些既定目的(*R v Barnet London L.B.C. ex p Shah* [1983] 2 AC309, 1 All ER 226 (HL) 及 *Sun Jie v Registration of Persons Tribunal and others* [2003] HKCU 555)。不論在《立法會條例》還是其他現有選舉法例，都沒有訂定"家居"一詞的定義，因此必須參考該詞的一般及正常涵義。"家居"一詞本身不易給予確切的定義，在不同語境可以有不同涵義。根據《簡明牛津英語詞典》，"home"(即家居)一詞的定義為："住宅房屋、房屋、居住地方：家庭或住戶的固定居所；某人本身的房屋；某人通常居住的住宅或某人將之視為其正式居住地方的住宅"。上述定義被視為包含"家居"所須具備的必要元素(*Herbert v Byrne* [1964] 1 ALL ER 882 at p. 887, CA, *per* Salmon L.J.)。

以監獄作為選舉登記的住址

3. 委員曾經討論到，對在囚人士(特別是遭判處長期或終身監禁的人士)而言，除在囚監獄外，他們在香港可能再沒有家居，而他們可能希望以監獄地址作為其住址，作選舉登記用途。

4. 政府當局認為，如果某人非自願地被拘禁於某地方，這地方便不合條件成為該人在《立法會條例》下的居所。當局依據法院最近一宗案例而提出上述意見。在這宗案例當中，一名被判監禁54個月的在囚人士申請改以其在赤柱的囚室作為選民登記冊上的地址，但遭法院駁回其申請(*Choi Chuen Sun v Secretary for Justice and Electoral Affairs Commission* (HCAL 83/2008))。

5. 然而，有一點值得注意，就是草擬第28條所載的居所規定時的背景。在草擬第28條時，在囚人士無權登記為選民，亦無權投票。在取消對在囚人士投票權的限制後，就正在服長期監禁刑罰而在監獄外再沒有居所的在囚人士而言，除非這些在囚人士的在囚監獄地址可被視為根據現有第28條屬可予登記的住址或作出若干其他安排(如監獄地址不得作此登記用途的話)，否則，這些在囚人士可能仍然不合資格登記為選民。

6. 鑒於任何人士均須先登記為選民，才可行使其投票權，法院在詮釋現有居所規定時，若信納有關人士如因沒有可予登記的地址而可能變為不合資格，則法院可採用考慮立法目的的取向。在這情況下，應適當地考慮個別個案的事實。在決定某人的住址可否作選舉登記用途時，監獄不可能是某人自願選擇作為其居所此一事實，可能會被視為無關重要。因此，若某名在囚人士能夠證明，他沒有任何其他可予登記的地址，則就選民登記而言，監獄仍可能合條件成為某人的居所或家居。

7. 過往曾有多個例子，就某一特定目的而言，懲教院所或醫療院所(如監獄或精神病院)可被視為某人的居所。在*Lexi Holdings plc v Shaid Luqman and Others* (2007)22/10/2007一案中(有關資料載於附件I，只備英文本)，法院裁定，就向該名在囚人士送達法律程序文件的目的而言，該名在囚人士的慣常或最後為人所知的居所是該人的在囚監獄[1]。在*Head v Head* [1963] 3 All ER 640一案中(有關資料載於附件II，只備英文本)，就離婚法律程序而言，精神病人被視為在精神病院內"居住"(隨文附上上述案例的資料(只備英文本)，以供參考)。

連附件

立法會秘書處
助理法律顧問
譚淑芳
2009年6月8日

[1] *Per* Briggs J, the High Court of England and Wales。資料來源：Butterworths Personal Injury Litigation Service，2007年11月，編輯：Nicholas Bevan and others。

Annex I

(Extract)

Butterworths Personal Injury Litigation Service

November 2007

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Lexi Holdings plc v Shaid Luqman & Ors (2007) 22/10/2007

A prisoner's usual or last known residence is the prison

(Briggs J)

The facts: C applied for judgment in default of acknowledgement of service against the defendant partnership, having purportedly effected postal service on one of the partners (P) at his two residences or former residences. C knew that P was in prison at the time. C argued that a prisoner's house was no less his **residence when he was in prison**.

The decision: Unsurprisingly the court disagreed, and decided that where a claimant knew a defendant was in prison, the prison was his usual or last know place of residence.

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HEAD *v.* HEAD.

[EXETER ASSIZES (Rees, J.), May 16, 23, 1963.]

Divorce—Insanity—Incurable unsoundness of mind—Care and treatment for five years immediately preceding the presentation of the petition—Absence from mental hospital on trial leave—Whether "resident" in hospital notwithstanding temporary absence—Divorce (Insanity and Desertion) Act, 1958 (6 & 7 *Eliz.* 2 *c.* 54), *s.* 1 (1) (*a*).

In January, 1955, the wife was re-admitted to a mental hospital as a voluntary patient and in November, 1959, she was regraded as an informal patient under the Mental Health Act, 1959. On Sept. 18, 1961, she left hospital to spend four weeks' trial leave at her parents' home; the four weeks were extended by an order dated Oct. 25, 1961, for another four weeks, the wife remaining at her parents' home. During this period she was shown in the hospital's books as an in-patient on leave; she was not discharged because the doctor having care of her had not decided to discharge her, intending to see how she got on during the trial period. On Nov. 8, 1961, her husband presented a petition for divorce on the ground that she was incurably of unsound mind (as was established at the trial) and had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. On the question whether, during the period between Sept. 18 and Nov. 8, 1961, the wife was receiving treatment for mental illness as a resident in a hospital within s. 1 (1) of the Divorce (Insanity and Desertion) Act, 1958,

Held: on the true construction of s. 1 (1) (a) of the Divorce (Insanity and Desertion) Act, 1958, a patient may still be "resident" in a mental hospital, although the patient is temporarily absent therefrom (see p. 642, letter H, post); on the facts in the present case the wife was, between Sept. 18 and Nov. 8, 1961, "receiving treatment for mental illness as a resident in a hospital" within s. 1 (1) (a) and a decree of divorce would be granted (see p. 643, letter G, post).

Dunn v. *Dunn* ([1963] 1 All E.R. 440) applied.

[As to continuity of care and treatment where patient is absent on trial or for health, see 12 HALSBURY'S LAWS (3rd Edn.) 280, para. 538, note (l); and for cases on the subject, see 27 DIGEST (Repl.) 369, *3057-3059*.

For the Matrimonial Causes Act, 1950, s. 1 (2), see 29 HALSBURY'S STATUTES (2nd Edn.) 390; 39 ibid., 1118.

For the Divorce (Insanity and Desertion) Act, 1958, s. 1 (1) (a), see 38 HALSBURY'S STATUTES (2nd Edn.) 485.]

Cases referred to:

Chapman v. *Chapman*, [1961] 3 All E.R. 1105; [1961] 1 W.L.R. 1481; 3rd Digest Supp.

Dunn v. *Dunn*, [1963] 1 All E.R. 440; [1963] P. 192; [1963] 2 W.L.R. 311.

Mesure v. *Mesure*, [1960] 2 All E.R. 233; [1960] P. 184; [1960] 3 W.L.R. 78; 3rd Digest Supp.

Safford v. *Safford*, [1944] 1 All E.R. 704; [1944] P. 61; 113 L.J.P. 54; 171 L.T. 29; 27 Digest (Repl.) 369, *3059*.

Swymer v. *Swymer*, [1954] 3 All E.R. 502; [1955] P. 11; [1954] 3 W.L.R. 803; 3rd Digest Supp.

Petition.

The husband and wife were married in 1933, and they had one child, who was born in 1934. After the birth of the child the wife began to suffer from delusions. In September, 1940, a reception order was made and she was detained in Exminster Hospital under care and treatment as a person of unsound mind until November, 1954, when she was discharged as having recovered, but she was readmitted to Exminster Hospital as a voluntary patient on Jan. 13, 1955.

On Nov. 12, 1959, she was regraded as an informal patient under the Mental Health Act, 1959. On Sept. 18, 1961, she left hospital to spend a four-weeks period of trial leave at her parents' home. This was extended for a further four-weeks period by an order made on Oct. 25, 1961. During these two periods of trial leave the wife was shown on the books of the hospital as an " in-patient on leave ". On Nov. 8, 1961, during the currency of the second four-weeks period, the husband presented a petition for divorce on the ground that the wife was incurably of unsound mind and that she had been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. On and after Dec. 12, 1961, the wife ceased to be shown in the hospital's books as an in-patient. From Dec. 12, 1961, she remained at her parents' home under some degree of supervision by a mental welfare officer, and she was examined from time to time by the physician superintendent of the hospital.

In the divorce suit the Official Solicitor, as guardian ad litem of the wife, filed an answer to the petition denying that the wife was incurably of unsound mind and that she had been continuously under care and treatment for the requisite period. It was not disputed that the Exminster Hospital was a hospital within the provisions of s. 1 (1) (a) of the Divorce (Insanity and Desertion) Act, 1958.

H. E. L. McCreery for the husband.
T. G. Field-Fisher for the wife.

Cur. adv. vult.

May 23. **REES, J.,** having stated the facts and referred to the medical evidence, found that the petitioner had established that the wife was incurably of unsound mind, and continued: The difficult question arises whether the wife has been shown to have been between Sept. 18 and Nov. 8, 1961, receiving treatment for mental illness as a resident in a specified hospital. During this period she stayed at her parents' home in Devon on what Dr. Bartlett called " trial leave ". Counsel for the wife made the point that the wife was in the Exminster Hospital from Nov. 12, 1959, onwards, as an informal patient under arrangements made pursuant to s. 5 of the Mental Health Act, 1959, and that that Act contained no provisions enabling leave of absence to be given to such patients. Section 39 of the Act of 1959 does contain express provisions for leave of absence to be given to detained patients, but this section has no application to informal patients, such as the wife in this suit. Counsel for the wife argued, therefore, that in the case of an informal patient the legislature did not envisage leave of absence being given, with the result that, when such a patient left the confines of the hospital, he or she ceased to be a patient of the hospital and a fortiori ceased to be a " resident " in the hospital.

He distinguished the position of the respondent in *Swymer* v. *Swymer* (1) who, while a voluntary patient under the Mental Treatment Act, 1930, was sent for treatment for a fractured leg to another hospital—which was not an approved place under that Act—and returned to the mental hospital when his leg was healed. A schedule to the Act of 1930 gave power for rules to be made which could, if the power were exercised, have authorised the temporary absence of voluntary patients from the mental hospital. The power was not exercised for some unexplained reason, but ROMER, L.J., rested his judgment certainly in part on the view that the word " continuously " in s. 1 of the Matrimonial Causes Act, 1950, should be construed having regard to the consideration that the Act of 1930 envisaged the making of rules providing that voluntary patients might be absent for temporary periods. Counsel for the wife argued that no such consideration is applicable in the present case, since the Mental Health Act, 1959, does not provide for the temporary absence of informal patients. In my judgment, the absence of express provisions in the Mental Health Act,

(1) [1954] 3 All E.R. 502; [1955] P. 11.

1959, for granting leave of absence to informal patients does not assist the wife's case. For the present purpose I am required to construe the terms of the Matrimonial Causes Act, 1950, and the Divorce (Insanity and Desertion) Act, 1958. When these were enacted the argument based on the Act of 1930, to which ROMER, L.J., referred, was still open and the wife was a voluntary patient under the Act of 1930—a category similar to that of the respondent in the *Swymer* case (2).

Accordingly it could properly be said that the legislature contemplated that the wife could be given temporary leave of absence. If this be the case, then, in order to give effect to the argument of counsel for the wife, it would be necessary to suppose that the effect of the regrading of the wife to the status of an informal patient pursuant to s. 5 of the Mental Health Act, 1959, took away the power—which had existed since her readmission into hospital in January, 1955—to grant her temporary leave of absence. I am unable to accept that such is the effect of the passage into law of the Mental Health Act, 1959. I think that it might have been contemplated that patients who are admitted to, or remain in, hospital for treatment for mental disorders under informal arrangements made pursuant to s. 5 of the Act of 1959 could be given temporary leave of absence as circumstances might require. I think that the absence of express provision for granting leave of absence to these patients cannot be construed as a prohibition against the granting of such leave, but rather is due to the informality of the arrangements which are made for their admission to hospital. Such patients may suffer from the widest range of mental disorders and of the widest range of severity, and it seems to me unreal to suppose that the legislature intended to prevent their treatment including, for example, therapeutic and temporary absence from hospital to enable them to adjust to conditions of the outside world. Such absences might vary in length from a few hours to a month or more, and I cannot think that it was intended that the patient is required to be readmitted afresh under s. 5 of the Act of 1959 at the end of each temporary absence. I was informed by counsel that the argument with which I have just dealt had been addressed to WRANGHAM, J., in *Dunn* v. *Dunn* (3), and his decision necessarily involved its rejection. I am accordingly glad to find support for my own view.

I now turn to the central issue in this part of the case, namely, whether the wife between Sept. 18 and Nov. 8, 1961, was "receiving treatment for mental illness as a resident in a hospital." It is necessary to observe that these words in s. 1 (1) of the Divorce (Insanity and Desertion) Act, 1958, are not the same as those with which the Court of Appeal were concerned in the *Swymer* case (2) or in *Safford* v. *Safford* (4). Nevertheless, in my view the problem was to be approached in the light of the principles to be found in these cases. In the *Swymer* case (2) the patient remained "continuously" under care and treatment for his mental illness notwithstanding a four-week temporary absence from the mental hospital. Similarly, though the patient in the *Safford* case (4) was absent on trial leave periods lasting from four days to about seven weeks, it was held nevertheless that the patient was throughout "detained" in the mental hospital under care and treatment. I conclude as a matter of construction, and in the light of these authorities, that a patient may be still "resident" in a mental hospital notwithstanding temporary absence therefrom.

The decision of WRANGHAM, J., in *Dunn* v. *Dunn* (3) is directly in point and supports the view I have expressed. I should also refer to the decision of LLOYD-JONES, J., in *Mesure* v. *Mesure* (5), since he examined the terms of s. 1 (1) (a) of the Act of 1958. In that case he found that the petitioner had failed to establish that the respondent was incurably of unsound mind in that she had not received treatment as a resident in a specified hospital during an absence of

(2) [1954] 3 All E.R. 502; [1955] P. 11. (3) [1963] 1 All E.R. 440; [1963] P. 192.
(4) [1944] 1 All E.R. 704; [1944] P. 61. (5) [1960] 2 All E.R. 233; [1960] P. 184.

A eleven weeks in a sanatorium for tuberculosis. I do not find any part of that decision to be in conflict with the view which I have reached in the instant case. Indeed, the facts as found by LLOYD-JONES, J., precluded any other view than the one that he reached.

Similarly, I think that the decision of MARSHALL, J., in *Chapman* v. *Chapman* (6), which also turns in part on the construction of s. 1 (1) (a) of the Act of 1958,
B is wholly distinguishable on the facts, and I find no conflict between his views and those that I have expressed in the instant case. I add that in the instant case it was, quite properly, not sought to rely on s. 1 (3) of the Act of 1958 in relation to any " interruption " of twenty-eight days or less.

I now examine the facts in relation to the wife's "residence" and as to the " treatment " which she received during the vital period of seven weeks between
C Sept. 18 and Nov. 8, 1961.

I accepted the evidence of Dr. Bartlett without hesitation. His evidence showed that he decided to allow the wife to go to her parents' home for a period of one month, or four weeks, " to see how she got on ". He decided not to discharge her from the hospital, because he had an open mind whether the trial period would be successful or not. If during or at the end of the period her
D condition deteriorated he would have recalled her into hospital, and if she refused to return then, provided the necessary conditions were fulfilled, he would have invoked the powers provided by s. 25 or s. 29 of the Act of 1959 to enforce her return. Throughout the relevant period and up to Dec. 12, 1961, the wife was shown on the books of the hospital as an " in-patient on leave ", and was plainly so regarded by the hospital authorities.

E The appropriate mental welfare officer was instructed, through the medical officer of health for Devon, to supervise the patient and report her progress to the mental hospital. This first leave period was extended by another month, or four weeks, on Oct. 25, 1961. During the period the probability is that the wife did take some of the tablets which she was advised to take—but in her case these tablets were not essential and were only of possible value in her condition.
F She was visited by the mental welfare officer and reports were made to the hospital. Dr. Bartlett said that he regarded the period of trial leave as part of her treatment. He said that he did not personally inform the wife that she was on " trial leave ", but he was satisfied that she was told, because at a subsequent meeting with him she told him that she had been on trial leave.

In these circumstances I conclude without hesitation that the wife, during
G the period from Sept. 18 to Nov. 8, 1961, was " receiving treatment for mental illness as a resident in a hospital " within the meaning of s. 1 (1) (a) of the Divorce (Insanity and Desertion) Act, 1958. Accordingly I find that the husband has established that the wife is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition. Accordingly there will be a decree nisi of dissolution of the marriage.

Decree accordingly.

Solicitors: *Windeatt & Windeatt*, Kingsbridge (for the husband); *Official Solicitor* (for the wife).

[*Reported by* DEIRDRE MCKINNEY, *Barrister-at-Law.*]

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(6) [1961] 3 All E.R. 1105.