

# 立法會

## *Legislative Council*

LC Paper No. LS18/09-10

### **Subcommittee on Poverty Alleviation**

#### **Paper on the Constitutionality of the One-year Continuous Residence Requirement for the Comprehensive Social Security Assistance Scheme**

#### **Purpose**

At the meeting of the Subcommittee on Poverty Alleviation held on 15 May 2009, members discussed issues relating to the requirement under the Comprehensive Social Security Assistance (CSSA) scheme that an applicant for CSSA must have resided in Hong Kong continuously for at least one year immediately before making an application for CSSA (the one-year continuous residence requirement). The legal adviser to the Subcommittee was requested to advise whether the one-year continuous residence requirement would contravene the Basic Law, which provides that Hong Kong residents shall have the right to social welfare in accordance with law. This paper seeks to provide information and analysis on the issue.

#### **The One-Year Continuous Residence Requirement and its Rationale**

2. At the meeting of the Executive Council on 3 June 2003, the Executive Council decided that in line with "the principle of seven-year residence requirement" for providing social benefits heavily subsidized by public funds as recommended by the Task Force on Population Policy, the following residence requirements for CSSA was adopted **from 1 January 2004-**

- (a) To be eligible for CSSA, a person must have been a Hong Kong resident for at least seven years and have resided in Hong Kong continuously for at least one year immediately before the date of application (absence from Hong Kong up to a maximum of 56 days during the one-year period is treated as residence in Hong Kong).
- (b) Children aged below 18 are exempted from any prior residence requirement.
- (c) Current Hong Kong residents (i.e. those who have become Hong Kong residents before the seven-year residence rule comes into effect, viz. 1 January 2004 as proposed) need only to satisfy the requirement of one year's continuous residence in Hong Kong immediately before the date of application.

- (d) In exceptional circumstances, assistance may be granted at the discretion of the Director of Social Welfare (DSW) to a person who does not meet the residence requirement.

3. In the Legislative Council Brief dated 3 June 2003 (File Ref : HWF CR/3/4821/99(03) Pt. 7) issued by the Health, Welfare and Food Bureau (HWFB), HWFB explained that the additional requirement for the one-year continuous residence in Hong Kong immediately before the date of application of CSSA aims to discourage people who have lived outside Hong Kong for a long time from relying on CSSA as soon as they return to Hong Kong. The background and rationale of the one-year continuous residence requirement was further explained in another paper issued in May 2007 by HWFB to the Subcommittee on Review of the CSSA Scheme (LC Paper No. CB(2)1879/06-07(01)). According to the said paper, the CSSA Scheme is *"non-contributory and means-tested. It is funded entirely from general revenue. CSSA is a safety-net of last resort which provides financial assistance to bring the income of needy individuals and families up to a prescribed level to meet their basic needs. The one-year-continuous-residence requirement aims to discourage people who have lived outside Hong Kong for a long time from relying on CSSA as soon as they return to Hong Kong. While we are committed to providing a safety net for the financial vulnerable, we also need to strike a reasonable balance between the interests of various sectors of the community, having regard to the long-term sustainability of our social security system and the need for a rational basis on which our public resources are allocated."*

### **Right to Social Welfare under the Basic Law**

4. Article 36 of the Basic Law provides that

*"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. According to our research, there is no judicial authority on the constitutionality of the one-year continuous residence requirement. The seven-year residence requirement for the CSSA scheme (which was introduced together with the one-year continuous residence requirement on 1 January 2004) has however been the subject of challenge in courts. In *Kong Yun Ming v the Director of Social Welfare*<sup>1</sup>, the Court of First Instance, in considering whether the seven-year residence requirement infringes the right to social welfare protected by Article 36 of the Basic law, held that the right to social welfare under Article 36 is not an absolute right but one that may be restricted and subject to changes to the social welfare system made by the Government pursuant to Article 145 of the Basic Law, which reads:

*"On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own,*

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<sup>1</sup> [2009] 4 HKC 98, CFI.

*formulate policies on the development and improvement of this system in the light of the prevailing economic conditions and social needs."*

6. The Court decided that Article 36 of the Basic Law must be read together with Article 145 and that as economic conditions and social needs may change towards different directions at different times, the resulting policies on social welfare system could lead to a reduction in or restriction on social welfare benefits. By virtue of Article 145, the Government is entitled to change social welfare policy in respect of the CSSA scheme in response to mounting pressures exerted on the pre-existing social welfare system in the light of the then financial situation in Hong Kong and the rapid ageing of Hong Kong's population so as to enhance sustainability of the social welfare system in the long term. Therefore, the Court did not hold that the change of social welfare policy in the CSSA scheme in January 2004 (by introducing the new residence requirements for CSSA scheme) has contravened Article 36 or Article 145 of the Basic Law.

7. Since the one-year continuous residence requirement is added to the CSSA scheme as part of the change of social welfare system that has taken effect from January 2004 and based on decision in *Kong Yun Ming*, it seems that the one-year continuous residence requirement would not infringe Article 36 or Article 145 of the Basic Law. However, we are given to understand from the Administration that Kong Yun Ming, the Applicant in the case, is appealing to the Court of Appeal against the said judgment. It remains to be seen whether the Court of First Instance's judgment on the constitutionality of the seven-year residence requirement for the CSSA scheme would be upheld by the higher courts.

8. Further, in the course of preparing this paper, it has come to our Division's notice that in a judicial review proceedings no. HCAL 69 of 2009, a Hong Kong resident, namely, Yau Man Fai (the Applicant), had been granted leave to apply for judicial review against the decision of the Director of Social Welfare to refuse the Applicant's application for CSSA due to his failure in satisfying the one-year continuous residence requirement. It is given to understand from news reports that the Applicant's grounds of application relate to his rights under the Basic Law. We are also given to understand from the Administration that the judicial review application will be heard before the Court of First Instance in May 2010.

### **Discrimination and Article 25 of the Basic Law**

9. Article 25 of the Basic Law provides that:

*"All Hong Kong residents shall be equal before the law."*

Similar protection is provided in Article 22 of the Hong Kong Bill of Rights (HKBOR), which is constitutionally entrenched by Article 39(1) of the Basic Law. Article 22 of the HKBOR reads:

*"All persons are equal before the law and are entitled without any discrimination to the equal protection of law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion or other opinion, national or social origin, property, birth or other status."*

10. In the present case, apart from the right to social welfare, another relevant issue to consider is whether the policy of imposing the requirement of one-year continuous residence for the CSSA scheme would discriminate against those **Hong Kong residents who are permanent residents and can satisfy the financial tests for CSSA but have been absent from Hong Kong more than 56 days during the year before making applications for CSSA**. The legal principles on the subject of discrimination have been laid down by the Court of Final Appeal in the decision in *Secretary for Justice v. Yau Yuk Lung*<sup>2</sup>. The Court of Final Appeal held that while the law should usually accord identical treatment to comparable situations, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment might be justified for good reason, if they satisfy the "justification test". In order for differential treatment to be justified, it must be shown that the difference in treatment must pursue a legitimate aim; the difference in treatment must be rationally connected to the legitimate aim and the difference in treatment must be no more than is necessary to accomplish the legitimate aim<sup>3</sup>.

11. In *Kong Yun Ming*, apart from deciding that the seven-year residence requirement for CSSA is not inconsistent with the right to social welfare protected by the Basic Law, the Court of First Instance further held that the differential treatment of non-permanent residents of Hong Kong, as distinguished from permanent residents, entailed in the residence requirement is justified and there is no discrimination within the meaning of Article 25 of the Basic Law or Article 22 of the Hong Kong Bill of Rights. The Court considered that the introduction of the seven-year residence requirement for CSSA is in general rationally connected to the legitimate aim in that it requires that a particular, expensive benefit is confined to those who had been part of the community of Hong Kong for a sufficient length of time to establish that they were contributing to that community in one of a variety of ways.

12. It is likely that the discrimination issue would be one of the issues that the Court of First Instance will consider in the pending judicial review proceedings referred to in paragraph 8 above. It remains to be seen whether the Court is prepared to follow the decision in *Kong Yun Ming* notwithstanding that the differential treatment in that case relates to non-permanent residents of Hong Kong in relation to CSSA, while the one-year continuous residence requirement in the pending proceedings involves a difference in treatment to permanent residents of Hong Kong who have been absent from Hong Kong for more than 56 days during the year before making applications for CSSA. However,

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<sup>2</sup> [2007] 3 HKLRD 903

<sup>3</sup> Ibid, per Li CJ at p. 913D

in view of this difference in circumstances between *Kong Yun Ming* and the pending judicial review proceedings, it seems that if the issue of discrimination is to be raised in the pending proceedings, there might be room for the Court to distinguish *Kong Yung Ming* in determining the issue.

### **Conclusion**

13. In the light of the proceedings mentioned in paragraph 8 above, it seems likely that the question of the constitutionality of the one-year continuous residence requirement for CSSA will be considered by the Court of First Instance soon. If the Court is prepared to follow the decision in *Kong Yun Ming* in relation to the right to social welfare, it appears that the one-year continuous residence requirement would not infringe Article 36 of the Basic Law. As regards the issue of discrimination in the context of Article 25 of the Basic Law, it remains to be seen whether the Court is prepared to distinguish *Kong Yung Ming* and come to a different decision in the pending judicial review proceedings.

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