立法會
Legislative Council

LC Paper No. CB(2)1314/06-07(02)

Ref : CB2/BC/4/06

Bills Committee on Domicile Bill

Background Brief

Purpose

This paper gives an account of past discussion of the Panel on Administration of Justice and Legal Services on the rules for determining domicile.

Background

2. Domicile has been defined as "the place or country which is considered by law to be a person's permanent home". It is an important legal concept as it determines which system of law governs a person's legal status. The rules for determining a person's domicile have repeatedly been criticized as unnecessarily complicated and technical and sometimes leading to absurd results. The Secretary for Justice and the Chief Justice considered it appropriate to refer the topic to the Law Reform Commission (LRC) for review. The LRC appointed a sub-committee in June 2002 to review the law governing the determination of domicile of natural persons and to consider and make recommendations for such reforms as may be necessary.

3. In March 2004, the Domicile Sub-committee of the LRC published the Consultation Paper on "Rules for Determining Domicile" for public consultation until end of May 2004. In April 2005, the LRC published the Report on "Rules for Determining Domicile". The Report concluded that domicile was a complex and confusing area of the common law and recommended the introduction of legislative amendments to simplify the ascertainment of a person's domicile.

Consultation with the Panel

Consultation Paper on "Rules for Determining Domicile"

4. The Panel was briefed on the Consultation Paper on "Rules for Determining Domicile" at its meeting on 26 April 2004. Ms Audrey EU, the Chairman of the Domicile Sub-committee of the LRC, briefed the Panel on the concept of domicile, the problems with the existing rules for determining a person's domicile, and the recommendations in the Consultation Paper which would improve this complex and

confusing area of common law by simplifying the concept of domicile and making the determination of a person's domicile easier. The Panel noted that in practical terms, the recommendations in the Consultation Paper would not change the domicile of many people with the exception of married women's domicile which would no longer depend on that of their husbands. Another major change related to the domicile of children. The relevant recommendation was that a child's domicile should be in the country with which the child was most closely connected, instead of dependent on the domicile of the father. Moreover, there should be no differentiation between legitimate and illegitimate children in determining their domicile.

5. On whether objective criteria had been recommended for determining a person's domicile in a place if the person died outside that place, Ms Audrey EU explained that the Domicile Subcommittee had looked into the matter and found that disputes could happen only in a minority of cases where persons had different places of residence and were in possession of assets and properties in the places concerned. The major criteria for determining a person's domicile included whether the place was most closely connected with the person, the actual presence of the person in the place, and the intention of the person to make a home in that place for an indefinite period. She explained that difficulties in determining a person's domicile in fact rarely occurred because in most of these cases the persons concerned had supporting documents, such as documents of ownership of properties, to prove his long-term intimate connection with a certain place and the intention to live in the place permanently or indefinitely. In cases where a Hong Kong resident who spent most of his time working alone in the Mainland, factors such as whether he had family members and relatives living in Hong Kong would also be taken into account. Where disputes arose in individual cases, the court would decide having regard to all relevant factors.

Report on "Rules for Determining Domicile"

6. The Report on "Rules for Determining Domicile" published by the LRC in April 2005 was issued to all Members for reference. The LRC made a number of recommendations for legislative improvement, a summary of which is at Annex B to the LegCo Brief on the Domicile Bill.

Consultation Paper on "Domicile Bill 2006" and Domicile Bill 2007

7. In May 2006, the Administration consulted the two legal professional bodies, the law schools of the three universities and other parties on the Consultation Paper on "Domicile Bill 2006". The Consultation Paper was also circulated to the Panel.

8. On 27 November 2006, the Panel was briefed on the proposals in the Domicile Bill 2007. Members did not raise any queries on the Bill. The representative of the Hong Kong Bar Association attending the meeting advised the Panel that the Bar Association would give its comments after the Bill was gazetted.

9. Subsequent to the meeting, the Panel received a copy of the Bar Association's comments on the Consultation Paper on "Domicile Bill 2006" which was circulated to all Members for information (**Appendix I)**. The Administration's reply is in **Appendix II**.

Relevant papers

10. A list of relevant papers available on the LegCo website is in **Appendix III**.

Council Business Division 2
Legislative Council Secretariat
14 March 2007

Appendix I

LC Paper No. CB(2)843/06-07(01)

By fax and by hand
(Fax: 2180-9928)

Your Ref: LP 5019/9C II

20 December 2006

Ms. Kitty Fung
Senior Government Counsel
Legal Policy Division
Department of Justice
1/F High Block, QGO
Hong Kong.

Dear Ms. Fung,

Consultation Paper on Domicile Bill 2006

I refer to your letter dated 17 May 2006.

I enclose herewith a copy of comments of the Hong Kong Bar Association on the Consultation Paper on Domicile Bill 2006 for your consideration which was resolved at the Bar Council Meeting held on 14 December 2006.

Yours sincerely,

Philip Dykes SC
Chairman

/al
Encl.

HONG KONG BAR ASSOCIATION 'S COMMENTS ON CONSULTATION PAPER ON THE DOMICILE BILL 2006

BACKGROUND

1. In May 2004, the Bar was invited by the Law Reform Commission to comment on the Consultation Paper on Rules for Determining Domicile prepared by its Domicile Sub-committee. The Bar's submissions were delivered in June 2004. By letter dated 2nd February 2005, the Law Reform Commission replied to the points raised by the Bar. In April 2005, the Law Reform Commission published a report on "Rules for Determining Domicile" ("the Report"). The Report reviewed the existing domicile rules, (see Chapter 1), discussed the problems and anomalies arising from those rules (see Chapter 2) and made recommendations for reform (see Chapters 3 – 5).

2. The object of the Domicile Bill 2006 ("the Bill") is to simplify the common law rules for determining a person's domicile by implementing the recommendations set out in the Report. It is anticipated that the new law would not change the domicile of many people. The principal changes lie in the following aspects:-

(1) The concept of domicile of origin will be abolished.

(2) The domicile of children will no longer be tied strictly to the parents' domicile.

(3) A married woman's domicile will no longer depend on that of her husband.

THE BAR'S COMMENTS

3. The Bar's comments on the Bill are set out in the following paragraphs.

Clause 4: Domicile of children

4. Clause 4 seeks to abolish the traditional rules regarding domicile of origin and domicile of dependency of children. The Bar in its 2004 submissions supported this approach. Under the Bill, a child is domicile in the country or territory with which he is "most closely connected".

5. Clause 4(2) expressly stipulates that the intention of the child can be taken into account in determining which country or territory he is most closely connected with. The "closest connection test" in Clause 4 of the Bill appears similar to the test governing proper law of a contract in the absence of an express choice of law clause. In that context, there is

uncertainly as to whether the court should treat the "closest connection test" as a purely objective test so that the element of subjective intention should not be taken into account (see *Chitty on Contracts*, 29th Ed., Vol. 1, 30-004). Further, according to Article 3 of the Rome Convention, the test is purely objective and does not involve the consideration of intention of the parties.

6. The Bar agrees that the intention of the child should be taken into account for the following reasons:-

(1) Insofar as the "closest connection test" is concerned, the approach for domicile should be different from that for proper law because:-

(a) In the context of proper law, the court ceases to look for the intention of the parties (since they are presumed to have no intention on the point in the absence of any express choice of law provision). However, a person should normally have his own intention as to where he intends to reside.

(b) Further, it is unlikely that the subjective intentions of the parties will be of much assistance in determining the proper law of a contract as each party is bound to have its own preference.

(2) There is no reason why intention of children should be ignored in the context of domicile whilst their wishes are taken into account by the court in considering the question of custody in matrimonial proceedings.

7. Clause 4(2) states that the court shall take into account all relevant factors in determining which country or territory a child is most closely connected with. However, it appears from Clauses 4(3) and (4) that the country or territory of closest connection will be primarily determined by two presumptions, which can be rebutted when the contrary is proved. Hence, the Bar suggests that Clause 4(2) be expressly made subject to Clauses 4(3) and (4).

8. Further, in relation to Clause 4(2), it is unlikely that a child is able to "make a home". The Bar suggests that the phrase "make a home" be amended. Perhaps, the phrase "have a home" can be considered.

Clause 7: domicile in another country or territory

9. Clause 7 stipulates that in deciding whether an adult acquires a domicile in a country or territory other than Hong Kong, "one of the factors that

should be considered is whether his presence in that country or territory is lawful by the law of that country or territory". However, the effect of the issue regarding the lawfulness of his presence is unknown. In the context of Clause 6, unless exceptional circumstances can be shown, an adult does not acquire a domicile in Hong Kong unless he is lawfully present in Hong Kong. It is unclear from Clause 7 as to whether the proposed legislation intends to take a similar approach in deciding whether an adult acquires a domicile in another country.

Clause 11: burden of proof

10. According to Clause 11, any fact that needs to be proved for the purposes of this Ordinance shall be proved on a balance of probabilities. However, it should be noted that under Clause 6(2), an adult's presence in Hong Kong shall be presumed to be lawful "unless the contrary is proved". It is necessary to consider if a flexible civil standard is required when it comes to proof of unlawfulness of a person's presence, which would have the effect of denying his acquisition of a domicile in Hong Kong (see *R v Home Secretary, ex p Rahman* [1998] QB 136 at 173 C-D).

The phrase "for the time being" used in some provisions

11. It is unclear as to whether the phrase "for the time being" as contained in Clauses 4, 8 and 10 is intended to serve any particular purpose. If it is intended to exclude the effect of the concept of domicile of origin under the traditional rules, what is set out in Clause 13 should already be sufficient. Further, on the assumption that there is a particular need to insert the phrase, there seems to be a lack of consistency in the use of the same. To say the least, there is no reason why it does not appear in Clauses 4(3) and (4).

Dated 19th December 2006.

Responses to the Bar Association's comments on the Domicile Bill

Clause 4: Domicile of children

Para 7 of the Bar Association's comments

Clause 4(3) and (4) of the Domicile Bill sets out the two rebuttable presumptions in relation to the domicile of children. Having considered the Bar Association's suggestion that Clause 4(2) be expressly made subject to Clauses 4(3) and (4), we are of the view that it is clear that Clause 4(1) sets out the general test, while Clause 4(3) and (4) provides for two rebuttable presumptions on top of the general test. Furthermore, the expression "it shall be presumed, unless the contrary is proved" makes the weight of clause 4(3) and (4) clear.

Para 8 of the Bar Association's comments

2. In view of the Bar Association's suggestion, we have already amended the phrase "make a home" as "have a home" in clause 4(2) of the Bill.

Para 9 of the Bar Association's comments

3. The Law Reform Commission's recommendation was based on Dicey and Morris (13th ed, 2000), which states:

> "It has been held that a domicile of choice cannot be acquired by illegal residence. The reason for this rule is that a court cannot allow a person to acquire a domicile in defiance of the law which that court itself administers. But it is *an open question whether the courts of one country would hold that a person could acquire a domicile of choice in some other country by residence there which was illegal under the law of the second country. An English court clearly could hold that a domicile had been acquired by residence illegal under the foreign law.*" (para 6-037)

4. However, it was recently noted that the 14th edition of Dicey and Morris (2006) states the following:

> "Although there is some Commonwealth authority and one English dictum supporting the proposition that a domicile of choice cannot be acquired on the basis of residence which is illegal, it is now settled that in English law the illegality of residence is no bar to the acquisition of a domicile of choice in England. *The same would seem to be the case where the issue is the acquisition of a domicile of choice in another country: as Lord Hope of Craighead observed in Mark v Mark, as our courts do not apply the public policy of a foreign state, the illegality of the residence under that state's law would not be regarded here as inconsistent with the acquisition of a domicile of choice in that country.*" (para 6-037)

Lord Hope of Craighead said in Mark v Mark [2005] UKHL42, [2006] 1 A.C.98,

> "[10] ... 'It has been held that a domicile of choice cannot be acquired by illegal residence. The reason for this rule is that a court cannot allow a person to acquire a domicile in defiance of the law which that court itself administers.'
>
> [11] This passage has been retained in the current edition: Dicey and Morris on the Conflict of Laws (13th edn, 2000) vol 1, para 6-037. The editors cite Puttick's case as authority for it, as well as cases from Australia and South Africa. As Anton and Beaumont Private International Law (2nd edn, 1990), point out, at p 140, however, *these propositions are perfectly understandable where the issue is one of public law. But they find no similar justification in matters of private law. Dicey and Morris, para 6-037, states that it is an open question whether the courts of one country would hold that a person could acquire a domicile of choice in some other country by residence there which was illegal under the law of the second country. The better view would seem to be that, as our courts do not apply the public policy of a foreign state, the illegality of the residence under that state's law would not be regarded here as inconsistent with the acquisition of a domicile of choice in that country.*"

5. It appears that Dicey and Morris is more certain in its view in the latest edition that unlawful presence/residence *per se* would not prevent a person from acquiring a domicile in another country.

6. Having considered the above, we are of the view that the rationale behind Clause 7 still stands, that is, the court should have the

discretion to decide on a case-by-case basis as the clause relates to all jurisdictions apart from Hong Kong. Moreover, as Clause 6 requires lawful presence for acquiring a domicile in Hong Kong, it would be difficult to justify why unlawful presence is not a hindrance for acquiring a domicile in other jurisdictions.

Clause 7: domicile in another country or territory

7. In the context of Clause 6, unless exceptional circumstances can be shown, an adult does not acquire a domicile in Hong Kong unless he is lawfully present in Hong Kong. The Bar considers it unclear from Clause 7 as to whether the proposed legislation intends to take a similar approach in deciding whether an adult acquires a domicile in another country.

8. Clauses 6 and 7 reflect the recommendation of the Law Reform Commission's Report on the Rules for Determining Domicile. It was mentioned in para 4.90 of the Report that "It is, however, arguable whether the courts of one country will allow a person to acquire a domicile in another country by residence there which is unlawful under the law of that other country." It was further mentioned in para 4.101 that "In the case of a claim to a domicile in another jurisdiction, the existing position should also remain unchanged." Clause 7 serves the purpose of preserving the existing position.

Clause 11: burden of proof

9. The Bar Association relied on R v Home Secretary, ex p Rahman [1998] QB 136. The applicant in this case, born in Bangladesh, claimed to be the son of S, a British citizen living in the United Kingdom. Having obtained a certificate of entitlement to right of abode, the applicant began to live in the United Kingdom and subsequently obtained a British passport. The Secretary of State instituted inquiries in the course of which entry clearance officers visited villages in Bangladesh and interviewed villagers who claimed to know S and the applicant. The information obtained strong supported the allegation that the applicant was not S's son. Having interviewed the applicant, an immigration officer concluded that he was an illegal entrant who had obtained entry to the United Kingdom by deception and ordered his detention pending removal from the United Kingdom. The applicant sought leave to apply for judicial review of that decision and a writ of habeas corpus to secure

his release. A judge refused him bail and ordered that the matter proceed as an application for habeas corpus. The applicant was later released on bail. On the application, the Secretary of State tendered in evidence affidavits of immigration officers and of the entry clearance officers who had conducted the inquiries in Bangladesh, and the applicant adduced evidence on affidavit to support his claim.

10. Collins J held that evidence tendered by the Secretary of State was admissible in such proceedings, even though it was hearsay, and on the basis of that evidence dismissed the application. The applicant appealed.

11. The Court of Appeal held that where the court was obliged, whether on an application for judicial review or for habeas corpus, to inquire into the truth of a question of fact on which an administrative decision had been based, it was entitled to take into account all the material on which the decision maker had legitimately relied, even if it was not presented in a form which would be strictly admissible in a trial at common law. Where the evidence relied on was hearsay, the court could make appropriate allowance for that fact in the weight it attached to that evidence. Hence, since the immigration officer on behalf of the Secretary of State had been entitled when taking the decision to rely on the information obtained by the entry clearance officers in Bangladesh, the judge had rightly admitted in evidence the affidavits in which they deposed to that information.

12. In the Court of Appeal, all three law lords agreed that the standard of proof should be “balance of probabilities”. The degree of probability must, however, be great in view of the seriousness of the matter, because at issue was whether the applicant was an illegal entrant and should therefore be deported. Hobhouse LJ said:

> “It is common ground that the governing authority is Reg. v. Secretary of State for the Home Department, Ex parte Khawaja [1984] A.C. 74 and that where the Secretary of State seeks to declare a person an illegal entrant, the Secretary of State must prove that he is in fact an illegal entrant. *It is accepted, albeit reluctantly by [counsel for the applicant], that the standard of proof is the "flexible" civil standard, that is to say, the balance of probabilities having regard to the seriousness of the matters that have to be proved and the general assumption that a person has acted legally not illegally.* It is further accepted that the immigration officer or an adjudicator is entitled to take into

> account all the material placed before him either from the person concerned or those representing him or from those who have conducted inquiries on behalf of the Secretary of State: see Ejaz v. Secretary of State for Home Affairs (unreported), 21 December 1978; Court of Appeal (Civil Division) Transcript No. 777 of 1978. This is an important point to which I will have to revert. It is a point which must be borne in mind when reading the speeches in the House of Lords in the Khawaja case [1984] A.C. 74." (at 173 C) (emphasis added)

Staughton LJ also said along this line:

> "It is accepted that *the standard of proof is not that prevailing in a criminal case. Rather it is that which applies when an allegation of crime is part of an issue to be decided in what is not a criminal case.* There is then, as it were, ordinarily a presumption to be placed in the scale which favours innocence, because ordinary people do not ordinarily commit crimes. The weight of that presumption varies; as Denning L.J. said in Bater v. Bater [1951] p. 35, 37 quoting Best C.J.: "in proportion as the crime is enormous, so ought the proof to be clear." Here any presumption which once existed that Saidar Rahman would not be guilty of deceit in an immigration context is rebutted; it is now admitted that he was guilty of such deceit in connection with a child who was said to be his son in 1991." (at 181D) (emphasis added)

Even Hutchison LJ, the dissenting judge, agreed on this issue:

> "*The question for the court is whether we are satisfied that the applicant was an illegal entrant*, which depends on whether we are satisfied that he is not, as he claims to be, the son of Abdus Somed. Collins J. directed himself, ante, p. 1001A-B, that, whereas it was technically correct to apply the civil standard of proof (in accordance with ex parte Khawaja) in reality the criminal standard must be invoked because '*where one is dealing with a case such as this nothing less than that sort of approach seems to me to be appropriate.*'
>
> In so far as the judge was recognising that *in a case where a finding of illegal entrance involved imputing to the immigrant serious fraudulent conduct the degree of probability must be so great as closely to approximate to the criminal standard I would not quarrel with his approach. But if he intended to go further I cannot agree,*

since as Lord Scarman explained in a passage I have already cited from his speech in Khawaja, the distinction is of importance." (at 166E) (emphasis added)

13. Having considered the case, we do not intend to adopt the Bar Association's suggestion for two reasons. First, what was at stake in the above case was whether the applicant was an illegal entrant and, if so, the applicant would be subject to deportation. This is very different from the issue in Clause 6 of the Domicile Bill where the legality of a person's presence in Hong Kong is to be disproved for the purposes of determining a person's domicile at a certain point in time. This is purely a civil law matter, as opposed to matters such as citizenship or deportation. In many instances, a person's domicile is determined only after his death in the context of administration of his estate. Secondly, while the balance of probabilities is a well-established standard in civil cases, a "flexible" balance of probabilities will create uncertainty. The court, with its inherent discretion, will take into account all the facts and issues of the case in any event.

The phrase "for the time being"

14. The Bar mentioned that it is unclear as to whether the phrase "for the time being" as contained in Clauses 4, 8 and 10 is intended to serve any particular purpose. Further, on the assumption that there is a particular need to insert the phrase, there seems to be a lack of consistency in the use of the same and there is no reason why it does not appear in Clauses 4(3) and (4).

15. The expression "for the time being" is used in clauses 4, 8 and 10 to establish the changing nature of the domicile based on closest connection in the case of –

(a) a child;
(b) a person lacking capacity to form the intention needed for acquiring a domicile of choice; and
(c) a person not having formed an intention to make a home in a particular territory in a country.

16. While Clause 4(1) establishes the changing nature of domicile based on closest connection in the case of a child, Clause 4(3) and (4) deals with a different point, namely, the relationship between a child's country or territory of closest connection and the domicile of either or both of the child's parents. It is unnecessary for Clause 4(3) to refer to "for the time being". Clause 4(1), (3) and (4) is in line with the

draft rules 1(1), (2) and (3) in the Schedule to the draft Bill of the Law Commission and The Scottish Law Commission in their report "The Law of Domicile" [2]. In fact, referring to that phrase may result in a cumbersome clause -

> "(3) Where **for the time being** the child's parents are domiciled in the same country or territory and the child has his home with either or both of them, it shall be presumed, unless the contrary is proved, that the child is **for the time being** most closely connected with that country or territory."

#332562 v2

[2] Law Com. No. 168; Scot. Law Com. No. 107, at page 50.

Appendix III

Domicile Bill

Relevant documents

Committee	**Date**	**Papers**
Panel on Administration of Justice and Legal Services	Meeting on 26 April 2004	Consultation Paper of the Domicile Sub-committee of the Law Reform Commission on "Rules for Determining Domicile" published in February 2004 Letter dated 21 April 2004 from the Hong Kong Bar Association [LC Paper No. CB(2)2129/03-04(05)] *(English version only)* Minutes of meeting [LC Paper No. CB(2)2425/03-04]
	Issued in April 2005	Report of the Law Reform Commission on "Rules for Determining Domicile" published in April 2005 *(English version only)*
	Issued on 24 May 2006	Consultation Paper on "Domicile Bill 2006" prepared by the Department of Justice [LC Paper No. CB(2)2117/05-06(01)]
	Meeting on 27 November 2006	Paper provided by the Administration on "Domicile Bill 2007" [LC Paper No. CB(2)429/06-07(02)] Minutes of meeting [LC Paper No. CB(2)887/06-07]
	Issued on 10 January 2007	Comments of the Bar Association on the Consultation Paper on "Domicile Bill 2006" [LC Paper No. CB(2)843/06-07(01)] *(English version only)*