

**Domicile Bill - questions raised
during first Bills Committee meeting
on 15 March 2007**

At the first meeting of the Bills Committee, the Chairman of the Committee raised a number of questions regarding the Bill. The Administration's response is set out below.

(a) "To clarify whether a person who was not lawfully present in Hong Kong at the time he was sentenced to a long period of imprisonment would be regarded as "lawfully present" in Hong Kong during his imprisonment"

2. The Immigration Ordinance (Cap. 115) regulates, *inter alia*, whether a person has lawfully landed and stayed in Hong Kong. Section 2(4) of the Immigration Ordinance (Cap. 115) provides that a person is not to be treated as ordinarily resident in Hong Kong –

(a) during any period in which he remains in Hong Kong –

(i) with or without the authority of the Director, after landing unlawfully; or

(ii) in contravention of any condition of stay; ...

(b) during any period, whether before or after the commencement of this Ordinance, of imprisonment or detention pursuant to the sentence or order of any court. [Emphasis added.]

3. This provision, however, only concerns whether a person is "ordinarily resident", not whether his presence in Hong Kong is lawful. 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. In addition, his imprisonment should not be able to legitimise his wrongs and turn his time spent in prison into "lawful presence".

4. However, 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. The question is whether the Bill should have such a provision to cover a very rare scenario where a person has unlawfully landed in Hong Kong, or has breached any conditions of stay, and is then imprisoned for committing an

offence; and he also intends to make his home in Hong Kong during the imprisonment, knowing that he will, after release, immediately be sent back to the place he comes from. In other words, 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, bearing in mind that a person's domicile, as a connecting factor, connects him to a system of law which would determine his personal matters, such as his capacity to marry or devolution of his personal property. It is in these contexts that his domicile will need to be ascertained. None of the jurisdictions discussed in the LRC Report have such a provision.

(b) "clarify whether a person who was not lawfully present in Hong Kong at the commencement of his imprisonment would be denied the opportunity to acquire a domicile in Hong Kong after being discharged from prison by common law rules or clause 6(1) of the Bill"

5. Regarding a person who enters Hong Kong unlawfully and is imprisoned, clause 6 applies in determining whether he acquires a domicile in Hong Kong. The position will be no different from a person who enters Hong Kong unlawfully but is not imprisoned. Clause 6(3) provides the Court with the necessary discretion to consider whether, in the circumstances, the requirement for lawful presence would result in injustice. For example, 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.

6. *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."

Cheshire and North (13th ed, 1999, p146) states:

"A clear example of constraint preclusive of the freedom is imprisonment in a foreign country, and there is no doubt that a prisoner, except perhaps one transported or exiled for life, retains the domicile that he possessed before his confinement."

7. According to *Dicey and Morris*, a prisoner in a different jurisdiction may be able to acquire a domicile in that jurisdiction, provided that he has the required intention. The authority cited by *Dicey and Morris* was an American decision, *Stifel v Hopkins*, 477 F 2d 1116 (6th Cir 1973). The prisoner in this case was incarcerated in Pennsylvania and his domicile was Ohio. At issue was whether the prisoner could establish a domicile in Pennsylvania. The Court of Appeal held that the prisoner should not be precluded from showing that he had the intention to be domiciled in the place where he was incarcerated simply because his presence there was deemed coerced rather than voluntary. This appears to be analogous with the scenario where a person has landed in a jurisdiction illegally and then becomes a prisoner there.

8. Under the English common law (*Mark v Mark* [2005] UKHL 42), illegal residence can be recognised for the purpose of acquiring a domicile. Deviating from this, clause 6 of the Bill requires lawful presence in Hong Kong. If a person's imprisonment is not regarded as lawful presence as discussed in paragraph 3, he would not acquire a domicile in Hong Kong during the imprisonment. After release, he would immediately be sent back to his previous jurisdiction. Once again, it is questionable how often and how likely it will be that the Hong Kong Courts would be asked to determine such a person's domicile.

9. It appears that acquiring a domicile in Hong Kong should not be regarded as obtaining a benefit. A person's domicile, as a connecting factor, connects him to a system of law which would determine his personal matters, such as his capacity to marry or devolution of his personal property. Thus, even if the prisoner in question can acquire a Hong Kong domicile, he should not be regarded as obtaining any benefit by his own wrongdoing.

(c) "To consider the need for a provision to define the meaning of "lawfully present" in clause 6(1) of the Bill."

10. The present clause 6(1) of the Bill reads: "*An adult does not acquire a domicile in Hong Kong under section 5(2) unless he is lawfully present in Hong Kong.*"

11. The word "lawfully" means that the presence is lawful under Hong Kong law. Cap. 115 regulates, *inter alia*, whether a person has lawfully landed and stayed in Hong Kong (see, for example, sections 7 to 13). Hence, in order to satisfy the "lawfully present" requirement in clause 6(1) of the Bill, a person has to comply with the relevant provisions in Cap. 115. As this is already governed by Cap. 115, it seems that it is not necessary to include a definition of "lawfully present" in the Bill.

12. Of the jurisdictions discussed in the Law Reform Commission's report on the Rules for Determining Domicile ("LRC Report"), only section 1(2) of the Domicile Act 1992 in South Africa expressly requires a person's presence to be lawful in order to acquire a domicile in a particular place. The Domicile Act 1992, however, does not contain a definition of "lawfully present".

(d) "In relation to clause 7, the Administration was requested to advise what other factors would be considered by the court in determining whether an adult acquired a domicile in a country or territory other than Hong Kong"

13. Clause 7 provides that in deciding, for the purposes of section 5(2), whether an adult acquires a domicile in a country or territory other than Hong Kong, one of the factors that shall be considered is whether his presence in that country or territory is lawful by the law of that country or territory.

14. In deciding the domicile of a person, 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.

15. In saying "one of the factors to be considered by the Hong Kong Courts" in Recommendation 6, the Sub-committee of the LRC emphasised that a person is not necessarily prevented from obtaining a domicile in another jurisdiction simply because his presence there is unlawful.

Other matters

16. The Chairman of the Bills Committee raised concerns regarding manipulation. The Administration considers it important to note that domicile does not give rise to direct entitlement to benefits. The report of the UK and Scottish Law Commissions says, in para. 6.11 –

"... Domicile is a conclusion of law drawn from the facts of each case irrespective of what the person concerned may directly wish in the matter, and whether or not it is to his advantage or disadvantage. Hence, if a person has his home indefinitely in a country he becomes domiciled there, irrespective of whether he wishes to be, and irrespective of any advantage or disadvantage to him ..."

17. While the UK and Scottish Law Commissions considered the possibility of manipulation in the case of a child or a person under mental disability, and were satisfied that the "closest connection" test will allow the Court to have regard to all the circumstances of the case, manipulation in the case of an able adult was not considered. It is relevant, however, that "domicile" determines what system of law applies to a person's civil status, rather than direct entitlement to benefits; and that an able adult is free to change his intention as to where to have his home and that he can make a will to express his testamentary intention. Therefore, it appears that manipulation of a person's domicile for an ulterior motive may be unlikely to occur.

18. Finally, the Bill does not purport to be a comprehensive code but merely seeks to reform outdated concepts (e.g., domicile of origin, domicile of dependency) to reflect modern realities.