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Legislative Council

LC Paper No. LS82/08-09

Paper for the Bills Committee on Voting by Imprisoned Persons Bill

Use of Prison address for electoral registration purposes

At the meeting of the Bills Committee held on 1 June 2009, members discussed issues relating to the registered addresses of imprisoned persons. The purpose of this paper is to assist members in their further deliberations on the issue of whether a prison address may qualify as residential address of the persons imprisoned thereat for the purpose of registration as electors under the existing electoral law.

The residence requirement

2. Section 28 of the Legislative Council Ordinance (Cap. 542)(LCO) requires a person applying for registration as an elector to have, amongst other things, a residential address that is his only or principal residence in Hong Kong. The "only or principal residence in Hong Kong" is defined in section 28(3) to mean "a dwelling place in Hong Kong at which the person resides and which constitutes the person's sole or main home" (residence requirement). The word "reside" implies a degree of permanence (*Brokelmann v Barr* [1971] 2 QB 602, 3 All ER 29). Residence means a person's abode in a particular place or country which he or she has adopted voluntarily and for settled purposes (*R v Barnet London L.B.C. ex p Shah* [1983] 2 AC309, 1 All ER 226 (HL) and *Sun Jie v Registration of Persons Tribunal and others* [2003] HKCU 555). There is no definition of "home" in the LCO or other existing electoral legislation and reference has thus to be made to the ordinary and natural meaning of "home". The word "home" is itself not easy of exact definition and is capable of having different meanings in different contexts. The definition in the Shorter Oxford English Dictionary, that is, "a dwelling-house, house, abode: the fixed residence of a family or household; one's own house; the dwelling in which one habitually lives or which one regards as one's proper abode" has been held to contain the essential elements of a home (*Herbert v Byrne* [1964] 1 ALL ER 882 at p. 887, CA, *per* Salmon L.J.).

Prison as residential address for electoral registration

3. As discussed by members, the imprisoned persons, particularly those serving a long-term or life imprisonment, may well not have a home in Hong Kong other than the prison where they are incarcerated and may want to use a prison address as their residential addresses for electoral registration purposes.

4. The Administration takes the view that a place where a person is involuntarily kept does not qualify as one's residence under the LCO. Reliance has been placed on a recent case in which the Court rejected the application by an imprisoned person who was sentenced to an imprisonment of 54 months to change his address to his prison cell in Stanley for the purposes of the register of electors (*Choi Chuen Sun v Secretary for Justice and Electoral Affairs Commission* (HCAL 83/2008)).

5. However, it is worth noting that the residence requirement contained in section 28 is drafted against the background that imprisoned persons are not entitled to be registered as electors and to vote. With the removal of restrictions on voting rights of imprisoned persons, an imprisoned person serving a long-term imprisonment who no longer has a home outside the prison may still become ineligible for voter registration unless the prison address of such an imprisoned person may be regarded as registrable as a residential address under the existing section 28 or some other alternative arrangements that have to be made if the prison address is not so registrable.

6. In view of the fact that registration is a prerequisite to one's exercise of his or her voting rights, the Court may adopt a purposive approach in interpreting the existing residence requirement if it is satisfied that the person concerned may otherwise become ineligible because of his not having a registrable address. Due consideration should be given to the facts of individual cases. The fact that a prison is not capable of being voluntarily adopted as one's residence may be regarded as immaterial for determining one's residential address for electoral registration purposes. As such, a prison may well qualify as one's residence or home for the registration purposes in the case of an imprisoned person who is able to prove that he has no other registrable address.

7. There are examples that penal or medical institutions such as prison or a mental hospital may be taken as one's residence for a specific purpose. In *Lexi Holdings plc v Shaid Luqman and Others* (2007)22/10/2007 (Annex I), the Court ruled that the prisoner's usual or last known residence is the prison for the purpose of service of legal proceedings on him[1]. In *Head v Head* [1963] 3 All ER 640 (Annex II), a mental patient was found to be a "resident" in a mental hospital for the purpose of divorce proceedings (the above cases are attached for reference).

Encls.

Prepared by

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[1] *Per* Briggs J, the High Court of England and Wales. Source: Butterworths Personal Injury Litigation Service, November 2007, Editors: Nicholas Bevan and others.

Annex I

(Extract)

Butterworths Personal Injury Litigation Service

November 2007

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LENGTH: 9933 words

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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.