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Council of Social Service
Forum on Residence Requirements under
the CSSA and Social Security Allowance Scheme+

Residence Requirements under CSSA & SSAS Forum (HKCSS) . Legal Perspective: *Yao Man Fai Case Study*

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21 July 2010

Man Fai George 游文輝 v Director of Social Welfare (DSW)

Court of First Instance of High Court

HCAL 69/2009, 21.6.2010

Before: Andrew Cheung J (張舉能法官)

Hearing: 24.5 & 8.6.2010

Hectar Pun (潘熙) for Applicant

Jat Sew Tong SC (翟紹唐) & Abraham Chan for DSW

Tsoi Yiu Cheong (蔡耀昌) for SoCO as an **Interested Party**

Judiciary. Judgments:

http://www.judiciary.gov.hk/tc/legal_ref/judgments.htm

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The structure and content of this note is modeled on the judgment's for understanding the legal reasoning.

1. Introduction

“ Comprehensive Social Security Allowance (綜援) (CSSA) Applicant Yao Man Fai George 游文輝 (Yao) must reside in HK continuously 1 year immediately before application (緊接申請日期前連續居港最少一年) subject to 56 days grace period (%oYRR+) (連續居港一年規定).

1. Introduction

- “ Since 1.1.2004, 7 Year residence requirement (7年居港規定) (%YRR+) (*Kong Yung Ming* (孔允明) *v* *DSW* [2009]4 HKLRD, HCAL 127/2008, 23.6.2009, Andrew Cheung J)
- “ Population policy review 2002-03 (subsidized obstetric (產科) services: *Fok Chun Wa* (霍春華) *v* *Hospital Authority*, CACV 30/2009, 10.5.2010)

2. Facts

1944	Yao was born in HK
2006	Employer required Yao to work in Guangdong
31.8.2008	Employer terminated Yao's contract
30.9.2008	Yao returned to HK (回流港人)
1.12.2008	Yao applied CSSA
17.12.2008	Yao withdrew as failing 1YRR

2. Facts

29.1.2009	Yao re-applied
17.2.2009	DSW reject w/o discretion to waive 1YRR
25.3.2009	Yao appeal to Social Security Appeal Board 社會保障上訴委員會
5.6.2009	Social Security Appeal Board rejected Yao
22.6.2009	Yao applied judicial review (JR), lived on food bank, bank a/c had \$19

Year Continuous Residence Requirement (1YRR)

- 3.1 Pre-2004 position
- 3.2 Task Force's report recommended a future review
- 3.3 Govt. & LegCo Panel's immediate response
- 3.4 Government's decision to introduce the requirement
- 3.5 Purposes to be served
- 3.6 Guidelines on waiving the requirement
- 3.7 Post-2004 position

Pre-2004 position

“ Task Force on Population Policy
Report 26.2.2003

“ 1949 10YRR

“ 1959 5YRR

“ 1970 1YRR

“ 2004 7YRR

2 Task Force report
recommended a future review

- “ Set up Task Force 9.2002
- “ Report % extremely brief + on
1YRR (para.5.59):
- “ % The Task Force considers that
this concern involves complex
issues. +

2 Task Force report
recommended a future review

“Time does not permit the Task Force to go into this matter in detail and come to a conclusive recommendation. We suggest that the Administration should review it later. +

Govt. & LegCo Panel
immediate response

Govt. Paper 3.2003 to
LegCo Welfare Services
Panel & the meeting not
deal with the 1YRR
review

Government's decision to introduce the requirement

- “ LegCo Brief 3.6.2003
- “ only para. 21-22 on 1YRR
- “ Absence from HK up to a maximum of 56 days within that one-year period prior to the date of application will be treated as residence in HK.+(在該年內如離港不超過56日，亦視為符合連續居港一年的規定)

Government's decision to
introduce the requirement

“ This additional requirement
aims to discourage people
who have lived outside HK for
a long time from relying on
CSSA as soon as they return
to HK.+

Government's decision to introduce the requirement

- “ Annex B had **little information** on financial needs or justification for 1YRR
- “ **no discussion or data** on those who had lived outside HK ~~for~~ for a long time+and who applied for CSSA after their return to HK without having resided in HK again for a period of time.+

Government's decision to introduce the requirement

- “ A similar rule had already been in existence for claiming disability allowance (DA). The Govt's decision was that the same rule be extended to those applying for CSSA and for old age allowance (OAA).
- “ 27.6.2003 Finance Committee endorsed 1YRR

1YRR Purposes to be served

- ” Affirmation of Choy Bo Chun, Polly:
- ” 1YRR Purposes (para. 25)
- ” “discouraging people who have lived outside HK for a long time from relying on CSSA as soon as they return to HK+

... purposes to be served

- “(a) to align the residence requirements in the eligibility criteria for social security schemes (i.e. CSSA, OAA and DA) in the context of an ageing population;
- (b) to address the public disquiet (concern/worry) about the burgeoning (rapidly increasing) welfare spending on CSSA;
- (c) to respond to the general consensus in the community that the residence requirement for CSSA should be tightened; +

... purposes to be served

- (d) to provide an effective and long-term sustainable safety net for the financially vulnerable; and
- (e) to provide a rational basis for the allocation of public resources in the light of fiscal constraints and ever-rising demands and to sustain a non-contributory social security system.+

Guidelines on waiving the requirement

- “ DSW internal guidelines (not published) for discretion (酌情權) to waive 1YRR
- “ Genuine hardship (真正困難) if wage earner in family (從事有薪工作以維持家人生活)
- “ Consider:
- “ Resources from relatives, friends or others
- “ Sufficient for family's needs 2 months

Post-2004 position

- “ 1.6.2007-30.6.2009: 110,223 CSSA applicants
- “ 5149 (4.7%) not meet 1YRR
- “ 3414 got waiver
- “ 1600 withdrew
- “ 111 rejected waiver application
- “ Total SWD expenditure 07-08 \$34 billion
- “ CSSA expenditure 07-08 \$18 billion

Preliminary Observations

- “ **Academic** since grant of leave
- “ Raises a question of general importance
- “ Court exercises exceptional discretion

5. Discrimination

5.1 The law

5.2 Differential treatment requires
justification

5.3 Intensity of scrutiny

5.4 The stated aim as the legitimate aim .
any genuine need shown?

5.5 Burden of proof on Government

5.6 Rational connection and no-more-than-
necessary

5. Discrimination

5.7 What is the triggering period of absence?

5.8 *Many not away “for a long time” are caught*

5.9 Requirement operates indiscriminately
regardless of reasons of absence

5.10 Period of suspension

5.11 Discretion to waive does not help

5.12 Other possible legitimate aims

5.13 Conclusion

5.1 The law

- “ Basic Law Article 25: HK residents shall be equal before the law
- “ HK Bill of Rights (HKBOR)
Article 22: all persons are equal before the law and are entitled without any discrimination to the equal protection of the law

5.1 The law

- ” *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, paras 19 to 21:
- ” “19. In general, the law should usually accord identical treatment to comparable **situations...Like cases should be treated alike, unlike cases should not ... be treated alike.+**

5.1 The law

“ §20. However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be **justified for good reason**. In order for differential treatment to be justified, it must be shown that:+

5.1 The law

The Justification Test

- 1) The difference in treatment must pursue a legitimate aim. For any aim to be **legitimate**, a **genuine need** for such difference must be established.

5.1 The law

(2) **The difference in treatment must be rationally connected to the legitimate aim.**

(3) **The difference in treatment must be no more than is necessary to accomplish the legitimate aim. +**

5.1 The law

201. The **burden** is on the **Government** to satisfy the court that the justification test is satisfied. Where one is concerned with differential treatment based on grounds such as **race, sex or sexual orientation**, the court will **scrutinize with intensity** whether the difference in treatment is justified. +

Differential treatment requires justification

- “ difference in treatment of permanent residents on 1YRR
- “ differential treatment plainly requires justification in order to be constitutional and lawful.

Intensity of scrutiny

Residence Requirement
(RR) (居港規定) not a
ground inherently invidious
(offensive) and suspect
and attracts the closest
scrutiny

stated aim as the legitimate
aim . any genuine need shown?

Objective %to discourage
people who have lived
outside HK for a long time
from relying on CSSA as
soon as they return to HK+
(%the stated aim +)

stated aim as the legitimate
aim . any genuine need shown?

“ **lack of sufficient evidence** to
establish the same as %
genuine need +

“ not find any detailed analysis,
data or statistical figures, to
back a genuine need .

stated aim as the legitimate
aim . any genuine need shown?

“ Hindsight: the post-2004
statistical figures insufficient to
prove a genuine need

“ 4.7% (5,149 applications)
failed 1YRR

“ 66.3% (3414) got waiver

stated aim as the legitimate
aim . any genuine need shown?

- “ 33.7% of waiver application
and 1.55% of total CSSA
application unable to get
waiver and withdrew
- “ Very minor proportion of total
CSSA application failed 1YRR

On the Burden of proof on Government

Yau Yuk Lung: 2007. What must be established is a genuine need for the differential treatment. That need cannot be established from the mere act of legislative enactment. It must be identified and made out. The matter fails at the first stage of the justification test. +

burden of proof on Government

Bokhary PJ: %no demonstrable
genuine need for the differential
treatment. +Protecting public
decency: common law offence
of outraging public decency:
neutral on sexual orientation

rational connection and no-
more-than-necessary

Will discuss other two
elements of the
justification test: rational
connection and no-more-
than-necessary

5.7 What is the triggering period of absence?

- “ Minimum period of continuous residence in HK = one year (less the grace period), or 309 days (365 days . 56 days).
- “ Maximum period of absence from Hong Kong permitted is not one year (less the grace period)
- “ Maximum period of absence from Hong Kong allowed is only 56 days

1.8 *Many not away “for a long time” are caught*

- “ Absence of a **mere 56 days** in the year is simply **not an absence for a long time**+ within the plain and ordinary meaning of that phrase as used in the stated aim
- “ 60 days can hardly be described as **lived outside HK for a long time**+. 60 days need not be continuous: can be scattered over the year

8 Many not away “for a long time” are caught

- ” Crucial question: whether the line has been drawn at a self-evidently unreasonable point? *Fok Chun Wa* at para 80 (per Stock VP)
- ” Examples fails 1YRR but not lived outside HK for a long time:
 - a. a civil servant sent by Govt. to attend a short training course for several months overseas.

8 Many not away “for a long time” are caught

- b. a volunteer helps natural disaster victims or orphans in Mainland for a short period
- c. A university student on a half-year overseas exchange student programme
- d. Medical treatment in Mainland several months
- e. Elderly spent a few months with children and relatives outside HK

*.8 Many not away
“for a long time” are caught*

- “ simply **no rational connection** between the stated aim as a legitimate aim and 1YRR: only temporarily absent from HK
- “ simply **goes beyond** what is **necessary** to achieve the stated aim (as a legitimate aim). 1YRR caught many % innocent+people

rement operates indiscriminately
regardless of reasons of absence

- “ unfair to the civil servant to say that his contribution and commitment to, and connection with, HK become less due to 2 years absence.
- “ Cannot say that he has had a lesser connection with (or commitment to) HK due to his working on Mainland for a HK company. (Chong: rethink relation between need/right and contribution)

ment operates indiscriminately
regardless of reasons of absence

- “ Unacceptable: **without inquiring** into the **reasons** and circumstances for his **absence requisite rational connection** between the purported legitimate aim and the means to achieve the aim is missing
- “ means adopted simply **goes beyond** what is **necessary** to achieve the aim.

Period of Suspension

- “ period of suspension would vary depending on number of days of absence and how those days of absence were scattered
- “ no justification, in terms of rational connection or necessity, for suspending CSSA entitlement

1 Discretion to waive does not help

- “ **guidelines not require** or permit to **consider the reason** for failure to meet 1YRR (Chong: imply it's not a right)
- “ No waiver even merely temporarily absent from HK (Chong's example: World Cup)
- “ No waiver even for good or innocent reasons of absence for a longer period
- “ Hence, fails second and third elements of justification test.

5.12 Other possible legitimate aims

1. align RR in eligibility criteria for social security schemes 公共福利金計劃: CSSA, Old Age Allowance (OAA) and Disability Allowance (DA) in an ageing population
 - must have %need+, rather than just %reasonable+or %desirable+
 - could drop 1YRR of DA instead of extending to CSA & OAA

5.12 Other possible legitimate aims

2. %60 address the public disquiet about the burgeoning welfare spending on CSSA+;
 3. %60 respond to the general consensus in the community that the residence requirement for CSSA should be tightened+;
 4. %60 provide an effective and long-term sustainable safety net for the financially vulnerable+
- all evidence focus on 7YRR
--**no evidence** on necessity of 1YRR

5.12 Other possible legitimate aims

5. ~~to~~ provide a rational basis for
the allocation of public resources
in the light of fiscal constraints
and ever-rising demands and to
sustain a non-contributory social
security system+

--no or insufficient evidence

5.12 Other possible legitimate aims

Hence, difficult to see how 1YRR
rationally connect to legitimate
aims (except first one) or
necessary for achieving these
aims

All these possible legitimate aims
fail the justification test

5.13 Conclusion

- “ 1YRR fails justification test
- “ 1YRR constitutes unconstitutional and unlawful discrimination against permanent residents (PR) who have been absent from HK for over 56 days in the year immediately prior to their CSSA application when compared with PR without such absence

6. Right to Travel

6.1 The arguments

6.2 *Chan Wing Hing*

6.3 A restriction on the right to travel

6.4 Is the restriction necessary?

6.5 Prescribed by law

6.6 Conclusion

1 The arguments

- “ Basic Law Article 31: freedom to travel & to leave HK
- “ HKBOR Article 8(2): everyone shall be free to leave HK
- “ Mr. Pun: right to travel not absolute, may be restricted if satisfy proportionality test
- “ Mr. Jat: this right not engaged at all

2 Chan Wing Hing

s30A(10)(b)(i) Bankruptcy
Ordinance (Cap 6): sanction for
non-notification: **relevant
period** for automatic discharge
cease to run during his absence
until he notifies the trustee of his
return

2 Chan Wing Hing

- “ *Chan Wing Hing* (2006) 9 HKCFAR 545:
the need to notify with sanction for failure
to notify constitute a restriction on right to
travel
- “ then apply proportionality test
- “ Outcome: restriction could not be justified
- “ Hence, s30A(10)(b)(i) was
unconstitutional

3 A restriction on the right to travel

- “ 1YRR suspend entitlement to CSSA imposes a sanction
- “ Impedes the constitutional right to travel
- “ entitlement to CSSA is a **valuable rights** (*Kong Yun Ming*)
- “ Guaranteed under Basic Law Article 36

3 A restriction on the right to travel

- “ **US cases:** *Shapiro v Thomson* 394 US 618 (1969) and *Saenz v Roe* 526 US 489 (1999): requirement of **minimum residence** immediately preceding an application for social welfare benefits in a State could infringe the constitutionally guaranteed **right to inter-state travel**. (Bokhary PJ in *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, paras. 50-55)
- “ By similar reasoning: 1YRR restricts the right to travel

When is the restriction necessary ?

- ” Restriction requires justification by applying **proportionality test**
- ” The test (s8(3) HKBOR):
 - (1) the restriction must be **rationally connected** to the protection of the **rights of others** ;
 - (2) the means used to impair the right to travel must be **no more than is necessary** to protect the rights of others.
- ” *Chan Wing Hing*, paras. 36 and 81.

...the restriction necessary ?

- “ For similar reasons with analysis in context of discrimination, 1YRR fails the proportionality test.
- “ Therefore need not deal with argument of deference to Govt. judgment.

Prescribed by law

- “ Mr. Pun: 1YRR restriction is not prescribed by law+
- “ no (direct) statutory underpinning of the requirement
- “ internal guidelines on counting the period of suspension and on exercising the discretion to waive the residence requirement are not published.
- “ No need to decide on this issue



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6.6 Conclusion

1 YRR unconstitutional
and unlawful for
infringing the
right to travel

Significant & Other Arguments

7.1 Freedom of Choice of Occupation

guaranteed under Basic Law Article 83

7.2 Development and Improvement of the Social Welfare System

--Govt. & right and responsibility to formulate policies on the development and improvement of the pre-existing social welfare system in the light of the economic conditions and social needs under Basic Law Article 145

7.1 Freedom of Choice of Occupation

- “ not entail a positive obligation on Govt. to provide jobs or guarantee employment right
- “ imposes a negative obligation against conscription for a job
- “ Mr. Pun: interferes with PRs choice of occupation, if the job requires to work outside HK over 56 days
- “ Unnecessary to deal with this argument

Development and Improvement of the Social Welfare System

- “ Mr. Pun: 1YRR not % developed and improved+pre-existing social welfare system due to discriminatory and infringing right to travel
- “ Nothing to be gained by resorting to this argument

Interested Party's Additional Arguments

- “ Right to Social Welfare
(Basic Law Article 36)
- “ Free from Cruel, inhuman or
degrading treatment
(HKBOR Article 3)
- “ Govt. fails to consider international
obligation under ICESCR

Interested Party & Additional Arguments

- ” International Covenant on Economic, Social and Cultural Rights (ICESCR) constitutional entrenched by Basic Law Article 39:
- ” %The provisions of the International Covenant on Civil and Political Rights, ICESCR, and international labour conventions as applied to HK shall remain in force and shall be implemented through the laws of the HKSAR.
The rights and freedoms enjoyed by HK residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article.+

Interested Party & Additional Arguments

ICESCR Article 2:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the **maximum of its available** resources, with a view to **achieving progressively the full realization of the rights** recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Interested Party & Additional Arguments

ICESCR Article 2:

2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised **without discrimination** of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**.

Interested Party § Additional Arguments

ICESCR Article 4:

The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such **limitations** as are determined by law only in so far as this may be compatible with the nature of these rights and **solely for the purpose of promoting the general welfare in a democratic society.**

Interested Party § Additional Arguments

ICESCR Article 5:

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Interested Party § Additional Arguments

ICESCR Article 9:

The right to social security and
social insurance:

The States Parties to the present
Covenant recognize the right of
everyone to social security,
including social insurance. +

Interested Party § Additional Arguments

ICESCR Article 11:

The right to an adequate standard of living:

1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right...
2. The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger

Interested Party & Additional Arguments

- “ Exempt children unfair to elderly
- “ Ground on article 36 rejected as unarguable (*Kong Yun Ming* paras. 39-65)
- “ Not deal with additional grounds:
 - Unnecessary
 - Only made known in hearing: unfair to DSW & Court

9. Outcome

Application for judicial review succeeds.

Court grants the substantive relief:

- “ Order of *certiorari* (移審令) to quash
DSW 17.2.2009 decision rejecting
Yao's CSSA application due to 1YRR;
- “ Order of *certiorari* to quash (推翻)
Social Security Appeal Board
5.6.2009 decision;

9. Outcome

3. **Declaration** that the requirement that, subject to a grace period of 56 days, an adult applicant for CSSA must have resided in HK continuously for at least one year immediately before the date of application **violates articles 25 and 31 of the Basic Law and articles 8(2) and 22 of the HKBOR and is unconstitutional and unlawful.**

9. Outcome

- “ DSW %~~ba~~ **has not asked for a temporary suspension order +**
- “ %~~ba~~ in any event, the Court does not consider that this is an appropriate case for the exercise of the Court’s exceptional jurisdiction to grant such an order. +

9. Outcome

% simply little material to demonstrate a genuine need for the stated aim to discourage people who have lived outside HK for a long time from applying for CSSA+

9. Outcome

- “ The Court further doubts the utility of a temporary suspension order as such an order would not shield the Govt. from liability.+
- “ SWD pays Yao’s costs
- “ No order as to costs between Interested Party & DSW

DSW filed an appeal to CA on 19.7.2010

Annex

Concluding observations of the United Nations Committee on Economic, Social and Cultural Rights (HKSAR) 13 May 2005 (E/C.12/1/Add.107)

Visited on 18 July 2010:

http://www.cmab.gov.hk/en/press/reports_human.htm

Annex

84. The Committee is seriously concerned that under the existing social security system, and in particular under the Comprehensive Social Security Assistance (CSSA), the levels of benefit are not sufficient to guarantee a decent standard of living and that many low-income persons, in particular older persons, are not covered by the scheme. **The Committee is further concerned that new migrants are unable to apply for CSSA due to the seven-year residence requirement.**

Annex

The Committee urges HKSAR to review the eligibility criteria for the CSSA so as to ensure that all those in need, including low-income persons and families, older persons and new migrants are adequately covered by the scheme to enable them to enjoy a decent standard of living.

Thank you for your patience!

- “ This note is for this forum only and should not be treated as a complete and authoritative statement of law. My elaboration and answers in the forum should not be treated as giving any legal advice.
- “ 延伸閱讀:
- “ 梁少玲「司法覆核」及莊耀洸、徐嘉穎「人權」輯於趙文宗、洪雪蓮、莊耀洸編 (2010)《社會福利與法律應用: 溝通與充權》。香港: 紅投資有限公司
- “ 香港社區組織協會 民權教育中心 (2003)《香港公民權益手冊· 經濟社會與文化權利》。香港: 香港社區組織協會 第二章「社會福利權」
- “ Any enquiry and comment, welcome to contact
YK Chong 莊耀洸 at www.ied.edu.hk or 2948-7901
- “ As at 19.7.2010 (22:30)

JR 21 July 2010)

(CSSA RR