FACV No. 2 of 2013

**IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

FINAL APPEAL NO. 2 OF 2013 (CIVIL)
(ON APPEAL FROM CACV NO. 185 OF 2009)

Between :

KONG YUNMING (孔允明)	Appellant
and	
THE DIRECTOR OF SOCIAL WELFARE	Respondent

Before:	Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Bokhary NPJ, Lord Phillips of Worth Matravers NPJ
Dates of Hearing:	18-19 November 2013
Date of Judgment:	17 December 2013

J U D G M E N T

Chief Justice Ma:

1. For the reasons contained in the Judgment of Mr Justice Ribeiro PJ, this appeal must be allowed. The Government's policy, which came into effect on 1 January 2004 requiring all recipients of Comprehensive Social Security

Assistance (CSSA) to have been a Hong Kong resident for at least seven years, is not constitutional.

Mr Justice Ribeiro PJ:

2. In this appeal, it falls to the Court to consider the scope and effect of the right to social welfare conferred upon Hong Kong residents by Article 36 of the Basic Law. It arises in the context of the applicant's claim for benefits under the Comprehensive Social Security Assistance ("CSSA") Scheme.

A. The appellant's circumstances

3. The appellant ("Madam Kong") is a native of Guangdong. She had previously been married but divorced her first husband in 1983. There were two sons of that marriage and they reside on the Mainland. In 2001, she met Mr Chan Wing, a Hong Kong permanent resident, and married him in October 2003, having visited him in Hong Kong on a two-way permit on several occasions. Mr Chan was not a man of means. His health was not good and he had been a recipient of social welfare since 1985.

4. Madam Kong worked on the Mainland as a home helper for the elderly until 2005. She was unable thereafter to find work and, when granted a one-way permit ("OWP") by the Chinese authorities on 30 November 2005, she decided to come to settle in Hong Kong with her husband. She arrived here on 21 December 2005, then aged 56, and was granted permission to remain for seven years. She thereupon became a non-permanent resident of Hong Kong within the meaning of Article 24 of the Basic Law.[1]

5. Sadly, her husband (who was aged 76) died on 22 December 2005, the day after she arrived in Hong Kong. In consequence, she found herself

[1] She was duly issued with a Hong Kong Identity Card on 28 December 2005.

homeless, since the Housing Authority immediately repossessed her late husband's public housing unit. She was without family or friends in Hong Kong and was admitted to a shelter for street sleepers.

6. On 20 March 2006, Madam Kong applied for CSSA but was unsuccessful. Her application was refused because the Government's policy has, since 1 January 2004, been that persons who have resided in Hong Kong for less than seven years do not qualify for CSSA, save where, in exceptional circumstances, the Director of Social Welfare ("the Director") waives that residence requirement as a matter of discretion. The policy was aimed at Mainland immigrants. Madam Kong's case was not considered appropriate for the exercise of that discretion and her appeal to the Social Security Appeal Board against that decision was rejected.

B. The decisions of the Courts below

7. She was granted legal aid and instituted judicial review proceedings to challenge the Director's decision to reject her CSSA application on the ground that the imposition of the seven-year residence requirement is inconsistent with Articles 25, 36 and 145 of the Basic Law, as well as Article 22 of the Hong Kong Bill of Rights.[2]

8. On 23 June 2009, Mr Justice Andrew Cheung (as Mr Justice Cheung CJHC then was) dismissed her application for judicial review.[3] His Lordship's decision was upheld by the Court of Appeal.[4]

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[2] All set out in Section D of this judgment.

[3] [2009] 4 HKLRD 382.

[4] Stock VP, Lam and Barma JJ, CACV 185/2009 (17 February 2012).

C. The CSSA scheme

C.1 The nature and purpose of CSSA

9. The CSSA scheme is a non-contributory, means-tested social security scheme. It is administered by the Social Welfare Department ("SWD") and is non-statutory. The Government describes it as "a means-tested safety-net benefit designed to ensure that people with limited or no other sources of income have sufficient money to meet their basic needs."[5] It aims in particular to provide "a safety net for individuals or families who are unable to support themselves financially because of age, disability, illness, low earnings, unemployment or family circumstances."[6]

10. As Mr Cheung Doi-ching,[7] giving evidence on the Government's behalf, explains, the basic needs "include food, clothing, fuel and light, rent and schooling expenses for children ..." The Director sets a level of income which represents the amount required to meet these essential needs and:

> "The difference between the total assessable monthly income of a family and its total monthly needs as recognised under the Scheme in terms of various types of payment will be the amount of assistance payable."[8]

C.2 The evolution of the residence requirement

11. At the end of World War II, with China in the throes of a civil war, Hong Kong experienced a massive influx of refugees which brought the post-war population of about 600,000 in 1945 up to 1,600,000 at the end of 1946.

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[5] Legco Brief, 3 June 2003, HWF CR/3/4821/99(03) Pt 7, §3.

[6] *Ibid*, Annex C, §1.

[7] Principal Assistant Secretary for Labour and Welfare (Welfare) 4 of the Labour and Welfare Bureau, Affirmation 8 January 2009 ("Mr Cheung's Affirmation"), §16.

[8] Legco Brief, 3 June 2003, Annex C, §5.

The population increased to 2,500,000 in 1956 and reached over 3,000,000 by March 1960.[9]

12. It was against that background that the Social Welfare Office was established in 1948, providing rudimentary relief in kind, primarily in the form of cooked meals for the relief of refugees. As welfare assistance evolved, a residence requirement of 10 years was established as a condition of eligibility for public assistance.[10] In 1958, the SWD was formed and it provided shelter for the destitute and continued to provide relief in the form of daily cooked meals and dry rations.[11] A year later, in 1959, the residence requirement was reduced to five years.

13. The inadequacies of the system were recognized in a report on "Aspects of Social Security" prepared by an Interdepartmental Working Party in April 1967, and in March 1970, a Memorandum for the Executive Council[12] pointed out that the then existing scheme:

> "... does not enable the need to be met adequately in a substantial proportion of cases. To some extent this is because the levels of assistance are too low. Mainly, however, this is because the form in which assistance is normally given, namely dry rations, takes no account of either the basic household needs required to maintain a minimum standard of living, or the special needs arising from any particular disability suffered by a member of a family."

14. The Memorandum recommended a change of policy, arguing that "the stage of development now reached by Hong Kong justifies a more liberal policy, and one which more closely meets the needs of the indigent" and that, as the Working Party had recommended, "public assistance, in the form of financial aid, should be accepted as a responsibility of the Government to be

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9 Mr Cheung's Affirmation, §41.

10 *Ibid*, §23.

11 *Ibid*, §24.

12 XCC (70) 14, For discussion on 17 March 1970.

met by public funds" with the aim of relieving the destitute. It proposed substituting cash grants on a means-tested basis for assistance in kind. It is of particular present relevance that it also proposed that the residence requirement be reduced to one year:

> "The second proposal is that the present criterion of a minimum period of five years' residence in the Colony should be reduced to one year, with the discretion of the Director of Social Welfare to pay assistance to people who have not fulfilled this condition, if, in their particular circumstances, he considers it necessary having regard for other available sources of aid. The residential criterion was established in 1948 at 10 years and reduced in 1959 to 5 years. The thinking behind the residential qualification was that public assistance should not be made so freely available as to attract a mass influx of new immigrants from China into the Colony. As a result, voluntary agencies, including some which are subvented by Government, have necessarily had to assume the responsibility for assisting persons who do not have this residential qualification. The situation regarding immigration has changed considerably in recent years and it is believed that this residential qualification could safely be reduced to one year, although for reasons associated with our external relations it would be possibly unwise at the present time to remove it entirely."[13]

15. As pointed out by Ms Polly Choy Bo Chun[14] on the Government's behalf, the Governor-in-Council endorsed those recommendations on 17 March 1970 and the Legislative Council's Finance Committee approved the necessary funding on 17 June 1970. The system then put in place developed into the present CSSA scheme which was introduced in its present form with effect from 1 July 1993.

16. From 1970 onwards, one year's residence was the residential condition of eligibility for the benefit. It was only on 1 January 2004 that the new requirement was adopted, resulting in Madam Kong having to wait seven years before qualifying for CSSA. I shall return later to examine the terms upon which the seven-year requirement was introduced and the Government's justification for its introduction.

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[13] Exco Memo, 11 March 1970, §7.

[14] Principal Assistant Secretary for Labour and Welfare (Welfare) 4 of the Labour and Welfare Bureau, Affirmation 19 January 2011 ("Ms Choy's Affirmation"), §12.

D. The constitutional provisions relied on by Madam Kong

17. By Article 36, the Basic Law provides:

> "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."

18. It must be read together with Article 145 of the Basic Law which states:

> "On the basis of the previous social welfare system, the Government of the Hong Kong Special Administrative Region shall, on its own, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs."

19. The focus of this appeal is on the right to "social welfare in accordance with law" as laid down by those two Articles.

20. The case as argued below centred on the right to equality before the law and protection against discrimination. Thus, reliance was primarily placed on Article 25 of the Basic Law which provides that "All Hong Kong residents shall be equal before the law"; and on Article 22 of the Bill of Rights which states:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the 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, political or other opinion, national or social origin, property, birth or other status."[15]

21. Professor Johannes Chan SC, who appeared[16] for Madam Kong did not abandon the case based on equality, but submits that the central complaint involves the Government's adoption of the seven-year requirement, whether framed as a contravention of Article 25 or of Article 36. Pursuing the case

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[15] Reflecting Article 26 of the International Covenant on Civil and Political Rights.

[16] With Mr Hectar Pun.

under Article 36 has the advantage of dispensing with proof of the element of discrimination. If, as Madam Kong submits, it was an infringement of her right to social welfare under Article 36 for the Government to introduce the seven-year residence restriction, her challenge succeeds without her having to show that she was the victim of discrimination.

22. I shall accordingly focus in this judgment on the allegation that refusal of Madam Kong's claim for CSSA benefit contravened her right as a Hong Kong resident to "social welfare in accordance with law".

E. The nature of the Article 36 right

23. As is true of many constitutional provisions, Article 36 is in very broad terms, conferring a constitutional right on Hong Kong residents "to social welfare in accordance with law". Apart from the CSSA scheme, which[17] forms the mainstay of social security in Hong Kong, the SWD provides a wide range of services. They include family and children services; services for the elderly; rehabilitation and medical social services; services for offenders; services for community development; and services for young people.[18] There is obviously room for argument as to whether all or only some part of those services come, as a matter of law, within the concept of "social welfare" for the purposes of founding a constitutional right under Article 36. In my view, however, since the CSSA scheme aims to provide a welfare benefit addressing basic, "safety net" needs – a fundamental function of any social security system, such benefit is a clear case coming within the Article 36 concept of "social welfare". It was not suggested otherwise. The question whether any other benefits and services provided by the SWD also fit within that concept must be left open. Other

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[17] With Social Security Allowance or "SSA" which provides largely non-means-tested allowances for the severely disabled and the elderly: Mr Cheung's Affirmation §7(b).

[18] Mr Cheung's Affirmation, §7.

facets of the system operated by the SWD might well give rise to different considerations and it should not be assumed that what is said in this judgment can necessarily be extrapolated for general application across the spectrum of services provided.

E.1 "In accordance with law"

24. Before examining the substantive content of the Article 36 right, one argument raised on Madam Kong's behalf should be disposed of. Professor Chan endeavoured to argue that restricting the pre-existing right to CSSA by imposing a seven-year residence requirement was constitutionally invalid because it had been effected administratively rather than by legislation. The argument was that the new policy was therefore not "in accordance with law".

25. I am unable to accept that argument. Article 145 recognizes and endorses the validity of "the previous social welfare system" which consisted of a non-statutory system of administrative rules and policies. Accordingly, reading Article 36 together with Article 145, the intention of the Basic Law must be taken to be that such administrative system – consisting of rules that are accessible, systematically applied and subject to a process of administrative appeal – is to be treated as a system providing "social welfare in accordance with law" within the meaning of Article 36.

26. Indeed, it is difficult to see how the argument helps Madam Kong. If, contrary to the view just expressed, it were correct to say that a purely administrative system does not provide "social welfare in accordance with law", it would be difficult to see what rights are conferred by Article 36.

27. A system of social welfare catering for a wide range of clients in a wide range of different circumstances may well be better served by the

operation of transparent and predictable administrative criteria rather than by having to have each benefit spelt out through a legislative process.

28. The evidence also shows that there was in fact very considerable interaction between members of the Administration on the one hand, and the Legislative Council; members of its Welfare Services Panel; and the Panel's Subcommittee; on the other, in relation to the new residence requirement. There was therefore in fact a substantial measure of public consultation and accountability. The funding of the social welfare system as a whole is subject to approval by the Legislative Council's Finance Committee.

E.2 The Court of Appeal's approach to the Article 36 right

29. The Court of Appeal rejected Madam Kong's argument as it was then put regarding the content of the Article 36 right, namely, that it "confers upon all Hong Kong residents a right to social welfare subject only to such restriction as is limited by law; which is to say, statute law or common law formulated with such precision as the occasion demands and which is accessible".[19]

30. Stock VP saw as incurable defects in that argument, among other matters, its attempt to confer a right to all forms of social welfare regardless of eligibility criteria or level of benefit;[20] its tendency to ignore the sheer width and variety of social welfare benefits in Hong Kong while "cherry-picking" the one CSSA facet;[21] and its isolation of the Government's social welfare obligations

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[19] Court of Appeal §50 and §69.

[20] Court of Appeal §53.

[21] Court of Appeal §§55-60.

from its other cost-bearing social obligations and functions.[22] I would respectfully agree with Stock VP in rejecting the argument so put.

31. His Lordship went on to ask rhetorically: "What then of Article 36?"[23] His answer was that it was "... strictly speaking, not necessary for the purpose of the instant exercise to decide what article 36 does mean. It suffices, for the present purpose, to conclude, as I do, that it does not bear the meaning for which the applicant contends."[24] His Lordship, however, added:

> "...But one might nevertheless venture to suggest what article 36 read with article 145 envisage. With the previous social welfare system as a base, they envisage the continuous formulation and promulgation of policy in the realm of social welfare for the benefit of Hong Kong residents – as opposed to visitors – in the light of such economic conditions and social needs as prevail from time to time, with the objective of developing and improving the system, it being manifestly implicit that that objective can only be met if the system be nurtured and sustained for the meaningful benefit of future generations as well as the present. In order to meet these requirements and in any event inherent in any such system, the right to social welfare carries with it qualifying conditions. Hong Kong residents are to enjoy that right, so long as they meet the qualifying conditions, for the right itself includes the conditions. The conditions must be lawful, so that conditions that are discriminatory are not permissible."[25]

32. With respect, I do not think that an adequate approach. Its lays the emphasis entirely on Article 145 and deprives Article 36 of any meaningful effect. It focuses on the Administration's role in formulating social welfare policies, regarding it as free to define the eligibility and other conditions for any particular benefit, provided only that such conditions are not discriminatory. But that allows the equality rights entirely to eclipse the welfare right. The equality guarantees derive from Article 25 of the Basic Law and Article 22 of the Bill of Rights. To say that the Administration cannot impose discriminatory eligibility conditions gives effect to those guarantees. But it fails to attribute

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[22] Court of Appeal §§61-65.

[23] Court of Appeal §68.

[24] Court of Appeal §72.

[25] *Ibid*.

any meaning to the first sentence of Article 36 which states: "Hong Kong residents shall have the right to social welfare in accordance with law".

E.3 The content of the Article 36 right

33. Those words unequivocally declare the Basic Law's intention to create an independent head of constitutional protection in the context of social welfare rights. True it is that Article 36 does not – and obviously cannot – descend into particulars as to specific welfare benefits or their eligibility and other conditions. But that is because, like many other constitutional provisions, Article 36 is intended to operate as a framework provision. Read together with Article 145, it provides the framework for identifying a constitutionally protected right to social welfare: Once it is clear that an administrative scheme such as the CSSA scheme has crystallized a set of accessible and predictable eligibility rules, those rules may properly be regarded as embodying a right existing "in accordance with law", qualifying for Article 36 protection.

34. Article 145 supports this view. It adopts the previous social welfare system as the basis for the Administration's formulation of policies after 1 July 1997 to develop and improve that previous system in the light of economic conditions and social needs. Article 145 therefore endorses the rules and policies established under the previous system and, as discussed above,[26] it implicitly regards them as rules established "in accordance with law" and thus capable of constituting particular rights protected by Article 36.

35. The relevant right given constitutional protection by Article 36 in the present case is the right defined by the eligibility rules for CSSA derived from the previous system of social welfare and in existence as at 1 July 1997. Crucially, this means that Article 36 confers constitutional protection on the

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[26] In Section E.1.

rules which laid down a one-year, and not a seven-year, residence requirement as a condition of eligibility for CSSA.

E.4 Modifying rights protected by Article 36

36. Social welfare rights which qualify as rights protected by Article 36 are subject to modification pursuant to policies generated by the Government in accordance with Article 145, as that Article plainly envisages. The importance of a right being recognized as a social welfare right protected by Article 36 is that any restriction subsequently placed on that right is subject to constitutional review by the Courts on the basis of a proportionality analysis (as Lord Pannick QC, appearing for the Director[27] accepted). The Government was therefore entitled to change its policy and to impose the seven-year requirement in place of the one-year requirement. But it is also clear that such modification is subject to constitutional review.

37. I pause at this stage to dispose of an argument made on Madam Kong's behalf which cannot be accepted. It was submitted by Professor Chan that because Article 145 authorizes the Government to formulate policies "on the development and improvement of this system in the light of the economic conditions and social needs", it can only make changes which improve welfare benefits (in the sense of making them more generous) and cannot introduce a "retrogressive" change by imposing a much longer qualifying period of residence. But Article 145 does not address, let alone freeze, the eligibility conditions or the level of any particular benefits. What it does is to make it clear that the Government may formulate policies "on the development and improvement of [the previous] *system*". Lord Pannick rightly submitted that Article 145 does not preclude the elimination or reduction of particular welfare

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27 With Mr Abraham Chan.

benefits if that proves necessary to develop, improve or maintain the sustainability of the welfare system as a whole.

E.5 Constitutional review where rights are protected by Article 36

38. As this Court has recognized, some rights are non-derogable and absolute, in which case, no infringement is permitted and no question of proportionality arises.[28] But in other cases, it is well-established that the law may validly create restrictions on constitutionally protected rights provided that each such restriction can be justified on a proportionality analysis.

39. The starting-point is the identification of the constitutional right engaged[29] – Article 36 in the present case. The next step is to identify the legal or administrative measure said to infringe or restrict that right – the imposition of the seven-year residence requirement in the present case (to which I shall return in greater detail). The Court then asks whether that restriction pursues a legitimate societal aim and, having identified that aim, it asks whether the impugned restriction is rationally connected with the accomplishment of that end. If such rational connection is established, the next question is whether the means employed are proportionate or whether, on the contrary, they make excessive inroads into the protected right.[30]

40. In some cases involving fundamental rights such as freedom of expression or freedom of peaceful assembly,[31] or rights bearing on criminal

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[28] *Ubamaka Edward Wilson v Secretary for Security* FACV 15/2011 (21 December 2012), involving for example, the prohibition of torture and of cruel, inhuman or degrading treatment.

[29] See for instance *Catholic Diocese of Hong Kong v Secretary for Justice* (2011) 14 HKCFAR 754 at §65-§66.

[30] See for example, *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at §§36-44 on how the proportionality test operates.

[31] As in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229.

liability such as the presumption of innocence,[32] the Court has regarded the restriction as disproportionate unless it goes no further than necessary to achieve the legitimate objective in question. This is sometimes called the "minimal impairment" test. Similarly, in discrimination cases, where the differentiating inroad is based on certain personal characteristics sometimes referred to as "inherently suspect grounds" such as race, colour, sex or sexual orientation, the Court will subject the impugned measure to "intense scrutiny", requiring weighty evidence that it goes no further than necessary to achieve the legitimate objective in question.[33]

41. However, as the Chief Justice noted in *Fok Chun Wah v Hospital Authority*,[34] "... it would not usually be within the province of the courts to adjudicate on the merits or demerits of government socio-economic policies". Where the disputed measure involves implementation of the Government's socio-economic policy choices regarding the allocation of limited public funds without impinging upon fundamental rights or involving possible discrimination on inherently suspect grounds, the Court has held that it has a duty to intervene only where the impugned measure is "manifestly without reasonable justification".[35] That is a test initially applied by the European Court of Human Rights while according a broad margin of appreciation to member States in setting and implementing their socio-economic policies.[36] As the Chief Justice points out, the margin of appreciation principle has previously been adapted to

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[32] As in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574; and *HKSAR v Ng Po On* (2008) 11 HKCFAR 91.

[33] As in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 at §§19-22; *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at §§77-78.

[34] (2012) 15 HKCFAR 409 at §66.

[35] *Ibid* at §§71 and 76.

[36] The Strasbourg and United Kingdom case-law is reviewed in *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545 at §§16-22.

apply in the context of our domestic law.[37] It is appropriate similarly to apply the "manifestly without reasonable foundation" test in our domestic context.

42. Professor Chan sought to argue that the challenged restriction in the present case should be regarded as a measure that contravenes fundamental rights or engages inherently suspect grounds of discrimination. I do not agree. The Article 36 right to social welfare is not a fundamental right but a right which intrinsically involves the Government setting rules determining eligibility and benefit levels. It arises in an area where the Courts acknowledge a wide margin of discretion for the Government. As the Chief Justice pointed out in *Fok Chun Wah*,[38] the adoption of a residence requirement as a criterion of eligibility for social welfare benefits has often been upheld and is generally not regarded as engaging any of the inherently suspect grounds.

43. Accordingly, in my view, insofar as the disputed restriction in the present case is rationally connected to a legitimate societal aim espoused by the Government, the restriction will only be held to be disproportionate if it is manifestly without reasonable foundation. I turn then to apply these principles to the facts of the present case.

F. The right, the new restriction and the Director's discretion

44. As we have seen, the right protected by Article 36 is the administratively defined right of Hong Kong residents who pass the means test and are not otherwise disqualified, to obtain CSSA payments after having resided here for one year. That was the established position as at 1 July 1997 when Article 36 took effect. There is no dispute that but for the seven-year residence requirement, Madam Kong would have qualified for CSSA after

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[37] *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at §63.

[38] *Ibid* at §72.

residing here for one year. Her income has at all material times fallen below the level defined by the Director as necessary to meet basic needs. The seven-year requirement therefore removed the safety net that would otherwise have been deployed in her case.

45. It is important to note the precise terms of the new restriction. At a meeting of the Executive Council on 3 June 2003, the Council advised and the Chief Executive ordered that with effect from 1 January 2004:

> "To be eligible for CSSA, a person must have been a Hong Kong resident for at least seven years ...[39]
>
> Children aged below 18 are exempted from any prior residence requirement.
>
> 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) [are also exempt[40]].
>
> 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."

46. The new residence requirement therefore does not apply to all new arrivals (the term used by the Director describe immigrants who have not yet resided here for seven years or more). Children under 18 (who had previously been subject to the one-year residence requirement) and current Hong Kong residents[41] who pass the means test therefore qualify for CSSA payments. So do other new arrivals for whom the requirement is waived as a matter of

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[39] I have eliminated the words "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 residents in Hong Kong)" from the Order since the constitutionality of that additional requirement was successfully challenged and not made the subject of an appeal by the Director: see *Yao Man Fai George v The Director of Social Welfare* CACV 153/2010 (17 February 2012) decided simultaneously with the present case by the Court of Appeal.

[40] The words in square brackets replace wording which had also referred to the condition of residence one year immediately before application.

[41] Provided that the adult residents had been here for at least one year.

discretion. The guidelines for the exercise of that discretion laid down by the Director are set out later in this judgment.[42]

G. The Government's purpose in adopting the seven-year rule

47. Turning to the next stage of the analysis, it is necessary to ask whether the seven-year restriction on the Article 36 right pursues a legitimate societal aim and, having identified that aim, to ask whether the restriction is rationally connected with the attainment of that end.

48. The restriction was recommended by the Task Force on Population Policy ("the Task Force") chaired by the then Chief Secretary, Mr Donald Tsang, in its Report issued on 26 February 2003.[43]

49. It is worthwhile emphasising that a purpose relied on to justify a restriction on a constitutional right must be a legitimate societal aim. In other words, it has to be an aim which furthers the legitimate interests of society. The Government might simply state that it is cutting expenditure with the aim of "saving money". But saving money would not in itself be a legitimate aim. The purpose and effect of the cut in expenditure would have to be taken into account. If the cut in expenditure meant that the Government was abdicating an important responsibility which the government ought to discharge in the public interest, the saving of money by that means would not be a legitimate aim. To take an extreme example, it would not be a legitimate aim to cut expenditure by say, halving the number of ambulances or fire engines, thereby endangering public safety. In the present case, the Government is not saying that its aim is simply to save money. It is saying that the restriction was introduced to save

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[42] In Section L.4 below.

[43] Mr Cheung's Affirmation, §45. It was endorsed by Finance Committee on 27 June 2003: Ms Choy's Affirmation, §39.

money because such savings are necessary to ensure the sustainability of the social security system.

50. Thus, explaining the new seven-year rule to the Legislative Council's Panel on Welfare Services ("the Welfare Panel") on 10 March 2004, the Director stated:

> "The new residence requirement for social security benefits was recommended by the Task Force on Population Policy. Its aim was to provide a more rational basis for the allocation of public resources in the light of rising social expenditure and limited financial resources and to ensure the long-term sustainability of the provision of social security benefits to the community."[44]

51. That is how the case has been argued. Andrew Cheung J noted that the Director's submission was:

> "... that the legitimate aim of the seven-year residence requirement is to adopt a proper basis for the allocation of finite public resources in the light of rising social expenditure so as to ensure the long term sustainability of the provision of social security benefits to the society as recommended by the 2003 Taskforce on population."[45]

52. It was an argument that the Court of Appeal accepted. Stock VP stated:

> "...ample justification has been provided for the contention that in order to sustain the viability of the social welfare system, the eligibility criteria required amendment. That was the result of anticipated problems posed by an ageing population, a low birth rate, by the fiscal deficit at the time of the decision, the continuing flow of OWP holders with a concomitant absence of control of immigration intake from that direction, decreasing emigration and the fact that the scheme was a non-contributory one."[46]

53. In Mr Cheung's Affirmation,[47] three related factors are said to contribute to the need for measures to safeguard the system's sustainability: (i)

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[44] LC Paper No CB(2)1616/03-04(02), §11. Repeated in LC Paper No CB(2)1616/03-04(03), §2.

[45] Judgment §123.

[46] Court of Appeal §108.

[47] At §§52-54.

the policy of accepting immigrants from the Mainland under the OWP scheme; (ii) Hong Kong's ageing population; (iii) the rise in expenditure on CSSA. The Government regards the seven-year restriction as a rational response to the sustainability problem so arising:

> "Against the background of a serious fiscal deficit and the implication of demographic trends and characteristics identified in the [Task Force] Report, the Administration took the view that there was a strong case for applying a uniform 7-year residence requirement for providing heavily subsidized social services. In respect of CSSA, the Administration considered a 7-year residence requirement for new arrivals aged 18 or above to be a rational basis for allocation of social resources ..."[48]

54. Mr Cheung also puts forward certain other arguments championing the reasonableness of the rule, which I shall consider later.[49] I wish first to focus on the question whether a rational connection exists between the avowed purpose of ensuring the financial sustainability of the social security system on the one hand and the seven-year residence requirement on the other. I propose to examine each of the three factors said to underlie the sustainability problem and consider whether they provide or contribute to a rational justification for the seven-year restriction.

H. The OWP scheme

H.1 The problem

55. The Task Force Report[50] explains the background and problem which had to be dealt with:

> "Under Article 24(2)(3) of the Basic Law as interpreted by the NPCSC Interpretation dated 26 June 1999, Mainland children born to Hong Kong permanent residents have the right of abode in Hong Kong provided that at least one of their parents have obtained permanent resident status by birth or residence at the time of birth of the children. In anticipation of the implementation of the Basic Law, the daily OWP quota was increased from 105 to 150 in 1995 to facilitate the entry of these children.

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48 Mr Cheung's Affirmation, §55.

49 In Sections K and L below.

50 At §§3.25 and 3.26.

> The remaining places are allocated to Mainland spouses and other OWP applicants with no right of abode who generally have to wait for a longer time before they can settle in Hong Kong. Currently, spouses in Guangdong have to wait for about seven to eight years.
>
> The discrepancy in the times of arrival in Hong Kong between the CoE children[51] and their Mainland parents often gives rise to separated families. Concern has been expressed in the community about the various problems that are believed to have resulted from this situation, problems such as inadequate parental care, economic hardship if the Hong Kong parent has to give up a job to look after the children, adverse impact on family relationship, etc. As the number of new arrivals from the Mainland continues to grow, the problem of split-families also grows. Many Legislative Council Members, academics and opinion leaders whom we approached have made the point strongly that the situation has to be properly addressed and that a proper balance has to be struck between orderly admission of new arrivals from the Mainland, both children and spouses, and upholding family unity."

H.2 Family reunion as the main source of population growth

56. To address this problem, the Government, in cooperation with Mainland authorities, adopted the OWP scheme. Mainland authorities issue OWPs in accordance with Mainland law, permitting the exit of Mainlanders to Hong Kong for settlement. As the Task Force Report explains:

> "The OWP Scheme is a scheme devised primarily to facilitate families with immediate members (spouses and children) residing in the Mainland to be reunited in Hong Kong. OWP holders can be broadly divided into two groups: children of Hong Kong permanent residents with Certificate of Entitlement (CoE); and spouses and other dependants. The CoE children are permanent residents and have right of abode in Hong Kong. Spouses and other dependants who enter Hong Kong on OWPs are non-permanent residents but may become permanent residents after having ordinarily resided in Hong Kong for a continuous period of not less than seven years."[52]

57. The OWP scheme has become "the single most important immigration policy that shapes Hong Kong's demographic growth and composition", accounting for some 93% of population growth from 1997 to 2001.[53] Applying the increased daily quota of 150,[54] about 55,000 Mainland

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51 Children issued with a Certificate of Entitlement showing that they are in principle entitled to right of abode and the status of a Hong Kong permanent resident.

52 At §2.17.

53 *Ibid*.

immigrants are admitted each year. The Task Force Report suggested that some 168,000 persons were in the queue waiting for a OWP.[55] The Government has been content to maintain that rate of inflow. In a press release issued upon publication of the Task Force Report on 26 March 2003, the then Chief Secretary stated:

> "We respect the right of family reunion and the Right of Abode conferred by the Basic Law, and we have concluded that the present daily allocation of 60 within the 150 quota for children with right of abode in Hong Kong is appropriate. ... For the time being, the total daily quota of 150 will remain unchanged. The SAR Government will liaise closely with the Mainland authorities with regard to the numbers and the allocation among the categories. If there is evidence that the demand falls, we will discuss with the Mainland authorities to reduce the quota."

58. Most new arrivals entering under the OWP scheme are children with the right of abode in Hong Kong and Mainland spouses coming to join spouses already resident here.[56] About half of the children tend to be under 18. So in 1996, 48% were aged 19 or below;[57] and in 2002/03, 51.6% were 18 or below.[58] The adult OWP holders are usually wives of Hong Kong residents. Thus, in 2001, 65% of all OWP holders entering Hong Kong were females, mostly housewives.[59]

59. It is the Government's policy to facilitate the integration of new arrivals in the community and the Task Force Report points out that:

> "...there are few significant differences in university attendance between native-born children and the Mainlanders who came to Hong Kong before the age of nine. It is only among the 'older' Mainland children who arrived in Hong Kong after the age of nine that significant differences in university attendance exist. This suggests that the

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54 It had been 75 in 1982, 105 in 1993 and became 150 in 1995.

55 Task Force Report, Summary of Recommendations, §8.

56 *Ibid*, §9.

57 Task Force Report, §2.21

58 LC Paper No CB(2)1401/03-03(03), §24.

59 *Ibid*.

> younger an OWP applicant is admitted, the easier it will be for him or her to adapt to Hong Kong's education system."[60]

60. The OWP scheme therefore favours younger children as immigrants and they are given the largest sub-quota (60) of the 150 daily quota. They are likely to be qualified to settle in Hong Kong before their parent (usually the mother) on the Mainland (spouses separated for over 10 years being given a sub-quota of 30). However, younger children obviously need parental care. Since 2002, Mainland authorities have facilitated visits by spouses to their families in Hong Kong by allowing them to apply for two-way permits as and when they wish once they have applied for a OWP.[61] This effectively allows family reunion to take place while the Mainland parent's own OWP is pending. The Task Force Report recommended that such spouses should be encouraged to take advantage of this to familiarise themselves with Hong Kong conditions and to help themselves decide whether to settle here.[62]

H.3 How the OWP scheme bears on the seven-year requirement

61. It is evident from the foregoing that no support for the CSSA seven-year requirement can rationally be derived from any aspect of the OWP scheme. The humane and laudable purpose of that scheme is the promotion of family reunion, respecting the right of abode of children of Hong Kong permanent residents under the Basic Law. It gives preference especially to younger children because they integrate more easily. And realistically, to provide them with adult carers, their Mainland parents, usually their mothers, are encouraged to come to Hong Kong on two-way permits pending issue of the OWP applied for, eventually settling here as Hong Kong residents in their own right.

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[60] At §2.27.

[61] Minutes Welfare Panel Meeting on 10 March 2003, LC Paper No CB(2)1738/02-03, §13.

[62] At p ix.

62. Where such a reunited family is poor, having means-tested income which does not cover the basic needs of its members, one would expect the social security scheme to operate in harmony with the OWP scheme and so make CSSA benefits available. While it may be that the one-year residence requirement has to be accepted as the basic right to social welfare historically defined, it would be wholly irrational, when viewed from the perspective of the OWP scheme, to raise it to a seven-year requirement. Although the Task Force Report contains considerable discussion of the OWP scheme, it provides no rational basis for adopting the seven-year rule. On the contrary, its logic demands the disapplication of that rule in relation to OWP arrivals.

63. That logic has only partly been respected. In line with encouraging younger immigrant children to come, new arrivals under 18 years of age have been exempted from the seven-year restriction, but – illogically – there is no such exemption for Mainland parents who come to take care of them. It follows that unless the operative restriction is waived as a matter of discretion – a matter discussed further below[63] – such parents have to find some way to cope over a seven-year period even though a means test has shown that they are without sufficient income to meet their basic needs.

64. That counter-productive aspect of the seven-year requirement has not escaped members of the Welfare Panel. At its meeting held on 10 March 2003, Ms Li Fung-ying is recorded as having stated that:

> "... the seven-year residence requirement for the CSSA Scheme [was] a policy marred with contradiction, as its having the effect of deterring potential new arrivals to settle in Hong Kong was at variance with the policy of family reunion."[64]

65. And after the seven-year requirement had been in place for some four years, the Sub-Committee appointed to review the arrangements for CSSA

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63 In Section L.3 below.

64 Minutes Welfare Panel Meeting on 10 March 2003, LC Paper No CB(2)1738/02-03, §14.

taking into consideration the views of the public, service users and non-governmental organisations providing welfare services, reported to the Welfare Panel[65] that deputations:

> "...informed the Subcommittee that many new-arrival single mothers faced great financial hardship for being unable to meet the residence requirement. They were unable to find a suitable employment because of their low educational attainment and the need to take care of their young children. Given that these new arrivals were not eligible for CSSA, they had to rely on their child(ren)'s CSSA for a living."

66. It is clear, to say the least, that the OWP scheme provides no support whatsoever for the Government's alleged legitimate aim of ensuring the welfare system's sustainability and no support for the existence of any rational connection between that aim and the impugned seven-year requirement. The policies underlying the OWP scheme militate against that restriction.

I. Hong Kong's ageing population

67. The second factor said to underlie the Government's avowed legitimate aim is the need to cater for an ageing population. The Task Force identified the problem in the following terms:

> "In 2001, Hong Kong's total fertility rate reached an extremely low level of 927 children per 1,000 women, well below the replacement level of 2,100 children per 1,000 women. At the same time, life expectancy at birth is projected to reach 82 for men and 88 for women in 2031, one of the longest in the world.
>
> Hong Kong's population is aging. A quarter of its population is expected to be aged 65 or above by 2031. More significantly, the size of the workforce will shrink as the prime working age population declines."[66]

68. In every society, the working age population economically supports children below, and the elderly above, working age. The demographic pattern identified above undoubtedly presents a serious long-term problem since it projects a shrinking working age population having to support a growing

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[65] LC Paper No CB(2)871/07-08, 23 January 2008.

[66] Task Force Report, Summary of Recommendations, §§4 and 5.

number of long-lived elderly dependents. The Task Force Report projects the following dependency ratios from 2002 to 2031:

Year	*Child*	*Elderly*	*Overall*
2002	223	158	381
2006	203	162	365
2011	180	164	344
2016	178	198	376
2021	179	245	424
2026	180	313	493
2031	182	380	562

69. These figures indicate the projected numbers of children (those under 15) and the estimated numbers of elderly persons (those over 65) who will be dependent on every 1,000 persons between the ages of 15 and 65. Thus, in 2002, for every 1,000 persons aged between 15 and 65, there were estimated to be 223 child dependents and 158 elderly dependents with a total overall dependency ratio of 381. It was projected that over the years, the child dependency ratio would decline while the elderly dependency ratio would markedly increase from the year 2016 onwards.

70. This obviously has serious implications for the cost of caring for the elderly. The Task Force puts this as follows:

> "One serious economic problem caused by an accelerated increase in the number of elderly people in the population is social security payments. The Government is committed to providing financial assistance to elderly people in need. More than 600,000 persons aged 60 or above receive financial assistance through either the CSSA or the Old Age Allowance (OAA). ... Total Government expenditure in financial assistance for elders is estimated to be $11.8 billion in 2002-03, accounting for 5.4% of recurrent public expenditure and representing an increase of 50% when compared to the $7.8 billion paid out in 1997-98. The CSSA and OAA Schemes are funded entirely from General Revenue and are non-contributory. Should the rate of payment and eligibility for the OAA remain unchanged, it is estimated that by 2031, the total payment for OAA alone will rise to $10.4 billion. That for CSSA on elderly

> cases is estimated to leap-frog to $20.8 billion... Another serious economic problem caused by an aging population is steep increases in healthcare expenditure."[67]

71. The Government is undoubtedly right to regard the problems of our ageing population as serious and right to lay down policies aimed at mitigating those problems with a view to ensuring the long-term sustainability of our social welfare system. But what, if any, rational connection is there between such mitigation and the impugned policy of excluding new arrivals from receiving CSSA until they have resided here for seven years? I do not think any such connection exists.

72. Given that one of the root causes of the ageing population problem is Hong Kong's low fertility rate, and given that the OWP scheme has become "the single most important immigration policy that shapes Hong Kong's demographic growth and composition", with Mainland new arrivals accounting for 93% of our population growth between 1997 and 2001,[68] a rational response to the ageing problem ought to involve encouraging the entry of young immigrants to rejuvenate our population. This was recognized by the Task Force which acknowledged that:

> "...OWP holders, in particular young children, have contributed significantly towards mitigating the negative effects of low fertility and population aging by replenishing the dwindling number of our younger age cohorts."[69]

73. As has already been pointed out, the Government has only partially acted on that logic, exempting those under 18 from the seven-year residence eligibility criterion for CSSA, but applying the restriction to parents who arrive to be reunited with and to care for such children. To that extent, far from the seven-year requirement being a rational measure to mitigate the ageing

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67 At §§3.6 and 3.7.

68 Task Force Report §2.17.

69 Task Force Report §5.3.

population problem (and thereby contributing to the sustainability of our social security system), it is a counter-productive and irrational measure.

74. The evidence regarding social security payments to the elderly also belies any rational connection between the new restriction and the Government's avowed aim of ensuring sustainability. The seven-year restriction does not affect all elderly CSSA recipients, but only new arrivals who are elderly. Such persons constitute only a small proportion of all new arrivals. The elderly are given a relatively low priority and thus are allotted a small sub-quota under the OWP scheme. Thus, the Task Force Report[70] states that the 150 daily quota was allocated according to the following sub-quotas: 60 for children with Certificates of Entitlement; 30 for spouses separated for over 10 years; 60 for persons in all other categories, including spouses separated under 10 years; unsupported children coming to join relatives in Hong Kong; persons coming to Hong Kong to take care of their unsupported aged parents; unsupported elderly people coming to join relatives in Hong Kong and persons coming to Hong Kong to inherit legacies.

75. Of the relatively few elderly persons who do enter under the OWP scheme, only a small proportion[71] receive CSSA and Old Age Allowance. And even before the seven-year requirement was introduced on 1 January 2004, there was already in place a stringent requirement in respect of Old Age Allowance: to be eligible, a person had to have resided in Hong Kong for not less than five years since attaining the age of 60.[72] It follows that savings to CSSA expenditure that could be achieved by raising the requirement to seven

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[70] At §5.4.

[71] Of 69,345 new arrival CSSA recipients as at the end of December 2002, 6.8% were aged 60 and above: Mr Cheung's Affirmation, §53.

[72] LC Paper No CB(2)1401/02-03(03), §28 for discussion 10 March 2003. It is paid to persons aged 65 – 69 subject to a means test, and to persons aged 70 and above without means testing. Legco Brief HWF CR/3/4821/99(03) Pt 7, §6.

years for new arrivals would be minimal and could hardly qualify as a response to the ageing population problem, aimed at ensuring the sustainability of the welfare system.

J. The rise in CSSA expenditure

76. There is no doubt that in the decade leading up to 1 January 2004, spending on CSSA had risen sharply and that it was the Government's duty to consider policies aimed at ensuring its sustainability.

77. The first point to note, leaving aside for the moment the seven-year restriction, is that the Government did indeed confront the problem of steeply rising expenditure and did take action aimed at safeguarding its sustainability. The question which arises is whether, in the light of those measures, there is any rational basis for regarding the seven-year restriction on the Article 36 right as such a measure.

J.1 The December 1998 Report

78. The problem of sharply increasing expenditure was recognized and subjected to detailed consideration by an Inter-Departmental Steering Group chaired by the Director, which published a report dated December 1998. The Report stated:

> "The current review was prompted by growing public concern about the rapid growth in the CSSA caseload and its expenditure, the high levels of CSSA benefit for larger families as compared with market wages, and the sharp increases in the number of people of working age turning to CSSA. There is also an increasing perception that some people are abusing the system."[73]

79. Key figures and concerns were given as follows:

> "(a) The CSSA caseload rose by 146% from 88,600 in September 1993 to 218,400 in September 1998.

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[73] Executive Summary, §3.

(b) The CSSA expenditure increased by nearly three times from $2.4 billion in 1993/94 to $9.4 billion in 1997/98.

(c) The average monthly CSSA payments for households of four or more persons are now considerably higher than low-end wages.

(d) The number of 'unemployment' CSSA cases increased over six times from 3,500 in September 1993 to 26,200 in September 1998, representing 12% of the total CSSA caseload. During the same period, the 'single parent' CSSA cases increased by 268% from 5,700 to 20,900, representing 10% of the total CSSA caseload.

(e) There have been increasing calls for the Government to take more effective measures to prevent abuse of CSSA. A special hot-line for reporting suspected CSSA fraud cases was set up by the Social Welfare Department (SWD) in August 1998. Up to the end of September 1998, it had received some 1,300 calls."

The estimated CSSA expenditure for 1998/99 is expected to be above $13 billion. The Government will spend much more on CSSA in the years to come even if all the SG's recommendations (see paragraph 8-29 below) are accepted and implemented."[74]

80. The Steering Group was therefore examining increases in CSSA expenditure over the scheme as a whole, seeking to identify contributing factors and seeking ways to bring such expenditure under control. There is no suggestion that CSSA claims by new arrivals merited any special attention or that they were a cause for concern.

81. The Steering Group made a series of policy recommendations, applicable across-the-board, mainly aimed at encouraging CSSA recipients to get jobs. To take one example, the Report noted that CSSA payments made to larger households resulted in per capita income that was larger than the per capita income of non-CSSA households in the lowest expenditure group,[75] with the likely result that able-bodied persons would opt to remain on welfare rather than getting a job. In response, the Report recommended an across-the-board reduction in the standard rate of CSSA of 10% for households with three able-

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[74] Executive Summary, §§4 and 5.

[75] Report, §47.

bodied adults and children; and of 20% for households with more than three such persons.[76] It contained a calculation of the percentage savings to be achieved by such measures, ranging from a saving of 5% in single member households to 17% in households with five members.[77] That recommendation was implemented in June 1999.[78] Such a policy, creating disincentives against the development of a culture of dependence, may readily be seen as rationally aimed at ensuring sustainability.

J.2 Reduction in the standard rate

82. Another rational response to concerns about mounting expenditure and sustainability was the order of the Chief Executive in Council to reduce standard rates of CSSA across-the-board by 11.1% to take effect on various dates in 2003 and 2004.[79]

83. The Legislative Council Brief described the problem faced as involving unacceptable unabated growth in welfare expenditure. It noted that upward adjustments had been made to standard rates by 6.5% in 1997-98 and 4.8% in 1998-99.[80] However, as at December 2002, the total CSSA caseload was 266,571, representing a year-on-year growth of 10.3%, with the "unemployed" CSSA caseload having increased by 40.3% over the same period. This led to the projection that the approved provision of CSSA in 2002-03 of $16 billion (already up 11.1% on actual the expenditure of $14.4 billion

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76 Report §49.

77 Executive Summary, §22.

78 Mr Cheung's Affirmation, §40; Legco Brief HWF CR 2/4821/58 (03) Pt 68, §11, 25 February 2003.

79 Legco Brief HWF CR 2/4821/58 (03) Pt 68, 25 February 2003, §1.

80 *Ibid*, §2.

in 2001-02) would be insufficient. It was also estimated that the requirement for 2003-04 would be well in excess of $18 billion.[81]

84. This was seen as a threat to the system's sustainability:

> "Firstly, against the general economic situation and high unemployment, the number of families and individuals requiring support by Government is bound to increase. To sustain this safety net, we have to ensure our existing resources go further to meet the increasing demand. Secondly, prices for goods and services have come down considerably even as measured specifically by the SSAIP.[82] ... Thirdly, the HKSAR Government is facing some unprecedented budget deficits and of the Government is committed to restoring fiscal balance by 2006-07 as announced by the Financial Secretary..."[83]

85. The Government therefore decided to reduce the CSSA and SSA standard rates of payment:

> "For fiscal reasons and to ensure that we could continue to meet increase in demand, it is therefore proposed that the CSSA and SSA rates should be adjusted downward; that the over-adjustments in standard rates for able-bodied recipients under the CSSA Scheme, and those of the non-means tested [Disability Allowance] under the SSA Scheme should be recouped in one go through an 11.1% reduction from June 2003 .... and for non-able-bodied CSSA recipients, namely the elderly, the disabled and those medically certified to be in ill health, the 11.1% reduction the standard rates will be effected in two phases, first by 6% from October 2003, followed by the second phase adjustment from October 2004."[84]

86. Again, in my view, the rational connection between the sustainability objective and those across-the-board reductions of the standard rates is plain to see.

J.3 The seven-year residence requirement

87. The Government's case in support of the seven-year requirement based on rising cost is unfocussed and sparse. Mr Cheung points to rising public expenditure on social welfare generally (reaching $32.8 billion in 2006-

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[81] *Ibid*, §5.

[82] Social Security Assistance Index of Prices.

[83] Legco Brief HWF CR 2/4821/58 (03) Pt 68, §4, 25 February 2003.

[84] *Ibid,* §6.

07), with social security taking up the largest share (73%).[85] He indicates how overall spending on CSSA has increased over the past decade:

> "In 1993-1994, expenditure for CSSA amounted to $2.4 billion. The upward trend in CSSA expenditure levelled off slightly between 1999 to 2001 at around $13.6 billion, and began to rise again in 2001-2002. In 2003-2004 Draft Estimates of Expenditure, the Administration was seeking a provision of $17 billion for CSSA to meet anticipated increase in demand. This is $780 million over the revised provision of $16.3 billion on 2002-2003."[86]

88. He refers to new arrivals taking up CSSA benefits, stating:

> "Between March 1999 and June 2002, it was estimated that new arrivals on CSSA benefits rose from 14.3% to 16.6% of all new arrivals."

89. He then points out how expenditure on new arrivals has increased:

> "The estimated CSSA expenditure on new arrivals increased from $1,467 million (or 10.8% of total CSSA expenditure) in 1999-2000 to $1,728 million (or 12% of total CSSA expenditure) in 2001-2002."[87]

90. Those arguments are quite inadequate. It is clear that spending on social welfare in general, and on CSSA in particular, has risen markedly over the past decade. But that says nothing to justify the impugned restriction relating to new arrivals. In March 2003, the Director reported that only 18% of new arrivals were on CSSA.[88] And on the figures derived from the evidence,[89] new arrivals have generally made up 12% to 15% of the total number of CSSA recipients:

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85 Mr Cheung's Affirmation, §8 and §9.

86 Mr Cheung's Affirmation, §53.

87 Mr Cheung's Affirmation, §58.

88 Minutes of Welfare Panel meeting on 10 March 2003, LC Paper No CB(2)1738/02-03, §7.

89 LC Paper No CB(2)1401/02-03(03), for discussion 10 March 2003, Tables 1 and 4.

Year	*Total of CSSA recipients*	*New arrival CSSA recipients*
98/99	382,454	45,945 (12%)
Mar 2000	370,231	45,477 (12.3%)
Mar 2001	367,470	50,146 (13.6%)
Mar 2002	410,998	60,982 (14.8%)
Dec 2002	466,868	69,345 (14.9%)

91. As we have seen, the December 1998 Report of the Inter-Departmental Steering Group addressed the problem of rapidly increasing costs without anywhere suggesting that CSSA claims by new arrivals caused any particular problem or required any measures to be taken. The overall increase in spending may obviously be due to a whole range of factors. Thus, the 11.1% across-the-board reduction of standard rates implemented in 2003 and 2004 was a response to an unacceptable increase in expenditure attributable to upward adjustments subsequently thought to have been excessive.

92. Nor is it helpful for the Government simply to point to the increase in CSSA expenditure in relation to *all* new arrivals. Without evidence as to the savings which the seven-year restriction has achieved by excluding the segment of new arrivals actually affected, it is very difficult to evaluate its rational connection (if any) with the avowed objective of ensuring sustainability of the social security system.

93. As emphasised above,[90] the precise terms of the seven-year residence requirement must be kept in mind. By implementing the new rule, no savings are achieved in relation to new arrivals under 18 years of age; new

[90] In Section F of this judgment.

arrivals already Hong Kong residents on 1 January 2004; and new arrivals who successfully obtained a waiver of the residence requirement.

94. The importance of those limits can be illustrated by considering the position in 2001-2002. In that year, the cost of CSSA was $14.4 billion for all recipients. The cost of CSSA paid to all new arrivals was 12% of the overall amount, namely, $1.7 billion. If the seven-year requirement had then been in place, $964 million would have been paid in any event to those under the age of 18.

95. As to the remaining $764 million, those who were already Hong Kong residents in that year would also have received CSSA despite the new rule, and savings would have shrunk further when discretionary waivers were taken into consideration. One would therefore have been left with savings in respect of new arrivals affected by the seven-year rule which represent a very small fraction indeed of the $14.4 billion overall expenditure on CSSA for that year. It is true that in subsequent years, the number of recipients who have not resided here for seven years would progressively diminish. It nevertheless remains the case that the actual savings would be proportionately reduced by payments made to residents in that class for each year over the entire seven-year period.

96. As pointed out above, the legitimate aim espoused is not merely saving whatever money might be saved, but preserving the system's sustainability. The relatively insignificant level of savings achievable by implementing the seven-year rule severely undermines the suggestion that the restriction was genuinely intended to be, or functioned as, a measure rationally designed to safeguard the sustainability of the social security system.

97. In fact, the Government has acknowledged the immateriality of the savings achievable by the seven-year requirement. In its information paper dated 2 January 2004, the day after the new rule took effect, the Government

informed the Welfare Panel's Subcommittee that "Of the amount paid to the new arrivals in 2002-03, $963 million were made to those aged 18 or above and $1,068 [million] to those aged below 18." Revealingly, the Paper went on to state:

> "The new residence requirements for CSSA are, however, *not driven by the need to reduce CSSA expenditure on new arrivals*, but by the need to adopt '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, to ensure a rational basis on which our public resources are allocated. The Government remains committed to providing an effective and sustainable safety net for the financially vulnerable." (Italics supplied)[91]

K. Other justifications put forward by the Government

98. The reference to the so-called "principle of seven-year residence requirement for providing social benefits heavily subsidized by public" quoted above recalls a point made in the Task Force Report[92] as an additional reason for the seven-year restriction, as follows:

> "Chapter III highlights the anomaly that exists in the eligibility criteria of various subsidized benefits in terms of length of residence in Hong Kong. Among the major benefits, a 'seven-year' residence rule is applied to public rental housing applicants (except children under the age of 18). In the case of CSSA, a 'one-year' residence rule is applied. No such rule is implemented for users of public health and hospital services; they are not even subject to means test."

99. The Task Force Report went on to state:

> "After careful consideration, the Task Force considers that there is a strong case for removing the anomaly that exists in the eligibility criteria for major subsidized benefits, and for applying a uniform seven-year residence rule for providing all heavily subsidized social services including CSSA and public healthcare benefits. Eligibility based on a seven-year residence requirement reflects the contribution a resident has made towards our economy over a sustained period of time in Hong Kong. A seven-year residence is also normally required for the grant of permanent resident

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[91] LC Paper No CB(2)834/03-04(02)(Revised), §§8-9.

[92] At §5.55.

> status in Hong Kong, for which additional rights are prescribed in the laws of Hong Kong."[93]

100. These suggestions[94] of course have nothing to do with promoting the financial sustainability of the social security system and do not provide any support for the seven-year residence requirement as rationally connected with the legitimate purpose proclaimed by the Government.

101. It is unclear whether the Director advances such grounds as separate purposes supplying independent legitimate aims capable of justifying the restriction of the Article 36 right. If that is the intention, such grounds are, in my view, so lacking in coherence that they cannot properly serve as legitimate aims for the restriction. Alternatively, if they do serve as such purposes, they are such insubstantial and socially insignificant aims that the restriction of the Article 36 right is a wholly disproportionate measure to achieve them, making it a measure that is manifestly without reasonable foundation.

K.1 Uniformity of qualifying periods

102. The first of the additional arguments mentioned above is the somewhat bizzare suggestion that there is some intrinsic value in having uniform qualifying periods for welfare benefits where such benefits are heavily subsidized by the state. Symmetry for the sake of symmetry is hardly a legitimate aim. Waiting times for public rental housing must obviously depend on the stock of public housing available and a shortage may lead to the setting of long qualifying periods. Why should those qualifying periods be relevant to setting the eligibility period for CSSA payments intended to meet the immediate basic needs of indigent individuals and families?

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93 Task Force Report, §5.56.

94 Adopted by Mr Cheung in his Affirmation at §55.

103. It is also hard to understand why the absence of any residential requirement for access to public health and hospital services should be regarded as "an anomaly". It would indeed be a dysfunctional public health system if a person in need of urgent medical services were to be refused medical assistance on the ground that he or she has not met some residential qualification imposed simply to achieve "uniformity" with residential qualifications adopted for wholly different purposes.

104. It is also impossible to see how the seven-year qualifying period for permanent resident status laid down by Article 24(2) of the Basic Law is relevant. That seven-year period is essentially a qualifying period for taking part in the government of the HKSAR. One has to be a Hong Kong permanent resident to vote and stand for election;[95] to become Chief Executive;[96] to become a member of the Executive[97] or Legislative[98] Councils; and so forth. It makes no sense to impose a like residence requirement for CSSA applicants simply to achieve a seven-year symmetry.

K.2 Contribution towards our economy

105. Another strand of these additional arguments involves the suggestion that:

> "Eligibility based on a seven-year residence requirement reflects the contribution a resident has made towards our economy over a sustained period of time in Hong Kong."[99]

106. This loses sight of the persons whose eligibility is in issue and the circumstances in which they find themselves. The evidence is that in 2002, in

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[95] Basic Law Article 26.

[96] Basic Law Article 44.

[97] Basic Law Article 55.

[98] Basic Law Article 67.

[99] Task Force Report §5.56, adopted in Mr Cheung's Affirmation, §55.

the 22-59 age group, 95% of new arrival CSSA recipients were women.[100] This pattern has continued so that new arrival recipients of CSSA are overwhelmingly likely to be women; and likely to be Mainland spouses reunited with their families in Hong Kong. They are likely to be looking after children who have the right of abode, and are therefore likely to be unable, or to have very limited capacity, to take up outside employment. In playing their role, they make a valuable contribution to our society, helping rejuvenate our ageing population, helping to integrate children with right of abode into our community and helping to avoid the socially disruptive consequences of split families. They are persons who, on the Director's own means test, are unable to meet their basic needs. In such circumstances, it appears arbitrary and manifestly unreasonable to exclude them from CSSA benefits for seven years because of some notion that they should only receive such benefits in exchange for seven years' worth of contribution to our economy.

107. But even where a Hong Kong resident, having arrived as holder of a OWP, is unable to work and is simply indigent, the idea of requiring him or her to contribute to our economy for seven years before being allowed to draw CSSA makes little sense. The realistic view is that such person will need to draw upon, rather than make contributions to, our economic resources in the same way as an indigent permanent resident does. It is illusory to think that adoption of a seven-year eligibility criterion is somehow going to turn such a person into a net contributor to the economy.

108. The idea of requiring seven years' contribution to the economy as a condition of receiving CSSA is in truth a rejection of the principle, accepted in Hong Kong since 1970, that social welfare is the responsibility of the

[100] LC Paper No CB(2)1401/02-03(03), §24 for discussion 10 March 2003.

Government to be met by public funds. Government officials in charge of social welfare have rightly rejected attempts to undermine that principle.

109. This is exemplified in two places in the December 1998 report of the Inter-Departmental Steering Group. It will be recalled that the Steering Group recommended the reduction of the standard rate for larger households.[101] It had also been suggested that payment of standard rates to such households should be capped. The Steering Group's response was:

> "We do not support this idea because by capping the benefits payable to larger households, the basic needs of some family members would not be provided for at all. This is against the objective of the CSSA Scheme."[102]

110. They also referred to a suggestion that CSSA for able-bodied unemployed recipients should be cut off or reduced after a time limit of say, six months, so as to encourage them to find employment. The Steering Group rejected that suggestion stating:

> "...we do not propose to terminate or reduce assistance for able-bodied unemployed recipients after a time limit. A balance has to be struck between ensuring incentives to work and the guarantee of basic livelihood. If termination or reduction of benefits was to be introduced and was seen as leading to undue hardship, it would run the risk of undermining the fundamental function of our social security system."[103]

111. Perhaps it is because the seven-year residence requirement originated, not in a specialist social welfare review, but as something of a side-wind deriving from a long-term population policy study, that there has not been proper recognition of the threat posed by the seven-year restriction to those fundamental social welfare values – values which have received constitutional acknowledgement in Article 36.

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[101] Section J.1 above.

[102] December 1998 Report at §48.

[103] At §§55 and 56.

K.3 Fiscal deficit

112. Another point made by the Government on a number of occasions in seeking to justify the seven-year rule involves reference to the restriction being imposed a "against the background of a serious fiscal deficit":

> "Against the background of a serious fiscal deficit and the implication of demographic trends and characteristics identified in the [Task Force] Report, the Administration took the view that there was a strong case for applying a uniform 7-year residence requirement for providing heavily subsidized social services."[104]

113. It is significant that the deficit is put no higher than a "background" feature. It is also significant that when Stock VP referred to this, he spoke of "the fiscal deficit at the time of the decision". Judicial notice may be taken of the following figures derived from the annual accounts published by the Government:[105]

Year HK$ millions	*Net Surplus /Deficit*	*Operating revenue*	*Operating expenses*	*Expenditure on social security*	*Exchange Fund surplus (deficit)*
2002-2003	(43,384)	151,244	(210,727)	(21,815)	31,488
2003-2004	10,979 (restated)	167,014	(212,188)	(22,860)	65,738
2004-2005	19,434	192,369	(207,827)	(23,247)	24,571
2005-2006	48,974 (restated)	231,156	(206,907)	(23,444)	33,165
2006-2007	124,867	223,627	(208,318)	(23,185)	65,887
2007-2008	179,343	265,269	(218,835)	(24,130)	63,821
2008-2009	(133,103)	250,609	(251,775)	(27,466)	(146,429)
2009-2010	145,252	242,133	(251,376)	(27,959)	116,309
2010-2011	96,724	274,637	(247,132)	(25,928)	50,037

114. The figures show that there was indeed a net deficit in the year ended 31 March 2003. However, the figures indicate that the seven-year rule was not introduced to cut spending so as to rein in that deficit. They also show that such deficit was not a persistent feature of Government finances. The figures suggest that the key determinants of whether there would be a net

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104 Mr Cheung's Affirmation, §55.

105 Available online at http://www.try.gov.hk/internet/eharch_annual.html.

surplus or deficit were the level of operating revenue[106] and the results of investments made by the Exchange Fund.[107] Operating expenses[108] in general and spending on social security in particular were relatively stable and rose at a comparatively modest rate in the eight-year period after the deficit was incurred. Healthy surpluses accrued in the five years following the deficit year as operating revenues increased and the Exchange Fund performed positively. There then accrued a substantial deficit in 2008-2009, very largely due to poor Exchange Fund results, but that was reversed by a greater net surplus in the following year, followed by another hefty surplus in the subsequent year. The fiscal deficit in 2002-03 is therefore indeed no more than a background feature in the discussion. It makes no contribution to any justification of the seven-year rule.

L. Prior warning, charities and the Director's discretion

115. Finally, I should mention three arguments that the Director has advanced in aid of the submission that the seven-year residence requirement is a reasonable measure. As I understand them, they are put forward at the proportionality stage of the argument. In other words, the Director's main proposition is that the seven-year requirement is justified as a rational measure aimed at ensuring the financial sustainability of Hong Kong's social security system and that it is a reasonable policy because any hardship flowing from the restriction is catered for, or at least significantly mitigated, by the three matters to which I now turn.

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[106] Comprising taxes, rates and duties; rental income; fees and charges; utilities; royalties and concessions; and other operating revenue.

[107] The Exchange Fund's results formed part of the category of non-operating revenue/expenses which also included capital expenses; land premia; net revenue from Home Ownership Scheme; interest and investment income; actuarial loss and curtailment loss on pensions; share of profits and losses of government business enterprises.

[108] Comprising salaries, allowances and other employee benefits; recurrent subventions; social security payments; depreciation and other operating expenses.

L.1 Prior warning against coming to Hong Kong

116. First, the Director points out that the seven-year requirement has been widely publicised on the Mainland,[109] the intention being that:

> "... a stricter residence requirement for CSSA would send a clear message to potential migrants that they should plan carefully and ensure that they have sufficient means to support themselves in Hong Kong."[110]

117. Making this point to the Welfare Panel, the Director stated:

> "..., it is not unreasonable to expect the sponsoring persons in Hong Kong to support their sponsored new arrivals, or the new arrivals who are economically active to support themselves with their own means in Hong Kong. As the proposed measures are to take effect from a future date, potential new arrivals will have an opportunity to make an informed decision on whether they would move to Hong Kong for settlement taking account of all relevant considerations."[111]

118. This is a highly unattractive approach. It amounts to telling potential immigrants who have been granted OWPs: "If you are poor, stay home. You will be ineligible for CSSA for seven years. So don't come to Hong Kong unless you can pay your own way or have someone who will support you." As was pointed out by a member of the Welfare Panel, it has "the effect of deterring potential new arrivals to settle in Hong Kong" and is "at variance with the policy of family reunion."[112] It runs counter to the avowed policies of respecting the rights of Mainland children with the right of abode; of promoting family unity; of promoting immigration of Mainland children to rejuvenate our ageing population when they are young and integrate more easily into our society.

119. I do not think this approach qualifies as a reasonable way to mitigate the hardship suffered by those caught by the seven-year residence requirement.

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[109] Ms Choy's Affirmation, §§40-45.

[110] FCR (2003-04)33, for discussion on 27 June 2003, §17.

[111] LC Paper No CB(2)1401/03-03(03) for discussion 10 March 2003, §27.

[112] Minutes Welfare Panel Meeting on 10 March 2003, LC Paper No CB(2)1738/02-03, §14.

L.2 Reliance on charities

120. The Government also makes the argument that, if denied CSSA, new arrivals are able to seek help from charitable institutions. Mention is made of charitable trust funds which assist people in family crisis and temporary financial hardship, mainly in the form of one-off grants; charities which provide foodstuffs and hot meals; and charities which provide second-hand clothing, furniture and appliances, and so forth.[113] It is self-evident that such charitable help can only be of a temporary or emergency nature. It may supplement but cannot be a practical substitute for CSSA.

121. More importantly, the argument is in principle objectionable. It really amounts to the Government abdicating its constitutional responsibility for social welfare to private charities and trying to make a virtue of the existence of such charities in the proportionality analysis. The Hong Kong residents concerned find themselves destitute and eligible for short-term or emergency help from charities because they have been excluded from CSSA as a result of the Government's adoption of the seven-year requirement. It is exceedingly unattractive for the Government then to shrug its shoulders and say: "Well, you can always approach local charities as a supplicant for their goodwill".

122. The primary responsibility of the Government for social security and the subsidiary role of voluntary agencies have been recognized since at least 1970 when, in a Memorandum for the Executive Council,[114] the Government stated:

> "It is highly desirable, both at present and for future planning, that Government should be responsible for public assistance, and that there should be a clear distinction between the responsibilities of voluntary agencies in this and other social welfare fields."

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[113] LC Paper No CB(2)1616/03-04(03), §17.

[114] XCC (70) 14, For discussion on 17 March 1970, §5(f).

123. I am unable to regard possible reliance on charities as a reasonable proportionality argument to be weighed in support of the impugned restriction.

L.3 The Director's discretion

124. Thirdly, the Director places heavy reliance on the existence of a discretion to waive the seven-year requirement as softening the impact of any hardship that may be caused by the restriction. Thus, Mr Cheung states:

> "... members of the [Welfare Panel] were informed that DSW would continue to exercise his discretion to waive the residence requirement in cases of genuine hardship, if necessary, thus making CSSA always available to the financially vulnerable in the absence of other options."[115]

125. The evidence shows, however, that it is clearly not the case that CSSA is "always available to the financially vulnerable". It is important to note the qualifying words "in the absence of other options". In fact, the Government's stance has been to treat the discretion as available only in *exceptional* cases. It has been quick to deem an applicant to have "other options".

126. The exceptional nature of the discretion was envisaged by the Task Force from the outset:

> "For exceptional cases, the Director of Social Welfare, of course, will have discretionary power to grant CSSA on compassionate grounds waiving the residence rule."[116]

127. And when, on 3 June 2003, the Chief Executive in Council made the Order that the seven-year requirement be implemented with effect from the following January, the fourth paragraph of the Order stated:

> "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."

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[115] Mr Cheung's Affirmation, §59.

[116] Task Force Report, §5.57.

128. The Director has laid down guidelines[117] for the exercise of the discretion in the following terms:

> (a) In general, financial hardship alone does not merit exceptional treatment, especially in the case of able-bodied adults.
>
> (b) The [relevant officer] can exercise discretion to exempt a Hong Kong resident from the [seven-year] rule if the applicant can satisfy *all* [emphasis supplied] the following criteria:
>
> (i) having no or insufficient income to meet his/the family's basic needs;
>
> (ii) having no relative or friend to turn to for assistance;
>
> (iii) no other forms of assistance being available to him/his family;
>
> (iv) having suffered a substantial and unexpected change in circumstances beyond his/her family's control;[118]
>
> (v) having genuine difficulty in returning to his country of origin or the place where he came from;
>
> (vi) the total resources available to him/his family, including any savings and other assets held by him/his family and any CSSA payable to his family members, are not sufficient to meet his/his family's recognised needs under the CSSA Scheme for two months."

129. As paragraph (a) makes clear, the discretion is only intended to operate in exceptional cases and financial hardship alone generally does not qualify as "exceptional" even if the applicant is destitute. He or she must satisfy all six of the listed conditions. Two of those conditions stand out.

130. First, as we have seen, the Director has made the argument in these proceedings that, if denied CSSA, new arrivals are able to seek help from charitable institutions. If that is the view generally taken by social welfare officers, applicants for a waiver are likely to find condition (iii) – the possible availability of other forms of assistance – an important obstacle in many cases.

131. Secondly, condition (v) – refusal of a waiver if the applicant is able to return to where he or she came from – is important. Although the discretion is held out as a measure mitigating hardship caused by the seven-year residence

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[117] In the Social Security Manual of Procedures, paragraphs C52 and C53.

[118] Failure to find or keep employment not usually being regarded as such.

requirement and relied on as demonstrating the proportionality of that restriction, paragraph (v) places severe limits on the discretion. It instructs social welfare officers to tell the applicant: "Go back to where you came from," unless the applicant faces "genuine difficulty" going back.

132. I have described[119] as highly unattractive the Director's practice of warning potential immigrants who hold OWPs (other than exempted new arrivals) to stay home and not to come to Hong Kong unless they are able to support themselves, since it contradicts avowed policies of promoting family unity for Mainland children with the right of abode; of rejuvenating our ageing population, and so forth. Condition (v) operates in the same vein. It involves abdicating responsibility for providing social welfare assistance to indigent new arrivals who have become Hong Kong residents and who are present in Hong Kong, unable to meet their basic needs, telling them that they should leave Hong Kong and go back to where they came from. A discretion that is subject to such a condition does little to establish the proportionality of the seven-year restriction of the Article 36 right.

133. The available statistics tend to confirm that the discretion plays only a small part in dealing with new arrivals who apply for CSSA but have not met the residence requirement. Only a small proportion (ranging from 2.4% to 9%) of such applicants go on to apply for a discretionary waiver. A very high proportion of those applicants (from 62% to 78%) then withdraw their applications (one assumes on being told that they do not meet the criteria), leaving a small number of live applications, most of which are then approved. The figures are as follows:

[119] In Section L.1 above.

	2004-05	2005-06	2006-07	2007-08
CSSA applications received not meeting residence requirement	68,601	62,097	54,746	46,807
Applications for waiver	1,665 (2.4%)	3,856 (6.2%)	4,925 (9%)	3,553 (8.5%)
Applications for waiver withdrawn	1,299 (78%)	2,892 (75%)	3,480 (70%)	2,221 (62%)
Applications approved	230	843	1,383	1,307
Applications rejected	18	26	33	39

134. After the death of her husband (who left her only $982.37) and having been made homeless, Madam Kong survived by living in a shelter for street sleepers and receiving some financial help in the form of one-off payments from certain charities.[120] She was willing to work and had attended government training courses with a view to finding employment. She had found sporadic casual jobs as a cleaner (at $175 per day) and as a substitute security guard (at $200 per 12 hour shift). When she applied for a waiver, she explained that her staying at the shelter was unsatisfactory because it did not open until 5.30 pm, so that she had to sleep in a park if she had been on night shift as a security guard. She submitted that she needed CSSA to meet her housing needs "in order to have better rest before she could find stable gainful employment". She admitted owning a property on the Mainland but explained that it was an illegal structure which was occupied by her two sons who were themselves without means, and was not a property that she could sell.

135. The Board applied the guidelines in rejecting her application. It noted that financial hardship alone does not merit exceptional treatment and found that the death of her husband did not count as a "substantial and unexpected change in circumstances beyond her control", as she should have realised that she could not depend financially on her late husband who was an aged CSSA recipient suffering from chronic disease. It noted that she had

[120] She received $3,200 from the Rainbow Fund, $2,100 from the Apple Fund.

expressed confidence in being able to find a job but concluded that after her husband's death, as she had no relatives or friends in Hong Kong, "it would be a better alternative for Madam Kong to return to her native place".

136. If the disposal of Madam Kong's application is anything to go by, the guidelines result in applicants for a waiver facing a very high threshold indeed.

M. Summary and conclusions

137. I have reached the conclusion that the seven-year residence requirement is an unjustifiable contravention of the right to social welfare in accordance with law, conferred by Article 36.

138. In seeking to address basic, "safety net" needs pursuant to an accessible and predictable set of administrative rules, the CSSA scheme clearly comes within the Article 36 concept of a "social welfare" scheme established "in accordance with law". It receives Article 36 protection, and while the Government has a wide margin of discretion, both in defining the conditions and level of the benefit in the first place, and in making any changes pursuant to policies developed in accordance with Article 145, such changes are subject to constitutional review.

139. Restrictions on rights protected by Article 36 must pursue a legitimate societal aim and must be rationally connected with the achievement of that end, employing measures that do not make excessive inroads into the protected right. If the restriction is not rationally connected to the avowed legitimate purpose or if the inroads it makes into the protected right are manifestly without reasonable foundation, the Court may declare the measure unconstitutional.

140. In the present case, the Government has claimed that the seven-year residence requirement pursues the legitimate purpose of curbing expenditure so as to ensure the sustainability of the social security system. In my view that claim is not made out. The seven-year restriction conflicts with two important social policies which are simultaneously embraced by the Government, namely the OWP family reunion policy and the population policy aimed at rejuvenating our ageing population. There is no evidence as to the level of savings actually achieved and achievable as a result of adopting the seven-year rule. On the contrary, everything points to the actual savings being modest and of an order that cannot sensibly be described as designed to safeguard the system's sustainability. The Government has indeed admitted that the new residence requirement is not driven by the need to reduce CSSA expenditure on new arrivals.

141. Other matters identified as objectives promoted by the seven-year rule include a search for uniformity in qualifying periods for heavily subsidized benefits and a policy of withholding benefits until the applicant has contributed to our economy for seven years. These are purposes that either lack legitimacy as societal aims or are wholly insubstantial in terms of societal interests. If the restriction has to rest on such purposes, it must be viewed as a restriction that is manifestly without reasonable foundation.

142. Many of the Government's arguments seek to sidestep the issue and fail to confront the constitutional issue altogether. They abdicate responsibility for addressing the right conferred by Article 36 on Hong Kong residents to social welfare in accordance with law. They suggest that indigent newly arrived residents should look to charities rather than the social welfare system; that they should not have come here in the first place without ensuring that they could support themselves; or, if already here, that they should not receive any

discretionary assistance to meet their basic needs but should go home instead. These arguments do not provide any justification for the restriction.

143. I do not doubt that the Government adopted policies genuinely with the legitimate aim of curbing expenditure on CSSA with a view to ensuring the financial sustainability of the social security system. I readily accept that it did take rational measures towards that end by reducing standard payments in 1999 in relation to larger households and reducing standard payments across-the-board in 2003 and 2004. But in my view, the Director has not made good the proposition that the seven-year residence requirement was rationally connected to the aforesaid legitimate aim. If there was any rational connection, the restriction was wholly disproportionate and manifestly without reasonable foundation, given its contradictory policy consequences and socially insubstantial benefits.

144. I accordingly conclude that the appeal must be allowed and that the seven-year residence requirement must be declared unconstitutional, restoring the pre-existing residence requirement of one year. There can, however, be no constitutional objection to the Government's exempting new arrivals under the age of 18 from any residence requirement and the Order which I would make does not seek to re-impose a one-year residence requirement on new arrivals in that age group. It merely declares unconstitutional the policy expressed in the words "To be eligible for CSSA, a person must have been a Hong Kong resident for at least seven years" contained in the first sentence of the Order made by the Chief Executive in Council on 3 June 2003 to take effect on 1 January 2004.[121]

145. I would also make an order nisi that the Director pay Madam Kong's costs here and below and direct that any submissions as to costs be made in

[121] Set out in Section F above.

writing and lodged with the Registrar within 21 days from the date of this judgment and that any submissions in reply be lodged within 21 days thereafter, in default of such submissions, the order nisi to stand as an order absolute without further order. I would order the appellant's costs to be taxed in accordance with the Legal Aid Regulations.

Mr Justice Tang PJ :

146. I agree with the judgment of Mr Justice Ribeiro PJ.

Mr Justice Bokhary NPJ :

Judicial role in regard to socio-economic rights

147. This case is about social welfare. Policy matters thereon are for the political branches of government. But there is in Hong Kong a constitutional right to social welfare. And the responsibility for enforcing constitutional rights, socio-economic ones no less than other ones, rests with the courts. In discharging this responsibility, it has to be recognized that courts are not ideally equipped to undertake resource allocation. At the same time, the courts cannot decline to intervene if the legislative (or administrative) scheme in question fails to accord people the basic necessities to which they are constitutionally entitled. The approach formed by those two propositions is one at which I arrive on principle. It is, however, worth noting that it happens to be the approach adopted by the Federal Supreme Court of Switzerland in *V v. Einwohrnergemeine X und Regierunsgrat des Kantons Bern* BGE/ATF 1211 1367, 27 October 1995.

CSSA and the residence requirement

148. The form of social welfare concerned in the present case is Comprehensive Social Security Assistance (commonly known as "CSSA"). It

is non-contributory and means-tested. Payments thereunder are made in cash. Its purpose is that of enabling recipients to meet basic needs. The scheme under which it is operated (which it is convenient to call "the CSSA scheme") is an administrative scheme, not a statutory scheme.

149. There is a residence requirement for the receipt of assistance under the CSSA scheme. This requirement applies to adults. It is that they must have been a resident of Hong Kong for at least 7 years by the time of their application for CSSA.

Question

150. Is that requirement constitutional or unconstitutional? That is the question now before this Court. The learned judges in the courts below (being Andrew Cheung J in the High Court and Stock VP and Lam and Barma JJ in the Court of Appeal) have concluded that the requirement is constitutional. Their conclusion is disputed by the appellant Madam Kong Yunming for whom Professor Johannes Chan SC and Mr Hectar Pun appear. It is supported by the respondent the Director of Social Welfare for whom Lord Pannick QC and Mr Abraham Chan appear. Such being the legal representation, the rival submissions prepared and presented have of course been of the highest quality.

Facts

151. Shortly stated, the facts are these. Madam Kong was born in the Mainland in 1949. In 2003 she married a Hong Kong permanent resident. He had been a CSSA recipient since 1985. In November 2005 she was granted a one-way permit to come to Hong Kong in order to settle here. On 21 December 2005 she arrived in Hong Kong for that purpose. Tragically, her husband, who had been in ill-health, died on the following day. She tried to have herself registered as the new tenant of the public housing unit which had

been allocated to him. But that was turned down. The Housing Authority repossessed the unit. She became homeless, and was admitted to a street sleeper shelter. All that she received from her late husband's estate was a sum of $982.37. She lived on charity.

152. On 20 March 2006 she applied for CSSA. Her application was turned down on the sole ground that she did not meet the residence requirement, the Director of Social Welfare refusing to exercise his discretion to waive that requirement in her case. Her appeal to the Social Security Appeal Board against this refusal was launched in June 2006, heard in October that year and dismissed in the following month.

153. In 2008 she commenced the judicial review proceedings by which she challenged the constitutionality of the 7-year residence requirement. That is the challenge which, having failed in the courts below, has now reached this Court. The question of law on which the Appeal Committee granted Madam Kong leave to appeal to this Court is framed by reference to equality as well as the right to social welfare.

154. Cases like this one seem to be seen by some people as contests between long-term locals and Mainland arrivals. But they are not. Nor are they to be seen as contests between the "haves" and the "have-nots" in our society. Cases like this one are about – and only about – what an independent and impartial judiciary will, after receiving and weighing full and rational argument on both sides of the question, adjudge to be the true constitutional position. That, no more and no less, is what cases like this one are about.

Guarantees of equality

155. Under our constitutional arrangements, equality is guaranteed by art. 25 of our constitution the Basic Law. This article provides that "[a]ll Hong

Kong residents shall be equal before the law". (As art. 24 of the Basic Law provides, Hong Kong residents consist of permanent residents and non-permanent residents: permanent residents having the right of abode and being qualified to obtain permanent identity cards which state their right of abode; and non-permanent residents being qualified to obtain identity cards but having no right of abode).

156. A constitutional guarantee of equality is also to be found in the Bill of Rights. Taken word-for-word from art. 26 of the International Covenant on Civil and Political Rights ("the ICCPR") and entrenched by art. 39 of the Basic Law, art. 22 of the Bill of Rights provides as follows:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the 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, political or other opinion, national or social origin, property, birth or other status."

157. It will be noticed at once that those guarantees of equality are not confined to permanent residents. Article 25 of the Basic Law speaks of *all* residents, and art. 22 of the Bill of Rights speaks of *all* persons.

Right to social welfare

158. Turning to the right to social welfare, it, too, is not confined to permanent residents. Article 36 of the Basic Law confers this right on Hong Kong residents, not just Hong Kong permanent residents, saying this:

> "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."

Development and improvement

159. The development and improvement of social welfare is an obligation placed on the Government by art.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, formulate policies on the development and improvement of this system in the light of the economic conditions and social needs."

Economic conditions and social needs

160. As can be seen, the expression "in the light of economic conditions and social needs" comes immediately after the reference to the development and improvement of the previous welfare system. I readily accept that economic and social conditions can justify slowing down or temporarily halting such development and improvement. What about new restrictions on the availability of social welfare? If the new restrictions go to undoing development and improvement introduced *after* the coming into effect of the Basic Law, then I think that a really serious economic downturn might justify such restrictions. Can an economic downturn justify moving the welfare systems backwards from where it had stood *when* the Basic Law came into effect? I would not rule that out but find it difficult to see how any economic downturn can justify such a course unless it is so dire as to bring about a situation not contemplated by the constitution. If art. 145 of the Basic Law is less protective than that, it would of little practical use.

Residence requirement made seven times more restrictive

161. The CSSA scheme was introduced in 1973. From that time until 1 January 2004, the residence requirement for the receipt of CSSA was one year. The CSSA scheme with a one-year residence requirement is part of the "previous welfare system" to which art. 145 refers. That is easy to see. The Basic Law was promulgated and adopted on 4 April 1990 and came into effect upon the handover on 1 July 1997. So the CSSA system with a one-year residence requirement was in place when the Basic Law was promulgated and adopted and when it came into effect. The one-year residence requirement

stood until it was turned into a seven times more restrictive requirement of 7 years' residence with effect from 1 January 2004. That was done by an order made by the then Chief Executive in Council on 3 June 2003 following a recommendation put forward by the Task Force on Population Policy in its report of 26 February 2003.

Residents and non-residents

162. Neither art. 36 nor art. 145 of the Basic law, each of which deals with the position of Hong Kong *residents*, was engaged in the case of *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409. That case was about the exclusion of *non-resident* women from receipt of subsidized obstetric services at public hospitals in Hong Kong and about increases in the charges payable by them for obstetric services at such hospitals. As can be seen from para. 90 of the judgment in that case, what was upheld was the drawing of a line between residents and non-residents. There was no question of treating non-permanent residents as outside the protection of art. 36 or 145 of the Basic Law.

163. A word should be said about art. 41 of the Basic Law, which reads:

> "Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in assistance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter".

That was not treated by the Court in *Fok Chun Wa's* case to mean that every right and freedom prescribed in Chapter III of the Basic Law was enjoyed by non-residents. Article 41 of the Basic Law calls for purposeful construction in the context of the Basic Law as a whole. Upon such a construction, it will be seen at once that some Chapter III fundamentals, for example freedom from torture, must by their very nature and in conformity with international human rights norms, extend to all persons present in Hong Kong. But that is not so in regard to the right to social welfare.

Unwarranted retrogression

164. Even without reference to the right to equality before the law, the requirement of 7 years' residence for receipt of CSSA is unconstitutional. If necessary, I would be prepared so to hold on the following basis. The introduction of a 7-year requirement to replace the one-year requirement moved the previous social welfare system backwards. It therefore runs counter to art.145 of the Basic Law which, as far as that system is concerned, contemplates progression and leaves no room for retrogression except in a situation so dire as to lie beyond the contemplation of the constitution. And no such situation has arisen. So the increase from one year's residence to 7 years' residence amounts to unwarranted retrogression and is therefore unconstitutional.

165. But I am content to hold that increase unconstitutional on another basis, being the one to which I now turn.

Unjustified distinction

166. We are in this case concerned with equality in regard to a socio-economic right. In *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (ed. Malcom Langford) (2008) (Cambridge University Press) at the page immediately preceding the table of contents, what Justice Albie Sachs of the South African Constitutional Court said about socio-economic rights when speaking at the Southern Methodist University School of Law in 1999 is quoted. He said:

> "There is growing acceptance all over the world that certain core fundamental values of a universal character should penetrate and suffuse all governmental activity, including the furnishing of the basic conditions for a dignified life for all.
>
> I believe that 21st-century jurisprudence will focus increasingly on socio-economic rights."

I respectfully share that perception and that belief.

167. Professor Chan was in the company of Hong Kong's leading constitutional lawyer, Professor Yash Ghai, when they said two decades ago (in *The Hong Kong Bill of Rights: a Comparative Approach* (eds Johannes Chan and Yash Ghai) (1993) (Butterworths Asia) at p.5) that "(i)n countries with an established tradition of constitutionalism, the rule of law is acceptable because economic and social rights are woven into the fabric of public law." And their writings are in the company of, for example, Robert Alexander: *The Voice of the People* (1997) (Weidenfeld & Nicolson) where it is said at p.196 that "human rights…prevent the weakest going to the wall" and John P Humphrey: *Human Rights and the United Nations* (1984) (Transnational Publishers) where it is said at p.2 that "[h]uman rights without social and economic rights have little meaning for most people".

168. Socio-economic rights are not alien to common law systems. Common lawyers may be generally more familiar with civil and political rights than with rights of a socio-economic nature. But as Professor Geraldine Van Bueren QC demonstrates in "Socio-Economic Rights and a Bill of Rights – An Overlooked British Tradition" [2013] Public Law 821, socio-economic rights, too, have historical origins that can be traced back to medieval times in the land where the common law came to life.

169. In recommending a requirement of 7 years' residence, the Task Force on Population Policy said in para. 5.56 of its report of 26 February 2003 that:

> "Eligibility based on a seven-year residence requirement reflects the contribution a resident has made towards our economy over a sustained period of time in Hong Kong. A seven-year residence is also normally required for the grant of permanent resident status in Hong Kong, for which additional rights are prescribed in the laws of Hong Kong".

That is followed by a footnote which says that those additional rights include "the right to vote and to stand for election under Article 26 of the Basic Law

and to become the principal officials of the HKSAR in accordance with Article 61".

Departures from equality have to be justified

170. Departures from equality have to be justified. The departure from equality brought about by the requirement of 7 years' residence cannot be justified. Its effect – and its declared objective, too, it might be added – is essentially to draw a distinction between permanent residents and non-permanent residents in regard to the right to social welfare. This distinction is drawn in the face of a constitutional guarantee which extends to all residents without distinction. Even treating art. 145 of the Basic Law as far less protective of disadvantaged people than I consider it to be, by no standard of review, test or approach that preserves rather than undermines constitutional guarantees can such a distinction be justified.

Basic Needs

171. Nothing more has to be said, but more could be said. We are, after all, concerned with basic needs. On what basis do I say that the present case concerns basic needs? I am prepared to say so on the basis that a right to social welfare, if it is to have any meaningful content, must encompass basic needs at the very least. But it is not necessary to proceed on that basis if one prefers not do so, for the Government accepts that CSSA is there to enable persons to meet their basic needs. The requirement of 7 years' residence would leave needy members of one category of residents dependent on exercises of discretion or charity in order to meet basic needs. Whatever else the Government may be saying about Hong Kong's resources, I do not understand the Government to be going to the extreme of saying that those resources are in a state that compels the imposition of a residence requirement of 7 years even though that has the effect of excluding non-permanent residents from the right to social welfare

conferred by the constitution on all residents, permanent and non-permanent alike.

172. As to the Task Force on Population Policy's reference to the right to become a principal official, that right depends also, as one can see from art. 61 of the Basic Law, on being a Chinese citizen with no right of abode in any foreign country. No one has suggested that it would be constitutional to make that status a condition of receipt of social welfare in Hong Kong.

ICESCR

173. Even though I am of the view that Madam Kong should succeed without having to rely on the International Covenant on Economic, Social and Cultural Rights ("the ICESCR"), I propose to deal with this covenant, we having received full argument on it.

174. In 2003, which is the year before the residence requirement for the receipt of CSSA was raised from one year to 7 years, the Hong Kong Government submitted a report to the United Nations' Committee on Economic Social and Cultural Rights ("the CESCR") in which this was said:

> "It is true that there is no single law – corresponding to the Hong Kong Bill of Rights Ordinance in relation to the ICCPR that incorporates the ICESCR into Hong Kong's domestic legal order. However, ICESCR provisions are incorporated into our domestic law through several Articles of the Basic Law (for example Articles 27, 36, 37 137, 144 and 149), and through provisions in over 50 Ordinances. Those laws were listed in Annex 3 to the initial report, and are updated at Annex 2A of the present report. We consider that specific measures of this kind more effectively protect Covenant rights than would the mere re-iteration in domestic law of the Covenant provisions themselves."

The Hong Kong Government said in Annex 2A of that report that art. 39 of the Basic Law is the constitutional guarantee for art. 2 of the ICESCR and that arts 36 and 145 of the Basic Law are the constitutional guarantees for art. 9 of the ICESCR.

175. Article 39 of the Basic Law reads:

> "The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region."
>
> The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions for the preceding paragraph of this Article."

It will be observed that this article, too, speaks of residents and not only of permanent residents.

176. Turning to the two articles of the ICESCR which the Hong Kong Government told the CESCR are constitutionally guaranteed in Hong Kong, art. 2 reads:

> "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."

And art. 9 reads:

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

What the CESCR said

177. Now let us look at what the CESCR said about CSSA in general and the 7-year residence requirement in particular. That was said on 13 May 2005 in the CESCR's concluding observations on economic, social and cultural rights in the People's Republic of China (including Hong Kong and Macao) for which the reference is UN Doc E/C. 12/1/Add.107, §84. And this is what was said:

> "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 the 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."

178. Coming from no less a source than the CESCR, none of that is anything that an international financial centre (as Hong Kong is recognized in art. 109 of the Basic Law to be) can feel comfortable to read about itself. However that may be, the sufficiency or otherwise of benefit levels is not before the Court in this appeal. But what the CESCR says about the 7-year residence requirement's adverse effect on new migrants is directly relevant in the present appeal, because it highlights the fact that the requirement excludes for a long time a large class which the relevant constitutional guarantees do not exclude at all.

Retrogressive in regard to basic needs and deliberately so

179. Such exclusion is retrogressive. What makes it all the more serious is that it is retrogressive in regard to basic needs and deliberately so. In this connection, it is to be remembered that the CESCR had, on 14 December 1990, said this in its General Comment No.3, the reference for which is UN Doc E/1991/23, §9:

> "The principal obligation of result reflected in article 2 (1) is to take steps "with a view to achieving progressively the full realization of the rights recognized" in the Covenant. The term "progressive realization" is often used to describe the intent of this phrase. The concept of progressive realization constitutes a recognition of the fact that full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. In this sense the obligation differs significantly from that contained in article 2 of the International Covenant on Civil and Political Rights which embodies an immediate obligation to respect and ensure all of the relevant rights. Nevertheless, the fact that realization over time, or in other words progressively, is foreseen under the Covenant should not be misinterpreted as depriving the obligation of all meaningful content. It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal. Moreover, any deliberately retrogressive measures in that regard would require the most careful

> consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources."

180. Much the same point is made in, for example, Sandra Liebenberg, "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 Stellenbosch Law Review 5 and Aoife Nolan, Bruce Proter and Malcolm Langford, "The Justifiability of Social and Economic Rights: an Updated Appraisal" CHRGJ Working Paper No. 15, 2007. In the "Right to Welfare" chapter of *Law of the Hong Kong Constitution* (eds Johannes Chan and C L Lim) (2011) (Sweet & Maxwell) – a book cited by Lord Pannick in the course of argument (although not on this point) – Professor Karen Kong put it like this (at p.798, para 25.040):

> "As suggested by Sandra Leibenberg in relation to South African court's adjudication of social rights, 'claims involving a deprivation of basic needs should attract a high level of judicial scrutiny'. Aoife Nolan et al. also commented, '[i]n general, Government will be held to a stricter test in relation to available resources when existing programs are cut than they might be with regard to a simple failure to take positive steps to create programs or enhance them.' The stricter test will include imposing a heavier burden on the Government to justify potentially retrogressive measures, and the need to show that alternative measures had been carefully considered."

Discretion

181. In seeking to justify the raising of the residence requirement from one year to 7 years, the Government places some reliance on the Director of Social Welfare's discretion to waive the residence requirement. A discretion to waive is also a discretion not to waive. It is not suggested that the discretion would invariably, or even generally, be exercised in favour of any person who, absent a waiver, would be driven to seeking charity in order to meet her or his basic needs.

182. There is in any event, an inherent and fundamental weakness in the Government's "discretion" argument. As Lord Shaw of Dunfermline said in

Scott v. Scott [1913] AC 417 at p 477, to remit the maintenance of a constitutional right to the region of discretion is to shift the foundations "from the rock to the sand".

Other benefits

183. Then the Government places some reliance such other welfare benefits as a needy person who is excluded from the CSSA scheme for want of 7 years' residence, and who fails to obtain a discretionary waiver, might be able to obtain. But since CSSA is designed to meet basic needs, what can such other benefits really do, even if obtained, in the absence of CSSA?

Charity

184. And then the Government places some reliance on such charity as such a person may be able to obtain. As to that sort of argument, there is the decision of the South African Constitutional Court in the case of *Khosa v. Minister of Social Development* 2004 (6) 505. At para. 80 Mokgoro J spoke of the likely impact on a group of persons excluded from the constitutional right to social security. He said that such exclusion "is likely to have a severe impact on the dignity of the persons concerned, who, unable to sustain themselves, have to turn to others to enable them to meet the necessities of life and are thus cast in the role of supplicants". That reflects the classic view. In the concluding section of the chapter on "Rights, Freedoms and Social Policies" of his book *Hong Kong's New Constitutional Order*, 2nd ed (1997) (Hong Kong University Press), Professor Yash Ghai quotes (at p.454) Alexis de Tocqueville's statement that:

> "There is nothing which, generally speaking, elevates and sustains the human spirit more than the idea of rights. There is something great and virile in the idea of rights which removes from any request its suppliant character, and places the one who claims it on the same level as the one who grants it."

Not proportionate

185. A decrease in expenditure on the CSSA scheme is a lawful objective. But just because it is legitimate to do something, it does not mean that whatever is done will be legitimate. The raising of the residence requirement from one-year to 7 years, putting the burden of that increase on immigrants so as in effect to exclude non-permanent residents from the right to social welfare conferred by the constitution on all residents without distinction has not been shown to be a proportionate means by which to obtain that objective.

Conclusion

186. The one-year residence requirement was part of the previous system on the basis of which art. 145 of the Basic Law required the Government to formulate its policies for the development and improvement of social welfare in the light of economic conditions and social needs. We have not been asked to hold that the residence requirement of one year had also been unconstitutional, and I see no reason to do so. The raising of the residential requirement from one year to 7 years, however, is, in my judgment, unconstitutional for the reasons which I have given. I would allow this appeal to declare that rise unconstitutional.

187. As to costs, I would order legal taxation of Madam Kong's own costs. I would make an order *nisi* awarding her costs here and in the courts below, such order to become absolute 21 days after the handing down of judgment in this appeal unless an application has been made to vary that order. And I would direct that in the event of such an application, costs he dealt with on written submissions lodged according to a time-table for which the parties, if not agreed thereon, should seek procedural directions from the Registrar.

188. I end by thanking both legal teams for the excellent arguments prepared and presented.

Lord Phillips of Worth Matravers NPJ :

189. I agree with the judgment of Mr Justice Ribeiro PJ.

Chief Justice Ma :

190. By a unanimous decision, this appeal is allowed. The Court also makes the declaration referred to in paragraph 144 above and makes the orders as to costs set out in paragraph 145 above.

(Geoffrey Ma)
Chief Justice

(RAV Ribeiro)
Permanent Judge

(Robert Tang)
Permanent Judge

(Kemal Bokhary)
Non-Permanent Judge

(Lord Phillips of Worth Matravers)
Non-Permanent Judge

Mr Johannes Chan SC and Mr Hectar Pun instructed by Tang, Wong & Chow and assigned by the Legal Aid Department, for the Appellant

Lord Pannick QC and Mr Abraham Chan instructed by the Department of Justice, for the Respondent