



COMMONWEALTH OF PENNSYLVANIA
OFFICE OF ATTORNEY GENERAL
HARRISBURG, PA. 17120

16TH FLOOR
STRAWBERRY SQUARE
HARRISBURG, PA. 17120
(717) 787-3391

THOMAS W. CORBETT, JR.
ATTORNEY GENERAL

December 9, 1996

Honorable Feather O. Houstoun
Secretary
Department of Public Welfare
Room 333, Health and Welfare Building
Harrisburg, PA 17105

Dear Secretary Houstoun:

You have requested my opinion regarding the enforceability of the durational residency and citizenship requirements of Act 1996-35 ("Act 35"), which amended various provisions of the Public Welfare Code governing eligibility for cash and medical assistance under the Commonwealth's General Assistance program.

Section 11 of Act 35 amends Section 432.4 of the Public Welfare Code, 62 P.S. §432.4, to enlarge from sixty days to twelve months the period of time that an applicant for cash assistance must be a Pennsylvania resident before becoming eligible for benefits. Section 15 of Act 35 amends Section 442.1 of the Code, 62 P.S. §442.1, to add a requirement that an applicant for medical assistance must be a Pennsylvania resident for ninety days before becoming eligible for benefits. Section 14.1 of Act 35 amends the Code to add Section 432.22, 62 P.S. §432.22, which disqualifies for cash or medical assistance an applicant who is not a citizen of the United States.

In providing legal advice to the head of a Commonwealth agency, the Attorney General is required by Section 204(a)(3) of the Commonwealth Attorneys Act, 71 P.S. §732-204(a)(3), "to uphold and defend the constitutionality of all statutes so as to prevent their suspension or abrogation in the absence of a controlling decision by a court of competent jurisdiction." Since each of the foregoing provisions of Act 35 implicates a decision of the United States Supreme Court relevant to its constitutionality, it is incumbent upon me to determine whether the Supreme Court decision is "controlling" so as to compel the advice that the provision to which it relates is unenforceable.

As a threshold matter, it must be emphasized that the concept of a "controlling decision by a court of competent jurisdiction" is not susceptible to precise definition. Clearly, it cannot be construed so narrowly as to require a decision by a court of last resort holding unconstitutional the very provision on which the Attorney General's advice is sought, since that construction would render the Attorney General's advice a meaningless gesture. On the other hand, the decision said to be "controlling" must be more than merely predictive of the constitutionality of the statutory provision on which the Attorney General's advice is sought; it must adjudicate the constitutionality of a statutory provision materially indistinguishable from the statutory provision on which the advice is sought, and it must be rendered by a court that has jurisdiction over the entirety of Pennsylvania.

I. RESIDENCY

In Shapiro v. Thompson, 394 U.S. 618 (1969), the United States Supreme Court held that a state statute that requires a minimum one-year residence in the state as a condition of eligibility for public assistance violates the Equal Protection Clause of the United States Constitution. Among the state statutes specifically invalidated in Shapiro was then Section 432(6) of the Public Welfare Code, which required a minimum one-year residence in Pennsylvania as a condition of eligibility for cash general assistance or Aid to Families with Dependent Children.

In relation to Section 11 of Act 35, Shapiro presents a clear example of a "controlling decision by a court of competent jurisdiction," since it invalidated a materially identical provision of the same statute, pertaining to the same government program. That the appellees in Shapiro were all applicants for federally-assisted rather than wholly state-funded cash assistance is of no consequence, since the Supreme Court has held that "whether or not a welfare program is federally funded is irrelevant to the applicability of the Shapiro analysis." Memorial Hospital v. Maricopa County, 415 U.S. 250, 261 (1974) (citations omitted). The Shapiro decision, therefore, renders Section 11 unenforceable.

In Memorial Hospital v. Maricopa County, id., the United States Supreme Court held that a state statute that requires a minimum one-year residence in the state as a condition of eligibility for medical assistance violates the

Honorable Feather O. Houstoun
Page Three
December 9, 1996

Equal Protection Clause of the United States Constitution. Specifically invalidated in Memorial Hospital was an Arizona statute that required one-year residence in a county as a condition of eligibility for county-funded medical assistance.

On its face, the Arizona statute invalidated in Memorial Hospital exhibited two features that distinguish it from Section 15 of Act 35: first, its residency requirement applied to county rather than state residence; second, its residency requirement was one year rather than ninety days. Notwithstanding such differences, the Memorial Hospital decision may be "controlling" with respect to the constitutionality of Section 15. The key question is whether the differences are material, that is, whether either of them presents a basis on which to conclude that there is a reasonable possibility that the Supreme Court would uphold Section 15.

The decision in Memorial Hospital relied heavily upon the Court's analysis in Shapiro v. Thompson. In Shapiro, the Court observed that, because the right to travel interstate - more precisely described as the right to migrate from one state to another - is a fundamental right protected by the Constitution, "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional." Shapiro, 394 U.S. at 634. The Court found that differentiating between old and new indigent residents penalized the latter for the exercise of a constitutional right by denying them aid upon which they may depend for the basic necessities of life. The Court then examined, and found impermissible or insufficiently compelling, each of the governmental interests advanced in support of the classification.

Rejected by the Court as impermissible, because they served only to deter the exercise of the constitutional right to travel interstate, were the state objectives of preserving the fiscal integrity of public assistance programs by discouraging the immigration of indigents or by discouraging those who would enter the state solely to obtain larger benefits, and favoring old residents over new based on the contribution to the community that old residents may have made through the past payment of taxes. Rejected by the Court as insufficiently compelling were the administrative objectives of facilitating the planning of the welfare budget, providing an objective test of residency, minimizing the opportunity for fraudulently obtaining benefits from more than one jurisdiction, and encouraging early entry of new residents into the labor force.

Honorable Feather O. Houstoun
Page Four
December 9, 1996

In Memorial Hospital, the Court first noted that the applicability of the Arizona statute to county residency rather than state residency did not distinguish that case from Shapiro, since the Arizona residency requirement operated not merely upon intrastate migration, but upon interstate migration as well. For the same reason, it is immaterial to the determination of whether the Memorial Hospital decision is "controlling" with respect to the constitutionality of Section 15 of Act 35 that Section 15 imposes a state rather than a county residency requirement upon eligibility for medical assistance.

The Court in Memorial Hospital next proceeded to emphasize that a durational residency requirement must be justified by a compelling state interest only if the residency requirement operates to penalize the exercise of the constitutional right to interstate migration. Acknowledging that Shapiro did not specify the level of impact on interstate migration that would constitute a penalty, the Court nevertheless concluded that "it is at least clear that medical care is as much 'a basic necessity of life' to an indigent as welfare assistance." Memorial Hospital, 415 U.S. at 259. Thus, the Arizona residency requirement penalized the right to interstate migration and could survive constitutional challenge only if shown to be necessary to promote a compelling state interest.

As in Shapiro, the Court in Memorial Hospital rejected as impermissible or as insufficiently compelling each of the proffered state interests. Rejected as impermissible were the state objectives of preserving the fiscal integrity of its free medical care program by discouraging the immigration of indigent persons generally or indigent persons who would enter the county solely to partake of its medical facilities, and favoring long-time residents because of their contribution to the community through the past payment of taxes. Rejected as insufficiently compelling were the state objectives of facilitating determination of residency, preventing fraud, and assuring budget predictability.

From the Shapiro and Memorial Hospital decisions, it is apparent that the determination of whether the Memorial Hospital decision controls the constitutionality of Section 15 of Act 35 rests squarely upon the determination of whether the ninety-day residency requirement of Section 15 "penalizes" the exercise of the right to interstate migration. If the ninety-day residency requirement does not rise to the level of a penalty, then strict scrutiny is avoided and the state interests proffered in support of the requirement need only be rational.

Honorable Feather O. Houstoun
Page Five
December 9, 1996

While it is exceedingly rare for the Office of Attorney General to refer to pending litigation in rendering an official opinion, the decision of the District Court on the plaintiffs' motion for preliminary injunction in Warrick v. Snider, No. 94-1634 (W.D. Pa. filed June 30, 1995), underscores the importance of the "penalty" inquiry, while shedding considerable light upon the determination of whether the ninety-day residency requirement for medical assistance in Section 15 rises to the level of a penalty. In Warrick, a class of indigent Pennsylvania residents challenges the sixty-day residency requirement for cash general assistance, which was enacted by Section 6 of Act 1994-49 ("Act 49"). They contend that the sixty-day residency requirement operates to penalize the exercise of their fundamental right to travel interstate, and cannot withstand strict scrutiny.

In denying the plaintiffs' motion for preliminary injunction, the District Court distinguished Shapiro on the ground that the statutory provisions there at issue worked to deny to new residents all benefits necessary for basic sustenance and health, for an entire year, while Act 49 denies only cash assistance, for a period of only sixty days, allowing qualified new residents access to food stamps, emergency housing, medical assistance, job training, and job placement assistance. Because Act 49 provides new residents the means of obtaining what is necessary for their basic sustenance and health, and because a waiting period of two months is substantially less burdensome than a waiting period of an entire year, the District Court concluded that Act 49's durational residency requirement does not operate as a penalty on the right to interstate migration, and therefore need only be rationally related to a legitimate government purpose to survive constitutional challenge.

Holding that Act 49's sixty-day residency requirement is rationally related to the Commonwealth's legitimate governmental interest in encouraging employment, self-respect, and self-dependency, the District Court reasoned that "a social welfare structure which provides the things necessary for basic sustenance and health, and at the same time providing job training and assistance while limiting temporarily cash benefits is rationally related to the legitimate goal of encouraging welfare recipients to seek employment so as to support themselves." Slip op. at 19.

Ironically, if I were to conclude in this Opinion that Memorial Hospital is not "controlling" with respect to the constitutionality of Section 15 of Act 35, the plaintiff class in Warrick would become ineligible for medical assistance,

Honorable Feather O. Houstoun
Page Six
December 9, 1996

and a major underpinning of the District Court's decision in Warrick would be removed. It is my judgment, however, that Memorial Hospital is indeed "controlling" and that Section 15, therefore, is unenforceable.

Unlike the sixty-day residency requirement for cash assistance upheld by the court in Warrick, the ninety-day residency requirement for medical assistance in Act 35 is not part of a statutory scheme that provides to new residents "the things necessary for basic sustenance and health." Whereas the availability of medical assistance served to mitigate the impact of denying cash assistance to new residents under Act 49, the unavailability of cash assistance serves to compound the impact of denying medical assistance to new residents under Act 35.

Since Act 35, in contrast to Act 49, does not afford indigent new residents the means of providing for their basic sustenance and health, I conclude that the ninety-day residency requirement for medical assistance in Act 35 indeed operates to penalize the exercise of the right to interstate migration. Although admittedly less burdensome than the one-year requirement struck down in Memorial Hospital, it nevertheless denies medical assistance to indigent new residents while providing them no other assistance with which to meet their medical needs. I am unable, moreover, to identify any state interest served by this differential treatment of old and new residents that is any more compelling than the state interests rejected by the Supreme Court in Shapiro and Memorial Hospital.

In a series of decisions since Shapiro and Memorial Hospital, the United States Supreme Court applied rational basis analysis to invalidate state statutes that afforded preferential treatment to state residents based upon when residency was established. See Zobel v. Williams, 457 U.S. 55 (1982) (mineral income distributed to state residents according to years of residency); Hooper v. Bernalillo County Assessor, 472 U.S. 612 (1985) (property tax exemption afforded to Vietnam veterans who were state residents before May 8, 1976); Attorney General of New York v. Soto-Lopez, 476 U.S. 898 (1986) (civil service preference afforded to veterans who were state residents at the time they entered military service). In Zobel and Hooper, the majority of justices held that the classification of residents based upon when they first established residency served no legitimate state interest. In Soto-Lopez, a plurality of justices applied strict scrutiny, while the concurring justices needed to form a majority followed Zobel and Hooper to hold again that the classification of residents based upon when residency was established is irrational.

Honorable Feather O. Houstoun
Page Seven
December 9, 1996

Although these more recent decisions employed rational basis review, they cannot be said to signal a change of approach by the Supreme Court that would undermine my conclusion that the Shapiro and Memorial Hospital decisions are "controlling" with respect to the constitutionality of the durational residency requirements in Act 35. The statutes invalidated in the more recent decisions involved neither durational residency requirements nor welfare benefits; and they created classifications that, unlike those involved in Shapiro and Memorial Hospital, were permanent and would never equalize. It is always possible that the Supreme Court will depart from its prior decisions, but until it does so we are bound by them.

II. CITIZENSHIP

In Graham v. Richardson, 403 U.S. 365 (1971), the United States Supreme Court held that a state statute that requires United States citizenship as a condition of eligibility for public assistance violates the Equal Protection Clause of the United States Constitution. Among the state statutes invalidated specifically in Graham was then Section 432(2) of the Public Welfare Code, which required citizenship as a condition of eligibility for the Commonwealth's General Assistance program.

In relation to Section 14.1 of Act 35, Graham presents another clear example of a "controlling decision by a court of competent jurisdiction." Like Shapiro, Graham invalidated a materially identical provision of the same statute, pertaining to the same government program. Also like Shapiro, Graham employed strict scrutiny analysis, albeit for the different reason that classifications based on alienage, like those based on nationality or race, are inherently suspect. The Graham decision, therefore, renders Section 14.1 unenforceable.

In the Personal Responsibility and Work Opportunity Act of 1996, Congress enacted sweeping changes in federal welfare law, including provisions that affect the eligibility of aliens not only for federal and federally-assisted welfare benefits, but also for wholly state-funded welfare benefits. Section 411 of the federal act provides that, with certain exceptions, an alien not lawfully admitted into the United States "is not eligible for any State or local public benefits...." Section 412 provides that, with certain exceptions, "a State is authorized to determine the eligibility for any State public benefits" of an alien lawfully residing in the United States.

Honorable Feather O. Houstoun
Page Eight
December 9, 1996

Graham v. Richardson did not address the constitutionality of a state's denial of welfare benefits to an alien not lawfully admitted into the United States, and Section 432(3) of the Public Welfare Code, 62 P.S. §432(3), already provides that an alien must be "lawfully admitted" to be eligible for general assistance. Graham, however, specifically invalidated Arizona and Pennsylvania statutes that respectively denied federally-assisted and wholly state-funded welfare benefits to lawfully admitted resident aliens, and it did so in the face of Arizona's argument that the Social Security Act authorized Arizona's denial of benefits.

Questioning whether Congress indeed intended to authorize states to deny federally-assisted welfare benefits to lawfully admitted resident aliens, the Court in Graham stated that:

Although the Federal Government admittedly has broad constitutional power to determine what aliens shall be admitted to the United States, the period they may remain, and the terms and conditions of their naturalization, Congress does not have the power to authorize the individual States to violate the Equal Protection Clause. Shapiro v. Thompson, [supra, 394 U.S. at 641]. Under Art. I, § 8, cl. 4, of the Constitution, Congress' power is to 'establish a uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.

Id. at 382 (footnote omitted). Applying the principle that statutes should be construed whenever possible so as to uphold their constitutionality, the Court ruled that the Social Security Act did not authorize Arizona's citizenship requirement.

In Mathews v. Diaz, 426 U.S. 67 (1976), the Supreme Court rejected a due process challenge to a provision of the Social Security Act that conditioned an alien's eligibility for federal medicare benefits on admission for permanent residence and continuous residence in the United States for a period of five years. Noting that the provision discriminated not against aliens as a class, but rather among subclasses of aliens, and that the responsibility for regulating the status of aliens in

Honorable Feather O. Houston
Page Nine
December 9, 1996

the United States has been committed to the political branches of the federal government, the Court concluded that "[t]he reasons that preclude judicial review of political questions also dictate a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization." Id. at 81-82 (footnote omitted).

The Court in Mathews drew a sharp distinction between its decision in that case and its decision in Graham. The equal protection analysis relevant to the state law classifications at issue in Graham, the Court observed, "involves significantly different considerations because it concerns the relationship between aliens and the State rather than between aliens and the Federal Government." Id. at 84-85. As the Court explained:

Insofar as state welfare policy is concerned, there is little, if any, basis for treating persons who are citizens of another State differently from persons who are citizens of another country. Both groups are noncitizens as far as the State's interests in administering its welfare programs are concerned. Thus, a division by a State of the category of persons who are not citizens of that State into subcategories of United States citizens and aliens has no apparent justification, whereas, a comparable classification by the Federal Government is a routine and normally legitimate part of its business. Furthermore, whereas the Constitution inhibits every State's power to restrict travel across its own borders, Congress is explicitly empowered to exercise that type of control over travel across the borders of the United States.

Id. at 85 (footnotes omitted).

Mathews, therefore, does nothing to disturb the rule of Graham that state laws that discriminate against aliens in the provision of welfare benefits are unconstitutional unless narrowly tailored to achieve a compelling government interest. Mathews, however, did not address the question implicated by Section 412 of the recent federal welfare act of whether a state law that establishes classifications of eligibility for welfare benefits based on alienage is similarly subject to strict scrutiny if the state law is authorized by an act of Congress.

Honorable Feather O. Houstoun
Page Ten
December 9, 1996

In Plyler v. Doe, 457 U.S. 202 (1982), the Supreme Court applied rational basis analysis to sustain an equal protection challenge to a Texas statute that withheld from local school districts state funds for the education of children not lawfully admitted into the United States and that authorized the school districts to deny such children enrollment. In a footnote discussing the Court's rejection of a claim that "illegal aliens" are a "suspect class," the Court stated the following:

With respect to the actions of the Federal Government, alienage classifications may be intimately related to the conduct of foreign policy, to the federal prerogative to control access to the United States, and to the plenary federal power to determine who has sufficiently manifested his allegiance to become a citizen of the Nation. No State may independently exercise a like power. But if the Federal Government has by uniform rule prescribed what it believes to be appropriate standards for the treatment of an alien subclass, the States may, of course, follow the federal direction. See DeCanas v. Bica, [424 U.S. 351 (1976)].

Id. at 219 n.19.

In DeCanas v. Bica, the Court upheld a California statute that prohibited employers from knowingly hiring illegal aliens if doing so would adversely affect lawful resident workers. The challenge was based not on the Equal Protection Clause, but rather on claims that the statute violated the Supremacy Clause and interfered with Congressional power to regulate immigration and naturalization. Although Plyler involved an equal protection challenge, the Court's citation to DeCanas suggests that the Court's statement that a state may follow federal direction in its treatment of an alien subclass is concerned not with the extent to which a state may legislate with respect to aliens without violating the Equal Protection Clause, but rather with the extent to which a state may legislate with respect to illegal aliens without violating the Supremacy Clause or interfering with Congressional power over immigration and naturalization. See Barannikova v. Town of Greenwich, 643 A.2d 251 (Conn. Sup. Ct. 1994) (similarly interpreting the Plyler footnote).

Even assuming that the Court's statement in Plyler is concerned with the equal protection analysis of a state law classification based on alienage, the statement, by its terms,

Honorable Feather O. Houstoun
Page Eleven
December 9, 1996

is relevant only if the state law classification is authorized by a "uniform" federal rule - a circumstance that would appear not to prevail in the relationship between Section 14.1 of Act 35 and Section 412 of the recent federal welfare act. Rather than prescribing a "uniform" rule, Section 412 allows each individual state to determine the eligibility of its resident aliens for state welfare benefits, which leads inevitably back to the Court's statement in Graham that "[a] congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene th[e] explicit constitutional requirement of uniformity." Graham, *supra*, 403 U.S. at 382.

Admittedly, the constitutionality of Section 412 has yet to be tested, and the Court in Graham did not hold the Social Security Act provision there at issue unconstitutional, but rather construed it not to authorize divergent state laws concerning citizenship requirements for federally supported welfare programs. The possibility that a court could hold Section 412 to be a "uniform" rule, however, is hardly a sufficient basis on which to conclude that Graham no longer controls the constitutionality of a state statute, such as Act 35, that requires citizenship as a condition of eligibility for a wholly state-funded welfare program. On the contrary, Graham held specifically that the Fourteenth Amendment prohibits Pennsylvania from requiring citizenship as a condition of eligibility for its General Assistance program, and we are bound by that decision unless and until the Supreme Court, directly or implicitly, holds otherwise.

III. CONCLUSION

In summary, it is my opinion, and you are so advised, that controlling decisions of the United States Supreme Court render Sections 11, 14.1, and 15 of Act 1996-35 unenforceable. You are further advised that you should administer the Public Welfare Code, as amended by Act 35, as if the unenforceable durational residency and citizenship requirements of Act 35 were not enacted.

In particular, you should continue to enforce the sixty-day residency requirement for cash assistance enacted by Act 49, since it is clear that the General Assembly did not intend to repeal that requirement unless it could substitute the one-year

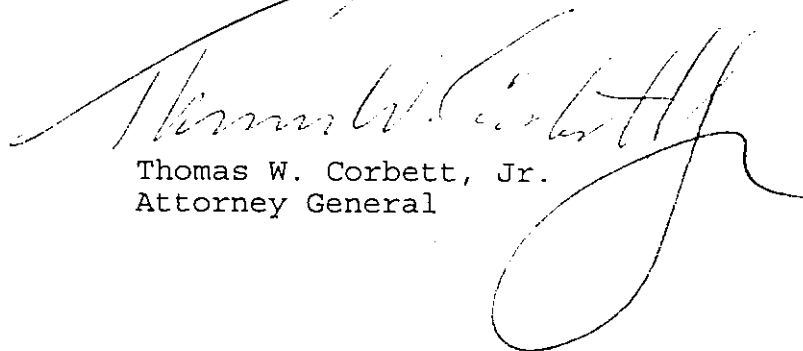
Honorable Feather O. Houstoun
Page Twelve
December 9, 1996

residency requirement of Act 35. See Mazurek v. Farmers' Mutual Fire Ins. Co., 320 Pa. 33 (1935) (legislative intent controls the effect of an unconstitutional enactment upon the pre-existing statute).

You should also continue to enforce Section 432(3) of the Public Welfare Code, which denies general assistance to illegal aliens. That provision was neither repealed nor significantly amended by Act 35; it is fully consistent with Section 411 of the recent federal welfare act, and its constitutionality is not in question.

Finally, you are advised that, in accordance with Section 204(a)(1) of the Commonwealth Attorneys Act, 71 P.S. §732-204(a)(1), you are required to follow the advice set forth in this Opinion and shall not in any way be liable for doing so.

Sincerely yours,



Thomas W. Corbett, Jr.
Attorney General

TWCJr/LJR/bjm