



### Summary of Judicial Decision

**Secretary for Justice v Leung Kwok Hung (“the Appellant”);  
Chief Executive of the HKSAR & Secretary for Justice v Clerk to the Legislative  
Council (“Clerk”) & Leung Kwok Hung  
CACV 200/2017 & CACV 201/2017; [2019] HKCA 173**

**Decision** : **The Appellant’s Appeals dismissed**  
**Date of Hearing** : **28 & 29 November 2018**  
**Date of Judgment/Decision** : **15 February 2019**

#### Background

1. All newly elected members of the Legislative Council (“LegCo”) were required to take the Legislative Council Oath (“LegCo Oath”) under the Basic Law (“BL”) Article 104 and the Oaths and Declaration Ordinance, Cap. 11 (“ODO”). The manner and way in which certain members, including the Appellant, purported to take the LegCo Oath gave rise to controversy. In consequence, the Government commenced legal proceedings against certain LegCo members, including the Appellant, seeking declarations, among others, that their respective LegCo Oaths purportedly taken on 12 October 2016 were invalid and had no legal effect, and that they had been disqualified from assuming the office of a LegCo member since 12 October 2016.
2. On 14 July 2017, the Court of First Instance (“CFI”) granted the declarations against the Appellant (“the CFI Judgment”). The CFI held that the purported LegCo oath taken by him was contrary to the Basic Law (“BL”) and the Oaths and Declaration Ordinance, Cap. 11 (“ODO”) in that his manner of taking the LegCo Oath amounted to the neglect or denial of taking the oath.  
(full text of the CFI’s Judgment at  
[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=110351&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=110351&QS=%2B&TP=JU))
3. The Appellant appealed to the Court of Appeal (“CA”). In brief, the Appellant appealed against the CFI’s findings that he had failed to comply with the “Solemnity Requirement” and the “Exact Form and Content Requirement” (“the Relevant Requirements”), such that he had declined or neglected to take the LegCo Oath when requested to do so on 12 October 2016. By judgment of 15 February 2019, the CA dismissed the Appellant’s appeal.

#### Issues in dispute

4. The issues in dispute are:
  - (1) Whether the Interpretation of BL104 issued by the Standing Committee of the National People’s Congress (“NPCSC”) on 7 November 2016 (“the Interpretation”) is valid or binding on the Hong Kong courts and carries retrospective effect. (“Issue on the validity, scope and effect of the Interpretation”)



- (2) Even if the Interpretation is valid, binding and has retrospective effect, whether the LegCo Oath taken by the Appellant was valid in view of the following issues:
  - (i) Whether the requirements for taking the LegCo Oath are not prescribed by law as it was not incorporated into the ODO. (“Prescribed by Law Issue”)
  - (ii) Whether the Solemnity Requirement is fulfilled so long as the member-elect takes the LegCo Oath in a way and manner that accords with the LegCo practices in view that the Appellant had a legitimate expectation that the LegCo practices and previous rulings of the LegCo President would continue to be adopted as the only benchmark in determining the validity of his LegCo Oath. (“Legitimate Expectation Issue”)
  - (iii) Whether the court should give a wide margin of deference and/or substantial weight to the decision of the Clerk or the LegCo President in determining if a member-elect’s oath taking accords with the requisite solemnity and sincerity. (“Margin of Deference Issue”)
  - (iv) Whether the Appellant’s LegCo Oath had in fact met the Relevant Requirements. (“Issue on Findings”)

### **Department of Justice’s Summary of the Court’s rulings**

(full text of the CA’s judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=120077&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=120077&QS=%2B&TP=JU))

5. First, the CA held that the Appeal Committee of the Court of Final Appeal’s decision in *Yau Wai Ching v Chief Executive of HKSAR* (2017) 20 HKCFAR 390 is a complete answer to the Issue on the validity, scope and effect of the Interpretation and it is not open to the CA to revisit the fundamental propositions laid down therein (paragraphs 14-16). It was held that:
  - (1) It has been well settled that the courts of Hong Kong have no jurisdiction to examine and determine if any act done by the National People’s Congress and the NPCSC in accordance with the provisions of the BL and procedure therein is valid or not. An interpretation of the BL by the NPCSC under BL158 is binding on all courts of Hong Kong and they are under a duty to follow it. The courts have no jurisdiction to examine and determine the validity of the Interpretation. (paragraphs 22-24)
  - (2) Article 67(4) of the Constitution of the People’s Republic of China (“Article 67(4)”) confers on the NPCSC the function and power to interpret laws, including the BL, which is a national law. The NPCSC’s power to interpret laws under Article 67(4) is general and unqualified, and the NPCSC can supplement a provision of the BL when interpreting it. (paragraphs 25-27)
  - (3) When interpreting the BL under Article 67(4), the NPCSC functions under



the Mainland system and under that system, legislative interpretation by the NPCSC can clarify or supplement laws. (paragraphs 28-30)

- (4) Whether the Interpretation is a supplementation calls for a closer scrutiny of (i) the duty to take the LegCo Oath; (ii) the requirements for the manner of taking the LegCo Oath; (iii) the consequences of declining or neglecting to take the LegCo Oath; (iv) the role of the oath administrator and the court; and (v) the terms of the Interpretation in these matters. Upon a close scrutiny and proper understanding, the Interpretation states what the Hong Kong law has always been and does not supplement BL104 or the ODO. As such, the NPCSC had not usurped the legislative functions of LegCo by issuing the Interpretation. (paragraphs 31-51)
- (5) As the Interpretation is not a supplementation, the question of retrospectivity is not engaged. In any event, an interpretation issued by the NPCSC under BL158(1) has retrospective effect back to 1 July 1997 as it states what the law has always been. (paragraphs 52-58)
6. On the Prescribed by Law Issue, the CA held that the ODO is to be interpreted with a purposive construction, taking into account its purpose and context, including BL104 (as interpreted by the Interpretation), and there is no need for the ODO to be amended to incorporate the constitutional requirements on oath-taking. The objective assessment of the oath taker's conduct in the particular circumstances of the case has been rightly adopted by the CFI. (paragraphs 61-63)
7. On the Legitimate Expectation Issue, the CA held that the doctrine of legitimate expectation does not come into play in the context of the case because questions of non-compliance and consequences of non-compliance are questions of law to be determined against the particular facts of the case by the courts (not the Clerk nor the LegCo President). LegCo practices and past decisions by the Clerk or the LegCo President as oath administrator do not bind the courts. (paragraphs 64-67)
8. On the Margin of Deference Issue, the CA held that the validity of the taking of the LegCo Oaths is a question of law to be determined by the courts by reference of the actual circumstances and that unless it can be demonstrated that the CFI had plainly erred, whether the court would take into account the Clerk's decision and how much weight is to be attached to it are entirely a matter for the CFI, and there is no basis for the CA to interfere. (paragraphs 68-71)
9. As to the Issue on Findings, having carefully considered the evidence, the CA upheld the CFI's finding that the Appellant failed to comply with Relevant Requirements in his purported taking of the LegCo Oath. (paragraphs 72-78)

**Civil Division**

**Department of Justice**

**February 2019**