

Summary of Judgment

**Kwok Cheung Kin (“Kwok”) v
President of Legislative Council for and on behalf of the Legislative Council
and Secretary for Justice (Intervener)
CACV 320/2019, [2021] HKCA 169**

Decision : **Kwok’s appeal dismissed with costs**
Date of Hearing : **22 December 2020**
Date of Judgment : **22 December 2020**
Date of Written Reasons for Judgment : **11 February 2021**

Background

1. Article 75(1) of the Basic Law (“**BL 75(1)**”) provides that the “quorum for the meeting of the Legislative Council of the Hong Kong Special Administrative Region shall be not less than one half of all its members”. Article 75(2) of the Basic Law (“**BL 75(2)**”) provides that “[t]he rules of procedure of the Legislative Council shall be made by the Council on its own, provided that they do not contravene this Law”.
2. By way of judicial review, Kwok challenged the resolution of the Legislative Council (“**LegCo**”), which took effect on 22 December 2017, to amend Rule 17(1) (“**RoP 17(1)**”) of its Rules of Procedures (“**RoP**”). The effect of the amendment is that the quorum for a meeting of a committee of the whole Council (“**CoWC**”) is reduced from not less than half of all the members of the Legislative Council to 20 members. Kwok argued that the new or amended RoP is inconsistent with BL 75(1), which requires the quorum to be not less than one half of all the members of the Legislative Council.
3. The issue in contention was, thus, whether the quorum requirement in BL 75(1) applies to a CoWC. By its judgment of 12 June 2019, the Court of First Instance (“**CFI**”) dismissed the judicial review and held that the words “meeting of the Legislative Council” in BL 75(1) refer only to a meeting of the Legislative Council as full body sitting in plenary session, but not a meeting of the CoWC, such that the quorum requirement under BL 75(1) is not applicable to a meeting of CoWC.
4. Kwok appealed to the Court of Appeal (“**CA**”).

Issues in dispute

5. The main issues in this appeal are:
 - i. whether Kwok had sufficient interest to apply for the subject

judicial review (“**Standing Issue**”); and

- ii. whether, on true construction of BL 75(1), the quorum requirement stipulated therein applies to a meeting of a CoWC (“**BL Issue**”).

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=133557&QS=%2B&TP=JU&ILAN=en)

6. On the **Standing Issue**, the CA first referred to section 21K(3) of the High Court Ordinance (Cap. 4), which stipulates that an applicant of judicial review has to show sufficient interest in the matter (§17). The CA then went through the relevant authorities on an applicant’s standing in judicial review applications, and highlighted the importance of context in the assessment of standing and the need to be guided by the object of the courts’ exercise of supervisory jurisdiction in judicial review (§27). Bearing in mind that the essential function in judicial review is to safeguard the rule of law, in the holistic assessment on standing, the court should be informed by the over-arching question of whether, in the particular context, the preservation of the rule of law requires standing be given to a particular applicant to ventilate the issues raised in the application in light of the interest he has (§28).
7. In CA’s view, reasonable arguability *per se* is not sufficient to satisfy the requirement of standing in every case. Much depends on the content. Whilst merit is a factor in the assessment of standing, the requirement of sufficient interest as prescribed under section 21K(3) of the High Court Ordinance (Cap. 4) is an additional requirement to the merit assessment (§39). As such, the court in considering the issue of standing needs to consider if the party in question can be said to be directly affected (§39).
8. In the present case, the CA held that Kwok did not have standing to bring the subject judicial review:-
 - i. Kwok, as a Hong Kong permanent resident, was not directly affected by the quorum requirement in the CoWC. The Committee Stage (i.e. the stage during which a bill is considered by the CoWC) is only an interim process in the legislative process. The LegCo itself (with a quorum requirement satisfying BL 75(1)) has to vote in favour of both (a) the motion to adopt the report made by the CoWC setting down the bill for third reading and (b) the Third Reading motion after debate in the LegCo before the bill would become law which binds all the people in Hong Kong (§33). Viewed thus, Kwok’s interest in the

CoWC process is no more than his interest in other interim steps in the works of the LegCo (§33).

- ii. Kwok cannot be considered to have standing simply because his challenge was based on a provision in the Basic Law and he was genuinely concerned about the same. The change of quorum requirement only affected the internal working of the CoWC and it did not have a direct impact on the general public. Even though the BL Issue is arguable (as accepted to be so by Chow J), it is not so strong that the rule of law demands there should be a judicial review even though none of the better placed challenger with a direct interest of the impugned decision (i.e. those LegCo members who were involved in the debate over the amendments of RoP 17(1)) deemed fit to take up such challenge (§37)
 - iii. Since the amendment of the RoP concerns internal working of the CoWC as opposed to the general public, this is not a case where Kwok has standing to challenge the amendment when those who are directly affected (*viz* the Members of the Council) did not deem fit to do so (§40).
9. On the **BL Issue**, the CA rejected Kwok's contention that the quorum requirement stipulated in BL 75(1) applies to a meeting of a CoWC (§56).
10. From the angle of continuity, the CA identified the following features which support a construction of BL 75(1) that the quorum requirement therein does not apply to a meeting of CoWC (§50):
- i. The quorum of CoWC was governed by the Standing Order of the LegCo whereas the quorum of the LegCo itself was governed by Royal Instructions. The authority of the Legislative Council came from the Royal Instructions, which was a document of constitutional order in the colonial political regime; whereas the CoWC derived its authority from the Standing Orders, which were rules adopted by the LegCo itself. As such, at all times prior to 1997, the quorum of the CoWC had never been prescribed by a constitutional instrument (§45).
 - ii. Changes in the quorum of the CoWC prior to 1997 had always been effected by the amendments to the Standing Orders adopted by the LegCo, instead of Royal Instructions (§47).
 - iii. Different changes of quorum were effected for the LegCo and CoWC prior to 1971, which highlighted that the LegCo was not regarded as the same entity as the CoWC (§48).
 - iv. The construction of BL 75(1) contended by Kwok would be a change from past practice, and Kwok had failed to pinpoint any contextual

material which could remotely suggest that the National People's Congress had the intention to make that change in the Basic Law (§50).

11. The CA further rejected Kwok's reliance on the historical comparison between the CoWC and the Committee of the Whole House in the English Parliament (§52). In any event, there are significant differences between these two bodies in respect of their compositions and functions (§53).
12. The CA further observed that there are other committees (e.g. the House Committee, the Bills Committee, the Select Committee) engaged in the legislative process and held that there is no ground for drawing a distinction between those committees and the CoWC in terms of construing BL 75 as to quorum requirement for the meeting of the LegCo (§55).
13. For the above reasons, Kwok's appeal was dismissed with costs.

Civil Division
Department of Justice
February 2021