



Summary of Judgment

**Junior Police Officers' Association of the Hong Kong Police Force and Anor
(collectively as "Applicants")**

v

**Electoral Affairs Commission, Chief Electoral Officer, Electoral Registration Officer
(collectively as "the Respondents")**

Hong Kong Journalists Association ("Intervener")

CACV 73/2020

Decision : **Applicants' appeal on (1) s 20(3), Cap 541A allowed, and (2) s 38(1), Cap 541F dismissed**
Date of Hearing : **5 May 2020 (substantive hearing) and 27 May 2020 (hearing on relief)**
Date of Judgment/Decision : **21 & 27 May 2020**

Background

1. This is the appeal of the Applicants, against the Judgment of the Court of First Instance ("**CFI**") dated 8 April 2020 ("**CFI Judgment**") dismissing the application for judicial review, to the Court of Appeal ("**CA**").
2. The appeal concerned an application for judicial review against an aspect of the current registration and electoral system in Hong Kong requiring the electoral registers showing the names of the registered electors together with their principal residential addresses ("**Linked Information**") to be made available for public inspection or provision to candidates ("**Impugned Measures**"). The applicants challenged the constitutionality of section 20(3) of the Electoral Affairs Commission (Registration of Electors) (Legislative Council Geographical Constituencies) (District Council Constituencies) Regulation (Cap.541A) ("**the Regulation**") and Section 38(1) of the Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap.541F) ("**the Electoral Procedure Regulation**") (together as "**Impugned Provisions**") in this appeal. Under the Impugned Provisions, the Linked Information of a registered elector as recorded in the Final Register would be available (1) to the public for inspection at place(s) specified by the Electoral Registration Officer ("**ERO**") and (2) to the candidate(s) for the constituency to which the elector belongs.
3. The applicants' challenges are two-fold:



- (1) A Constitutional Challenge, being a systemic challenge to the Impugned Provisions; and
 - (2) A Fact-Specific Challenge to the Respondents' decisions for the 2019 District Council elections making the Linked Information publicly available pursuant to Sections 20(4) and 21 of the Regulation and Section 38(1) of the Electoral Procedure Regulation.
4. CFI dismissed the application for judicial review. While CFI held that Article 14 of the Hong Kong Bill of Rights ("**BOR 14**") and Article 26 of the Basic Law ("**BL 26**") were engaged, it found that all four steps of the proportionality test are satisfied and the relevant provisions are constitutionally compliant. (Full text of the CFI Judgment at: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=127355&currpage=T)
5. By Notice of Appeal filed on 15 April 2020, the Applicants appealed against the CFI Judgment.

Issues in dispute

6. The principal issues in dispute are:-
- (i) The standard of review to be adopted; and
 - (ii) Whether the Impugned Provisions are proportionate given their interference to the registered electors' rights to privacy, family and home ("**BOR 14 right**") and their right to vote ("**BL 26 right**")

Department of Justice's Summary of the Court's rulings

(Full text of the judgment at:

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=128057&QS=%2B&TP=JU)

7. The CA first accepted as proper the requirement for a person registering as elector to provide his residential address to the electoral authorities; and the proportionality of having public inspection of Linked Information in general. (paras. 13-16)
8. The focus of the appeal is on the absolute unrestricted nature of public inspection and the lack of possibility of exemption from disclosure to the public generally



even in cases where the registered elector can demonstrate that he has a real concern for the safety of himself and those residing with him, resulting in an interference with his BOR 14 and BL 26 rights (para. 17)

9. As regards the right to privacy, CA held that the facet of privacy interest which forms the subject matter in the Constitutional Challenge is the right to control the extent of dissemination of one's residential address. CA further held that the fact that people disclose residential addresses from time to time does not undermine the importance of the said right. By virtue of the Impugned Measures, such right of control of a registered elector in this respect is taken away. Once the right is taken away, the right of privacy is substantially interfered with. (paras.33-47)
10. As regards the right to vote, CA held that it is indirectly engaged, which stems from the deterrent effect on an individual in the effective exercise of his voting right if he has to disclose to the public his principal residential address even when such disclosure could put his or his family's life and safety in danger. (para. 47)
11. CA held that the systemic challenge is brought against the absolute nature of the requirement of public inspection of the electoral registers for which the scope is narrow. CA accepted that a real risk of harm occasioned by the unrestricted public inspection of the electoral registers is demonstrated and is sufficient to support the Constitutional Challenge. There is no need to have evidence of specific instances of such harm to be put before the Court. (paras. 48-58)
12. CA confirmed that the disclosure of Linked Information to the public in general under the Impugned Provisions served legitimate aims and is rationally connected with those aims. (para. 60)
13. While accepting that the standard of "manifestly without reasonable foundation" is appropriate in a general assessment of the Impugned Provisions, CA held that a higher standard (i.e. no more than necessary) should be adopted in the examination of the proportionality of absence of discretion. (paras. 63-74)
14. CA further opined that the approach adopted by Lord Phillips in *R (F) v Justice Secretary* [2011] 1 AC 331 is instructive as it sheds light on how the court can strike a fair and proportionate balance. (paras. 75-77)
15. As regards Section 38(1) of the Electoral Procedure Regulation, CA held that it is proportionate even under the "no more than necessary" approach given the



limited scope of disclosure (confined to candidates to an election) and the Electioneering Aim and Transparent Election Aim. (paras. 80-83)

16. As regards Section 20(3) of the Regulation, CA first accepted that having public inspection of the register as part of the system involves resource-laden and policy considerations and for ordinary cases it is proportionate. (paras. 84)
17. However, CA further held that the crux of this appeal is not the operation of the system in ordinary cases. Instead, the crucial examination focuses on the extent to which the Transparent Election Aim would be eroded if there is a limited discretion for restricting public access to the Linked Information of a limited number of registered electors who could persuade the ERO that there is a real risk of harm to the safety of himself or his family if unrestricted public access is not withheld. (paras. 87)
18. CA opined that if there were to be such limited discretion, a person who seeks to have the discretion to be exercised in his favour would have to provide the necessary materials to support the application and it would be a legitimate requirement to demand him to submit satisfactory proof of his principal residential address. (para. 88)
19. CA further held that there could be provisions for the restricted publication of the Linked Information to the press and the political parties even if general publication is to be restricted. (para. 89-90)
20. CA found it difficult to see any real inroad to the Transparent Election Aim occasioned by having a limited discretion to withhold Linked Information generally (para. 91)
21. While accepting that it is not the function of CA to formulate electoral policy or to devise a particular electoral system, CA ruled that it cannot abdicate its function as the ultimate guardian of the law. In this instance, the law obliges CA to consider if a proportionate balance is struck between the right of privacy and the right to vote and the measures adopted in the current electoral system to achieve the Transparent Election Aim. (paras. 95-96)
22. The submission that the predicaments of electors who have justifiable concerns for safety are merely hard cases falling on the wrong side of a bright line was rejected as there is no discretion at all. (para. 97)



23. CA opined that the appeal should not be focused on doxxing against a large group of persons; it was more concerned about misuse of Linked Information against targeted individuals by someone who intends to do harm to them. For such type of cases, an elector could have a legitimate worry that the legal and administrative safeguards would not provide sufficient protection. (para. 102)
24. CA ordered that Section 20(3) of the Regulation is disproportionate to the extent that it allows an absolute unrestricted public inspection of the Final Register.

Civil Division
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