



Summary of Judicial Decision

Chan Ho Tin (“Petitioner”) v Lo Ying-ki Alan (Returning Officer for New Territories West Geographic Constituency) (“Returning Officer”) and others¹
HCAL 162/2016; [2018] HKCFI 345

Decision : Election Petition dismissed
Date of Hearing : 9 – 11 May 2017
Date of Judgment/Decision : 13 February 2018

Background

1. For the purpose of the Legislative Council General Election held on 4 September 2016 (“Election”), and as required by section 40(1)(b)(i) of the Legislative Council Ordinance (Cap. 542) (“LCO”), a person nominated as a candidate must sign a nomination form which included a declaration to the effect that the person “will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region (“HKSAR”)” (“Declaration”). Further, the Electoral Affairs Commission (“EAC”) had prepared a confirmation form (“Confirmation Form”) for the use of the returning officers and a nominated candidate was requested to sign and submit the Confirmation Form to the returning officer of the relevant constituency to confirm that he or she made the Declaration in the nomination form on the basis that he or she, amongst others, understood that to uphold the Basic Law included upholding its Articles 1, 12 and 159(4).
2. On 18 July 2016, the Petitioner submitted his signed nomination form (which was accompanied by the Declaration) for nomination as a candidate to run in the Election for the New Territories West Geographical Constituency. In the nomination form, the Petitioner filled in “Hong Kong National Party” as his political affiliation. He neither signed the Confirmation Form nor returned it to the Returning Officer.
3. By section 38(5) of the LCO, the Returning Officer must determine whether the Petitioner was validly nominated. With a view to making such determination, the Returning Officer, inter alia, wrote to the Petitioner on 26 July 2016 referring him to the media reports (including reports in the social media) which the Returning Officer had taken into account and asked him the following question: “Do you admit that, although you have signed the declaration in the nomination form to the effect that you uphold the Basic Law and pledge allegiance to the HKSAR, as a matter of fact, you still continue to advocate and push for the independence of the HKSAR ?” (“Question”). The Petitioner and his solicitors respectively replied, amongst others, that by signing the

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Declaration, the Petitioner had complied with the legal requirements of the LCO (including section 40(1)(b)(i) thereof).

4. On 30 July 2016, the Returning Officer informed the Petitioner that he was not validly nominated as a candidate for the Election (“Decision”). The Returning Officer explained, in essence, that he was satisfied that the Petitioner was advocating for the independence of the HKSAR from the People’s Republic of China and the nullification of the Basic Law, which constituted a fundamental inconsistency with the Declaration, and was further satisfied that even though the Petitioner had signed the Declaration, this did not constitute a valid declaration under section 40(1)(b)(i) of the LCO.
5. The Petitioner filed an election petition on 9 September 2016 claiming that multiple irregularities occurred in relation to the Election and that the Decision was unlawful. The Petitioner asked the Court to determine whether the nine candidates (see footnote 1) who were declared by the Returning Officer to be elected at the Election were duly elected.

Issues in dispute

6. There were five key issues in dispute:-
 - (i) The proper construction of section 40(1)(b)(i) of the LCO in relation to whether the Declaration requirement is only a requirement in formality which is complied with by the mere signature of the nominee on the nomination form, or whether it is a substantive legal requirement and pre-condition for nomination and standing for election.
 - (ii) Whether the Returning Officer has power to determine whether the Declaration requirement has been satisfied by a nominee substantively.
 - (iii) Whether the EAC has the power to issue the Confirmation Form and whether the Returning Officer is entitled to take into account the Petitioner’s failure to sign and return the Confirmation Form in deciding whether he complied with the Declaration requirement.
 - (iv) Whether the Petitioner had been given a proper and reasonable opportunity to answer the Returning Officer’s questions before the Decision was made.
 - (v) Whether the Decision infringed the Petitioner’s right to stand for election, right to freedom of expression and right against discriminatory treatment based on a person’s political opinion protected under, *inter alia*, Articles 25, 26 and 27 of the Basic Law and Articles 16, 21 and 22 of the Hong Kong Bill of Rights.



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

(full text of the CFI's judgement at http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=113686&QS=%2B&TP=JU)

7. On issue (i), the Court held the following:-
 - (a) Having regard to the proper context of section 40(1)(b)(i) of the LCO which includes its legislative history considered together with Article 104 of the Basic Law and the interpretation issued by the Standing Committee of the National People's Congress on 7 November 2016 ("Interpretation"), the Court held that the clear constitutional intention and objective of section 40(1)(b)(i) is that the Declaration requirement is a substantive legal requirement and a precondition for nomination and standing for election which is only satisfied if, at the time of making the Declaration, the nominee objectively has a genuine and truthful intention to uphold the Basic Law and pledge allegiance to the HKSAR. (paragraphs 34-49, 58 & 100)
 - (b) It is also the objective intention of the legislature that the submission of a signed Declaration should constitute strong *prima facie* objective proof of the genuine intent of the nominee to uphold the Basic Law and pledge allegiance to the HKSAR; such intent should only be displaced by cogent, clear and compelling evidence which shows plainly and objectively that the nominee does not have the intention at the time of the nomination to uphold the Basic Law and swear allegiance to the HKSAR. (paragraphs 77-80 & 100)
8. On issue (ii), the Court held that, once the Court concluded that the Declaration requirement under section 40(1)(b)(i) of the LCO is a substantive one, it is clear that the Returning Officer has the statutory power to determine whether the nominee has complied with the Declaration requirement substantively, including the power to ask for information and to look at various materials relating to the nominee's objective intention to uphold the Basic Law. (paragraphs 105-107)
9. On issue (iii), the Court held that, given it is not a mandatory requirement for a candidate to sign and return the Confirmation Form and that it is a means to aid the respective returning officers to decide whether a prospective candidate's nomination is valid, the EAC is entitled and empowered to issue the Confirmation Form and the Returning Officer is entitled to take into account the Petitioner's failure to sign and return the Confirmation Form in deciding whether he complied with the Declaration requirement. (paragraphs 122-125)
10. On issue (iv), the Petitioner complained that he was not given a reasonable opportunity to answer the Question because he was not in a position to



understand the Returning Officer's reasons for asking it. The Court held that, when the Question was viewed in the proper context (including the media reports and the various press statements issued by the Government, the Secretary for Justice and the EAC), it was objectively obvious to the Petitioner as to why the Returning Officer formed a view that the Petitioner's advocacy of the independence of Hong Kong was inconsistent with an intent to uphold the Basic Law. Thus, the Court held that the Petitioner had been given a reasonable opportunity to respond to the Returning Officer's inquiries including the Question, before the Returning Officer made the Decision. (paragraphs 126-139)

11. On issue (v), the Court held that, since the Petitioner did not challenge the constitutionality of section 40(1)(b)(i) of the LCO, it cannot be said that the Decision itself was unconstitutional insofar as it was rightly made based on the available material. As for the question of the constitutionality of section 40(1)(b)(i) of the LCO, the Court held that it is unarguable that the Declaration requirement in implementing the constitutional requirement as mandated by the Interpretation would be unconstitutional. Further and in any event, the Declaration requirement satisfies the proportionality test in that:- (i) the Declaration requirement serves the following three legitimate aims, namely, the protection of constitutional principles, the maintenance of public confidence in the Legislative Council and the election process and the protection of public order (*ordre public*), (ii) the Declaration requirement provides a clear rational connection between the restriction and the legitimate aims, (iii) giving due margin of discretion to the legislature, the Declaration requirement serves as a proportionate measure to achieve the legitimate aims, and (iv) the Declaration requirement strikes a reasonable balance between the restriction and the societal interests. (paragraphs 145-196)
12. The Court dismissed the election petition and declared that all the persons declared to have been elected in the New Territories West Geographical Constituency were duly elected.

(press summary issued by the Constitutional and Mainland Affairs Bureau in relation to the CFI's judgment at http://www.cmab.gov.hk/en/press/press_4003.htm)

Civil Division
Department of Justice

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