



Summary of Judgment

**Kwok Cheuk Kin (“Applicant”) v Chief Executive In Council (“Putative Respondent”) & Secretary for Justice (“1st Putative Interested Party”) & Secretary for Constitutional and Mainland Affairs (“2nd Putative Interested Party”)
HCAL 1978/2023; [2023] HKCFI 3074**

Decision : Leave to apply for judicial review granted but substantive application for judicial review dismissed

Date of Hearing : 30 November 2023

Date of Judgment/Decision : 1 December 2023

Background

1. This was an application for leave to apply for judicial review to challenge the nomination requirement in respect of a District Council geographical constituency (“**DCGC**”) of the District Council (“**DC**”) under section 7(2)(b) of the District Councils (Subscribers and Election Deposit for Nomination) Regulation Cap 547A (“**Nomination Requirement**”)¹ on the ground that it is inconsistent with Article 26 of the Basic Law (“**BL26**”) and/or Article 21 of the Hong Kong Bill of Rights (“**BOR21**”).
2. The Nomination Requirement is applicable to the forthcoming DC Ordinary Election, the polling date of which is 10 December 2023.
3. The Honourable Mr. Justice Coleman directed a “rolled-up” hearing of (1) the application for leave to apply for judicial review, and (2) if appropriate, the substantive hearing of the application for judicial review on 30 November 2023.

Issues in dispute

4. The main issues were summarised in §9 of the Judgment:-
 - (a) Whether the Applicant lacks the necessary locus or standing to bring this application (and has been less than frank in his response to the challenge made on that point);
 - (b) Whether there was undue delay in making the application, and whether there was any good reason to extend the time for making it;
 - (c) Whether the Nomination Requirement is one which has been specifically endorsed by organs of the Central People’s Government (“**CPG**”);

¹ Under the Nomination Requirement, a person seeking nomination in respect of a DCGC is required to obtain nomination from not less than 3, but more than 6, members of each of the three District Committees (“**3Cs**”) in the District.



- (d) Whether BL26 and/or BOR21 are engaged; and
- (e) If BL26 and/or BOR21 were engaged, whether the restrictions imposed by the Nomination Requirement is consistent with the Basic Law and satisfies the proportionality analysis.

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

(full text of the judgment at https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=156630&currpage=T)

Locus / Standing (§§104-118)

- 5. The relevant legal test as to standing is whether the Applicant has “sufficient interest in the matter to which the application relates”. Where the applicant is effectively pursuing the application as a representative of the public interest, the Court adopts a holistic approach by taking into account a host of relevant considerations including the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, and the nature of the breach of duty against which relief is sought. An applicant should not be regarded as having a sufficient interest merely because of the issue raised by him is of public interest or strong merits of the proposed challenge. (§§111-112)
- 6. The Applicant’s standing was at best doubtful (§§117 & 140). In this regard: -
 - (a) Given the Applicant is not included as a registered elector under the Final Register for the forthcoming DC Elections, the Applicant might at least have not taken much actual “interest” in the DC Elections. (§110)
 - (b) Evidence shows that the Applicant might have been less than full and frank despite the warning given by the Court to the Applicant in a previous case. The Applicant has failed to disclose whether he was a registered elector when he lodged the present application. He ought to have disclosed his telephone conversation with the Registration and Electoral Office in May 2023 concerning his discontinued registration, and would have known that he ought to have informed REO of his change of address if he were to continue to be a registered elector. (§§106-109).
 - (c) The Court of First Instance (“CFI”) noted that the Government’s submission that it could not be correct that any permanent resident of Hong Kong would enjoy the requisite standing to bring a judicial review on the mere ground that an issue of public interest was raised. CFI noted that no person who



have a greater interest than the Applicant (i.e. a person who had an intention to stand for election but have not been able to satisfy the Nomination Requirement) has chosen to make a similar challenge by judicial review. (§§113-115)

- (d) The degree of equivocation expressed by the Applicant on whether he should proceed with the application might at least go indirectly to the issue of standing. (§§12 & 117)
7. Nevertheless, in adopting a holistic approach by taking into account a host of relevant considerations, it would fall also to consider the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, and the nature of the public law deficiency against which relief is sought. Also relevant is the question of whether there has been undue delay. (§§112 (2) & 118)

Undue delay (§§119-143)

8. While an application made outside the three-month period will entail undue delay, the filing of an application within three months is not in and of itself sufficient to satisfy the requirement of promptitude. Public law decisions typically affect a broad range of parties, and there is a significant public interest in ensuring that any challenges to such decisions are brought expeditiously. Full weight must be given to all aspects of the public interest. (§§123, 125)
9. Whether an application has been “made promptly” would depend on the particular circumstances in each case, and the relevant circumstances include (1) the nature of the relevant statutory or regulatory framework, (2) the reasonableness or unreasonableness of the applicant’s conduct, and (3) the impact of any delay on interested parties (§124).
10. The present application was lodged on 6 November 2023. The Applicant clearly did not act “promptly” within the meaning of the relevant Rules of the High Court. In this particular case, the Applicant should have made the application within just a few weeks (at least during July or early August 2023) (§129). Relevant considerations included:-
- (a) the publicly known discussions concerning the relevant legislative reform and the chronology²; and (§119)

² Key elements of the relevant chronology included:- (a) the public announcement of the proposal for the relevant legislative reform (including the introduction of the Nomination Requirement) was made on 2 May 2023; (b) such proposed reform received high publicity; (c) the public consultation period lasted from 2 to 16 May 2023; (d) the relevant Bill for the reform was introduced into the Legislative Council on 31 May 2023 and was passed on 6 July 2023; and (e) the relevant ordinance reflecting the reform was gazetted and came into effect on 10 July 2023; (f) the polling date (10 December 2023) was made known to the public on 24 July 2023; (g) the Guidelines on the DC Elections (which included details concerning the Nomination Requirement) were



(b) the statutory context regarding the holding of the DC Election (which were all public knowledge)³. (§120)

11. The Applicant said it was reasonable and prudent for him to take a “wait-and-see” approach to assess whether he should bring a judicial review. This amounted to a deliberate delay and was also rejected. However, in light of the importance of the issue raised in these proceedings and the greater danger of undermining the overall legitimacy and certainty if the JR application were to be dismissed solely on technical or procedural grounds, the CFI was persuaded that – despite the doubts about standing and the substantial undue delay (which caused potentially substantial prejudice) – the best course overall in the wider public interest is to deal with the challenge on its merits. (§§131-143)

Whether BL26 and/or BOR 21 are engaged (§§144-160)

12. CFI rejected the Government’s arguments that BL 26 was not engaged because under Articles 97 and 98 of the Basic Law:- (i) DCs are not organs of political powers; (ii) the formation of DCs is prescribed by law with no overarching requirement imposed by BL26; (iii) members of the DCs might in fact be entirely appointed, and (iv) election is not prescribed or required. (§§154-157)
13. The evidence was considered to have identified that members of the DCs are fully engaged in public affairs (which cover public administration at the district level). CFI was of the view that once the Government has decided that there should be an election of a public nature, it triggers the engagement of BL26 and/or BOR21. (§§149-150; 152, 158)

Endorsed by CPG (§§161-165)

14. CFI noted the Government’s submissions that the relevant press release or comment issued by the Hong Kong and Macao Affairs Office of the State Council (“**HKMAO**”) and the Liaison Office of the CPG (“**LOCPG**”) were in line with the decision of the NPCSC in improving the electoral system regarding the Chief Executive and the Legislative Council (as now found in Annexes I and II of the Basic Law); and provided some context for the constitutionality of the Nomination Requirement. (§§162-163)

published on 28 September 2023; (h) the nomination period ran from 17 to 30 October 2023; (i) potential concerns about the Nomination Requirement had been publicly aired almost throughout the period.

³ The Court considered it relevant to note that (i) the polling date for the DC Elections was 10 December 2023; (ii) the current term of the DCs would end on 31 December 2023; (iii) the statutory deadline for holding the DC Elections was 16 December 2023; and (iv) it was obviously impracticable to hold the DC Elections on a different basis than currently arranged, or to put off the election to a new date before 31 December 2023.



15. That said, CFI pointed out that neither the HKMAO nor LOCPG has the power of interpretation of the Basic Law. CFI held that the interpretation of the Basic Law and the question of constitutionality is not a political question, but is a legal question for the Court to determine. (§§164-165)

Proportionality Analysis (§§166-214)

16. Having satisfied that BL26 and BOR21 were engaged, CFI applied the four-step proportionality test as set out in §171 of the Judgment. The principles relevant to the application of such proportionality test were set out in §§ 172-176.
17. CFI held that the appropriate standard of review or margin of appreciation to be accorded to the Nomination Requirement is the “manifestly without reasonable foundation” standard, which is towards the lower end of the continuous spectrum of reasonable necessity. This conclusion was reached upon balancing the various features in this particular case. In particular, CFI noted the proposition endorsed by the Court of Final Appeal in another case that a large margin of appreciation should be afforded in matters concerning political decisions or legislative provisions reflecting political judgments, particularly where there has been active political debate on an issue or a piece of legislation. This is because the Courts are generally not equipped to determine political questions. (§§177-183)
18. CFI also highlighted that the margin of appreciation applies to all four steps in the proportionality test. (§177)
19. On step 1 of the test, CFI was satisfied that there were legitimate aims for the Nomination Requirement⁴. (§§184-189)
20. On step 2, CFI also accepted that the aims identified by the Government are logically furthered by the Nomination Requirement, because that requirement can reasonably be expected to contribute towards their achievement. Common sense and logic support the conclusion that there would be a high degree of confidence and likelihood that the 3Cs members would bear the fundamental aims in mind, and would likely agree to nominate a candidate only if satisfied that this requirement was met, instead of exercising their nomination powers arbitrarily (§§190-195).
21. On step 3, CFI noted, *inter alia*, that: (i) the Nomination Requirement relating to the need to obtain nominations from at least three of the members of each of the 3Cs was allied to the requirement to obtain at least 50 nominations/subscriptions from ordinary members of the relevant constituency; (ii) there were some criteria guiding the members of the 3Cs as to how to nominate or not nominate any potential candidate; (iii) members of the 3Cs have

⁴ The relevant aims were identified at §185 of the Judgment.



been appointed for their present term before the Nomination Requirement was even proposed; (iv) the Applicant has also himself accepted that the Nomination Requirement might nevertheless have permitted the selection of sufficiently diverse candidates; (v) the decision as to the constitution or composition of the District Councils was essentially a political decision requiring some element of judgment amongst the legislature. (§§196-210)

22. It was therefore concluded that the Nomination Requirement was not manifestly without reasonable foundation. CFI specifically stated that the Court would not have reached a different conclusion even if the standard of review were somewhat closer to the higher one of “no more than reasonably necessary”. (§211)
23. On step 4, CFI was of the view that a reasonable balance has been struck between the societal benefits of the Nomination Requirement and the inroads made into the constitutionally protected rights in BL26 and BOR21. (§§212-214)

Court’s Disposition (§§215-218)

24. CFI directed that:-
 - (a) the application for leave to apply for judicial review was granted, with the necessary extension of time for so doing: the intended application for judicial review was reasonably arguable and had a realistic prospect of success;
 - (b) however, the substantive application for judicial review was dismissed upon full consideration of the merits;
 - (c) all questions of costs were to be reserved and determined by the CFI on paper submissions to be filed after the parties have had an opportunity to consider the Judgment.

Civil Division
Department of Justice
4 December 2023