



Summary of Judgment

Wong Ho Ming v Secretary for Justice HCAL 2124/2019; [2020] HKCFI 1132

Decision : **Application for leave to apply for judicial review granted; application for judicial review dismissed**
Date of Hearing : **28 April 2020**
Date of Judgment/Decision : **10 June 2020**

Background

1. The Applicant has various criminal convictions during the period from 30 December 2015 to 9 April 2019, all of which carry imprisonment terms exceeding 3 months.¹
2. Pursuant to section 39(1)(e)(i) of the Legislative Council Ordinance, Cap. 542, section 21(1)(e)(i) of the District Councils Ordinance, Cap. 547 and section 23(1)(e)(i) of the Rural Representative Election Ordinance, Cap. 576 (collectively “**Impugned Provisions**”), a person is disqualified from being nominated as a candidate at an election and from being elected as a member of the Legislative Council or District Council, or as a Rural Representative for a Rural Area respectively, if the election is to be held or is held within 5 years after the date of a person’s conviction of an offence (“**Disqualification Period**”) with a sentence to imprisonment for a term exceeding 3 months without the option of a fine (“**Sentence Threshold**”) (collectively “**Impugned Measure**”).
3. In view of his criminal convictions and the Impugned Provisions, the Applicant will be disqualified from being nominated as a candidate or being elected as a member of the Legislative Council or a District Council or as a Rural Representative up to 8 April 2024.
4. In the application, the Applicant seeks declarations that the Impugned Provisions are inconsistent with Article 26 of the Basic Law (right to stand for election; “**BL 26**”) and/or Article 21 of the Hong Kong Bill of Rights (right to take part in the conduct of public affairs and to be elected; “**BOR 21**”), and therefore are unconstitutional, null, void and of no effect.

Issues in dispute

5. The question for determination was whether the restriction on the rights

¹ First, a conviction of “unlawful assembly” on 30 December 2015 in ESCC 3658/2014, and an appeal on sentence was allowed by the Court of Final Appeal on 7 September 2018 which substituted a sentence of imprisonment for three months and 9 days. Second, a conviction of “criminal contempt” on 13 October 2017 in HCMP 789/2015, and sentenced to a term of four months and 15 days’ imprisonment. Third, a conviction of one count of “incitement to commit public nuisance” and one count of “incitement to incite public nuisance” on 9 April 2019 in DCCC 480/2017, and sentenced to eight months’ imprisonment for each count to run concurrently; both the convictions and sentences are currently under appeal.



protected by BL 26 and BOR 21 imposed by the Impugned Provisions, i.e. the Impugned Measure, is proportional, and the main issues involved are:-

- (1) whether the Impugned Measure pursues a legitimate aim;
- (2) if so, whether it is rationally connected with advancing that aim;
- (3) whether it is no more than necessary for that purpose; and
- (4) whether a reasonable balance has been struck between the societal benefits of the restriction and the inroads made into the constitutionally protected rights of the individual, asking in particular whether the pursuit of the societal interest results in an unacceptably harsh burden on the individual.

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

(full text of the CFI's judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=128601&QS=%28HICAL%7C2124%2F2019%29&TP=JU)

6. The Court found that the Impugned Measure is lawful and constitutionally compliant as it (a) advances a plainly legitimate aim, (b) is rationally connected to the legitimate aim, (c) is not manifestly without reasonable foundation, and (d) achieves a reasonable balance.
7. On Legitimate Aim, the Court agreed with the Government's case that the aims of the Impugned Measure to maintain public trust and confidence in (a) the offices of the Legislative Council, District Council and Rural Representative, (b) the character, honesty and personal integrity of persons elected to those offices, and (c) the related electoral processes ("**Public Confidence Aim**") is plainly a legitimate one. The Public Confidence Aim is a legitimate aim not only in relation to the election of Legislative Council Members, but also in relation to the elections of District Council members and Rural Representatives despite that the functions of District Councils and Rural representatives are less important when compared to the Legislative Council. (paragraphs 42, 50, 52-55)
8. On Rational Connection, the Court found it clear that the Impugned Measure is rationally connected with advancing the Public Confidence Aim. The Court considered that that the matters raised by the Applicant, including that the Impugned Measure is mandatory, and that the sentencing court has no discretion on whether to impose a relevant disqualification order on the convicted person, do not affect the consideration of whether the Impugned Measure is rationally connected with the Public Confidence Aim. (paragraph 57 and 60-63)
9. As regards the issue of No More Than Necessary, the Court held that the Impugned Measure is not manifestly without reasonable foundation, which



should be the standard of review to be adopted in the present case. Even if the standard of review should be the higher one of “no more than reasonably necessary”, the Court would have reached the same conclusion. The drawing of a bright line regarding the Sentence Threshold and Disqualification Period is not objectionable. Unless the lines are so plainly unreasonable, the Court should respect the judgment of the Legislature which is better placed than the Court to assess where the lines should be drawn. (paragraphs 63, 66, 69, 72 and 74).

10. On Reasonable Balance, the Court was not persuaded that the pursuit of the societal interest by the Impugned Measure can be said to result in an unacceptably harsh burden on the Applicant and others in a similar situation, notwithstanding the importance of the rights being restricted. This is having taken into account that the Impugned Measure is imposed only after conviction (where persons charged with criminal offence are protected by BOR 10, BOR 11 and common law principles) and that the Public Confidence Aim is a matter of considerable public interest. (paragraph 76)

Civil Division

Department of Justice

10 June 2020