



## Summary of Judgment

### Lau Siu-lai (“Petitioner”) v Kwok Wai-Fan, Franco (Returning Officer for the Kowloon West Geographical Constituency (“Returning Officer”) & Chan Hoi-yan (“Ms. Chan”)

HCAL 245/2019; [2020] HKCFI 787

**Decision** : Election Petition Allowed  
**Date of Hearing** : 7 May 2020  
**Date of Judgment/Decision** : 21 May 2020

### Background

1. For the purpose of the Legislative Council (“**LegCo**”) by-election for the Kowloon West Geographical Constituency held on 25 November 2018 (“**By-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 (“**Declaration**”) to the effect that the person “will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region (“**HKSAR**”)” (“**Requirement**”).
2. On 2 October 2018, the Petitioner submitted her signed nomination form (which was accompanied by the Declaration) for nomination as a candidate to run in the By-election, and a signed confirmation form declaring and confirming that she understood that to uphold the Basic Law included upholding Articles 1, 12 and 159(4) thereof.
3. On 12 October 2018, the Returning Officer informed the Petitioner that her nomination as a candidate in the By-election had been declared by him to be invalid, on the ground that he was not satisfied that the Petitioner had complied with the Requirement (“**Decision**”). The Returning Officer did not provide the Petitioner with an opportunity to respond to the materials intended to be relied upon by him prior to making the Decision (“**Failure**”).
4. As a result of the Decision, the Petitioner was precluded from standing as a candidate in the By-election. The By-election took place on 25 November 2018 with Ms. Chan elected.
5. The Petitioner filed an election petition on 25 January 2019 seeking the Court’s declaration on, *inter alia*, whether Ms. Chan was duly elected, and further claiming that the Petitioner was wrongly determined by the Returning Officer to be invalidly nominated and that a material irregularity occurred in relation to the By-election under section 61(1)(a)(iv) of the LCO.

### Issues in dispute

6. The main issues were:-
  - (a) whether the Failure constituted a material irregularity within the meaning



- of section 61(1)(a)(iv) of the LCO; and  
(b) whether the Decision was correct or not.

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

(full text of CFI’s judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=128046&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=128046&QS=%2B&TP=JU))

7. At the outset, the Court noted that the present case is indistinguishable from *Chow Ting v Teng Yu-Yan Anne (the Returning Officer for the Hong Kong Island Constituency) and Anor* [2019] HKCFI 2135 (2 September 2019) and (ii) *Lau Wing Hong v Chan Yuen Man Amy (Returning Officer) (No 2)* [2019] 5 HKLRD 1, in which it was held that the Requirement was a “substantive” and not a “formal” requirement and that the returning officer ought to have given a candidate a reasonable opportunity to respond to the materials intended to be relied upon by the returning officer prior to the making the decision. (paragraphs 18, 20)
8. In determining whether a material irregularity has occurred, the question of whether a candidate’s nomination was correctly or incorrectly determined to be invalid may be relevant but is by no means a conclusive consideration. Bearing in mind the nature of the right affected by the Decision, namely, the fundamental right to stand in an election, and the importance of the principles of natural justice or procedural fairness, the court should be very cautious in accepting an argument that because the same result would have been reached in any event it was not necessary to give the person adversely affected a proper opportunity to be heard. (paragraphs 22, 26)
9. The Court did not accept that the present case was exceptional by reason of the fact that the Petitioner was, by judgment in *Chief Executive of HKSAR v President of Legislative Council* [2017] 4 HKLRD 115, disqualified from the very office which the By-election was concerned. The Court held that the finding of the said judgment was directed at, and limited to, the relevant LegCo Oath taken by the Petitioner and cannot be treated as a general finding against her ability to satisfy the Requirement. It would also be illogical to argue that the Petitioner was not qualified to stand as a candidate in the By-election to return a member of the 6<sup>th</sup> LegCo for the Kowloon West Geographical Constituency, yet she would be qualified to stand as a candidate in any other by-elections to return a member of the 6<sup>th</sup> LegCo for other Geographical Constituencies, even though her fitness or properness to act as a member of the LegCo would be exactly the same. Counsel for the Returning Officer accepted that a person who was once determined not to genuinely and truly intend to uphold the Basic Law and pledge allegiance to the HKSAR is not forever barred from standing in a future LegCo election, and the Court held that whether a person has “repented” is a matter to be determined, in the first instance, by the returning officer and not the Court. (paragraphs 24,



31 – 32)

10. The Court was therefore of the view that there was a material irregularity in relation to the By-election by reason of the Failure, regardless of whether the Decision was correct or not. It was not necessary for the Court to determine (i) the proper approach which the Court should adopt in determining whether the Returning Officer was right or wrong to conclude that the Petitioner did not have the requisite intention to uphold the Basic Law and pledge allegiance to the HKSAR, and (ii) whether, on the facts of this case, the Returning Officer was right or wrong to reach that conclusion. The Court however noted that question (i) is of some general importance. (paragraphs 33 – 34)
11. The Court allowed the election petition and declared that (i) Ms. Chan was not duly elected in the By-election and (ii) neither the Petitioner nor any of the candidates standing in the By-election was duly elected in her place. (paragraph 35)

**Civil Division**

**Department of Justice**

**21 May 2020**