



Summary of Judgment

**Wong Chi Fung (“the Applicant”) v Secretary for Justice & Returning Officer for the South Horizons West Constituency (“Returning Officer”)
Lam Ho Por Kelvin (“Mr Lam”) as the Putative Interested Party
HCAL 346/2020; [2020] HKCFI 2444**

Decision : **Application for leave to apply for judicial review dismissed**
Date of Hearing : **7 August 2020**
Date of Judgment/Decision : **23 September 2020**

Background

1. The Applicant was one of the candidates of the South Horizons West Constituency in the 2019 District Council Ordinary Election (“**SHWC Election**”). On 29 October 2019, the Returning Officer decided that the Applicant’s nomination was invalid (“**Decision**”) as the Returning Officer was not satisfied that the Applicant had complied with section 34(1)(b) of the District Councils Ordinance (Cap 547) (“**DCO**”).
2. Section 34(1)(b) of the DCO provides that “*A person is not validly nominated as a candidate for an election unless the nomination form includes or is accompanied by a declaration to the effect that the person will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region.*”
3. The Election was held on 24 November 2019. Mr. Lam was declared to be duly elected in the SHWC Election.
4. The Applicant made the present application for leave to apply for judicial review to challenge, *inter alia*, (a) the constitutionality of section 34(1)(b) of DCO alleging that it infringed the Hong Kong residents’ right to hold opinion without interference, right to stand for election etc.; and (b) the propriety and legality of the Decision alleging that it was *ultra vires* section 34(1)(b) of the DCO, tainted by procedural unfairness, irrational etc. (collectively the “**constitutionality and legality grounds**”).
5. In making the application for leave to apply for judicial review, the Applicant made it clear that he did not question the result of the SHWC Election. His challenge was confined to the constitutionality and legality grounds referred to in para. 4



above.

6. The Applicant's application for leave to apply for judicial review was dismissed by the Court of First Instance ("CFI") by judgment of 23 September 2020.

Issues in dispute

7. The main issues in dispute are:-
 - (i) Whether, by reason of section 49(2) of the DCO, it is impermissible for the Applicant to challenge the Decision by way of judicial review instead of by an election petition;
 - (ii) Whether section 49(2) of the DCO is inconsistent with Article 35 of the Basic Law ("BL 35"); and
 - (iii) Whether the constitutionality and legality challenges are reasonably arguable.
8. Section 49(1) of the DCO stipulates that an election may only be challenged on grounds including that the elected person was ineligible, there was corrupt or illegal conduct or material irregularity occurred etc. Section 49(2) (read together with section 50) stipulates that an election may only be challenged by an election petition lodged by 10 or more electors or a person claiming to have been a candidate in the relevant constituency.

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=130997&QS=%2B&TP=JU&currpage=T)

9. On Issue (i), the CFI held that the Applicant has adopted the wrong legal procedure (i.e. judicial review) to challenge the Decision. (para. 37) In arriving at this ruling, the CFI held that on the face of section 49(2) of DCO, the Applicant's complaint in this case can only be ventilated in an election petition. The wording of that subsection - "[a]n election to return an elected member may be questioned only by an election petition lodged under section 50" [emphasis added] is mandatory. The CFI also relied on a formidable line of authorities. (para. 16)
10. The CFI summarized the applicable legal principles from the authorities (which were in the context of Legislative Council election or village representative (resident) ordinary election etc.), and held that the principles, with necessary modifications, are equally applicable to a person seeking to challenge a District Council election. The relevant summary is that where a person has the standing to lodge an election petition on grounds specified under relevant legislation, he is



generally precluded from challenging the election by way of judicial review. (paras. 17-33)

11. On the facts of the case, the Applicant was challenging the Returning Officer's decision that his nomination was invalid. This necessarily amounted to questioning an "election" within the meaning of section 49(1) of the DCO. Thus, the Applicant's present challenge can only be advanced in an election petition instead of an application for judicial review. (paras. 34 and 35)

12. On Issue (ii), it was premised on the Applicant's alternative argument that in the event section 49 of the DCO was found to have ousted the court's jurisdiction to review the lawfulness of the Decision, section 49 would be inconsistent with BL 35. The CFI rejected this argument, and held that the Applicant's right of access to the courts has not been infringed by denying him the right to proceed by judicial review, because he has an alternative remedy to challenge the Decision by way of election petition. (para. 36)

13. On Issue (iii), the CFI did not consider it necessary to deal with it because the conclusion that the Applicant has adopted the wrong legal procedure to challenge the Decision was sufficient to dispose of the leave application. (para. 37)

Civil Division

Department of Justice

23 September 2020