



Summary of Judicial Decision

**Chow Ting (“the Petitioner”) v Teng Yu-Yan, Anne (Returning Officer for the Hong Kong Island Geographical Constituency) (“Returning Officer”) & Au Nok-hin
HCAL 804/2018; [2019] HKCFI 2135**

Decision : Election Petition allowed
Date of Hearing : 17 June 2019
Date of Judgment/Decision : 2 September 2019

Background

1. For the purpose of the Legislative Council (“**LegCo**”) by-election for the Hong Kong Island Geographical Constituency held on 11 March 2018 (“**the 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 18 January 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 (“**Confirmation**”) confirming that she understood that to uphold the Basic Law included upholding its Articles 1, 12 and 159(4).
3. On 27 January 2018, the Returning Officer informed the Petitioner that she was not validly nominated as a candidate for the By-election (“**Decision**”). The Returning Officer explained, in essence, that the doctrine of “democratic self-determination” (民主自決) as promoted by Demosistō (“**Doctrine**”) was inconsistent with the principle of “one country, two systems” as enshrined and implemented under the Basic Law. Given that there was evidence that the Petitioner subscribed to the Doctrine, the Returning Officer was satisfied that the Petitioner did not have the intention to uphold the Basic Law and pledge allegiance to the HKSAR despite her signing of the Declaration and Confirmation.
4. The Petitioner filed an election petition on 8 May 2018 claiming that multiple irregularities occurred in relation to the By-election with the result that the Petitioner was wrongly determined to have been invalidly nominated.

Issues in dispute

5. Three principal questions arose for determination in this election petition:-
 - (a) Whether the Requirement is a substantive one;
 - (b) Whether the Returning Officer should give the Petitioner a reasonable opportunity to respond to the materials that the Returning Officer intended to rely upon before making the Decision;



- (c) If so, whether (i) there was a material irregularity in the By-election; and (ii) if there was a material irregularity, whether the court should nevertheless dismiss the election petition on the ground that giving the Petitioner an opportunity to present her case would have made no difference to the outcome.

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=124063&QS=%2B&TP=JU)

6. On issue (a), in holding that the Requirement is a substantive one, the Court agreed with the judgment of *Chan Ho Tin v Lo Ying Ki Alan* [2018] 2 HKLRD 7 and held that the issue is in any event conclusively settled by paragraph 1 of the interpretation of Article 104 of the Basic Law issued by the Standing Committee of the National People's Congress of the People's Republic of China on 7 November 2016, which is binding on the court and expressly stipulated that the Requirement is "... *also the legal requirements and precondition for standing for election in respect of or taking up the public office specified in the Article*" (paragraphs 22-23).
7. Regarding Au J's view in *Chan Ho Tin* that, in order to overcome the *prima facie* evidence of the Declaration, there has to be "*cogent, clear and compelling materials*" to show objectively and plainly that the nominee does not have the requisite intention at the time of the nomination, the Court observed that it could lead to an endless or fruitless debate on whether the materials are sufficiently "*cogent, clear and compelling*" if this is intended to lay down a legal requirement on the quality of the materials required for this purpose. The Court commented (but left the issue open) that the question for the Returning Officer should be "*whether the candidate genuinely and truthfully intends to uphold the Basic Law and pledge allegiance to the HKSAR*" (paragraph 24).
8. On issue (b), the Court held that the Returning Officer's failure to give the Petitioner any reasonable opportunity to respond is contrary to the principle of natural justice or procedural fairness. Even if the Returning Officer considered that she had clear and cogent evidence that the Petitioner did not satisfy the Requirement, she should still have given the Petitioner an opportunity to refute such evidence and explain her position with a view to persuading the Returning Officer to come to a different conclusion (paragraphs 25-29).
9. On issue (c)(i), the Court held that the Returning Officer's failure to give the Petitioner a reasonable opportunity to put forward her case before she made the Decision is a material irregularity in the By-election. (paragraphs 30-32)
10. On issue (c)(ii), the Court held that in view of the circumstances of the present case, it was not appropriate for the Court to exercise its discretion to refuse to grant relief (if the Court has such a discretion):-



- (i) The starting point is the fundamental principle that the HKSAR is an inalienable part of the People’s Republic of China (“**PRC**”). Any person who advocates for the independence of Hong Kong, or for a process of “self-determination” by Hong Kong People cannot genuinely and truthfully intend to uphold the Basic Law and pledge allegiance to the HKSAR. (paragraph 36)
 - (ii) Hong Kong law does not provide for important issues to be determined by “referendum”, the concept of which has no basis under our legal system. In any event, to advocate the determination of Hong Kong’s future by a constitutionally effective, or binding, referendum by Hong Kong people could potentially lead to the secession or independence of Hong Kong and would therefore be incompatible with the fundamental principle that the HKSAR is an inalienable part of the PRC (paragraph 37).
 - (iii) However, it would appear that the Doctrine supported by the Petitioner involved the use of a non-binding referendum essentially to forge public opinion and put pressure on the Central People’s Government and HKSAR Government when formulating future plans for Hong Kong and Hong Kong people with a view to pushing for a greater degree of autonomy for Hong Kong. (paragraph 38)
 - (iv) It is a matter for the Returning Officer to decide, prior to making the Decision, whether the Petitioner satisfied the substantive Requirement in view of the Petitioner’s response. While the Court would not rule out the possibility that it may, in some exceptional circumstances, find that the fairness and integrity of an election has not been compromised even where a candidate was denied an opportunity to be heard prior to his nomination being declared to be invalid, having regard to the circumstances of the present case, it is not appropriate for the court to pre-empt the decision of the Returning Officer on whether to accept the Petitioner’s explanation on her understanding of the concept of “democratic self-determination”, or find that it would have no difference to the outcome had she given the Petitioner a reasonable opportunity to put forward such explanation prior to making the Decision. (paragraphs 39 to 42)
11. The Court allowed the election petition and declared that (i) Au Nok-hin 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 his place. (paragraphs 43)

Civil Division

Department of Justice

2 September 2019