



Summary of Judicial Decision

Lau Wing Hong (“Petitioner”) v Chan Yuen Man, Amy (Returning Officer for the New Territories East Geographical Constituency) (“Returning Officer”) & Fan Gary Kwok Wai (“Mr. Fan”)

HCAL 844/2018; [2019] HKCFI 2287

Decision : **Election Petition Allowed**
Date of Hearing : **4 September 2019**
Date of Judgment/Decision : **13 September 2019**

Background

1. For the purpose of the Legislative Council (“**LegCo**”) by-election for the New Territories East 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 25 January 2018, the Petitioner submitted his 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**”) declaring and confirming that he understood that to uphold the Basic Law included upholding Articles 1, 12 and 159(4) thereof.
3. On 31 January 2018, the Returning Officer informed the Petitioner that his nomination as a candidate in the By-election had been declared by her to be invalid, on the ground that she was not satisfied that the Petitioner genuinely and truly intended to uphold the Basic Law and pledge allegiance to the HKSAR and that he had duly complied with section 40(1)(b)(i) of the LCO (“**Decision**”). Essentially, the Returning Officer came to that conclusion by reason of the Petitioner’s manifest and sustained stance in support of the independence of Hong Kong up to at least November 2016, notwithstanding the Petitioner’s purported public renunciation of that stance since December 2017. On the other hand, the Petitioner’s position was that he had a genuine change of heart after he came to realise, since 1 January 2016, that most people in Hong Kong were against Hong Kong independence.
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 11 March 2018 with Mr. Fan elected.
5. The Petitioner filed an election petition on 15 May 2018 seeking the Court’s declaration on, *inter alia*, whether Mr. Fan 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. Three principal questions arose for determination in this election petition:-
 - (a) Whether the Requirement was satisfied by signing the Declaration;
 - (b) If not, whether the Returning Officer ought to have given the Petitioner an opportunity to respond to the materials that the Returning Officer intended to rely upon for the Decision;
 - (c) If so, (i) whether the Returning Officer's failure to do so amounted to a material irregularity in the By-election; and if it did, (ii) whether the Court should nevertheless refuse to grant relief and dismiss the election petition on the ground that the Returning Officer would have come to the same conclusion even if she had given the Petitioner an opportunity to make representations.
7. The Petitioner also applied for leave to adduce further evidence to show that there was an instance in relation to the LegCo by-election in another Constituency where the returning officer did make relevant inquiries with a potential candidate prior to ruling on the validity of the candidate's nomination.

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

(full text of full CFI's judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=124354&QS=%2B&TP=JU)

8. The Court saw no reason to differ from the conclusions reached in the recent case of *Chow Ting v Teng Yu-Yan Anne (the Returning Officer for the Hong Kong Island Constituency) and Anor* [2019] HKCFI 2135 (2 September 2019). (paragraph 12)
9. On issue (a), the Court ruled that the Requirement was not satisfied by the Petitioner merely by signing the Declaration, and the Returning Officer was entitled, as a matter of law, to go behind the signed Declaration and examine whether the Petitioner genuinely and truly held such an intention. (paragraph 12(1))
10. On issue (b), the Returning Officer ought to have given the Petitioner an opportunity to respond to the materials intended to be relied upon by the Returning Officer in reaching the Decision. (paragraph 12(2))
11. On issue (c), failure to afford the Petitioner an opportunity to respond amounted to a material irregularity in the By-election, and the Court should not exercise its discretion to refuse to grant relief in the present case. While the Returning Officer confirmed she would have come to same conclusion even if she had given the Petitioner an opportunity to make representations and he



had responded by relying on the same materials and explanations being put forwarded in these proceedings, the principle of natural justice requires that the person affected by an adverse decision ought generally to be given an opportunity to make representations prior to the decision being made against him. Retrospective consideration of the representations by the decision-maker is generally unsatisfactory and should not be accepted by the court as being sufficient save in exceptional circumstances. (paragraphs 12(2), 12(3) and 11(3))

12. The Petitioner's application to adduce further evidence was dismissed, as the proposed evidence was irrelevant. (paragraphs 13 to 14)
13. The Court allowed the election petition and declared that (i) Mr. Fan 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. (paragraph 15)

Civil Division

Department of Justice

13 September 2019