# Leung Sze Ho Albert v Bar Council of the Hong Kong Bar Association

CACV No. 246 of 2015 (28 October 2016)[1]
CA

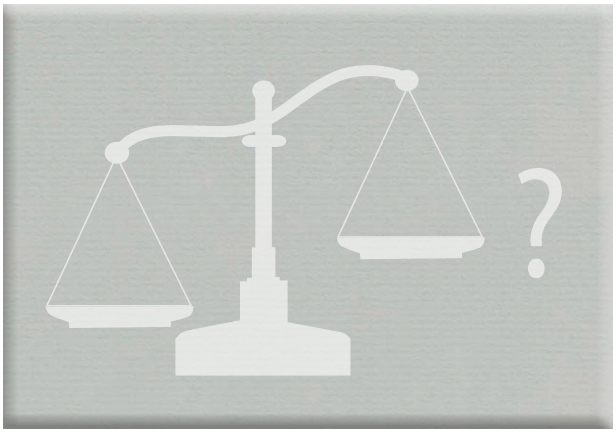
## Background

The Applicant was called to the Hong Kong Bar in 2005. He worked as an employed barrister until January 2014 when he resumed private practice. In March 2014 he completed a course in neuro-beautology with the International Naturopathic College ("the College") and sought permission from the Bar Council to engage in neuro-beautology as a supplementary occupation. The Applicant further stated that neuro-beautology is a natural medicine and involves 'body figuring' clients to correct distorted body structures. He undertook not to spend more than 17 hours a week in this occupation.

The Honorary Secretary of the Bar had considerable reservations about the professional standing of: (a) the College; (b) the International Naturopathic Medicine Association (of which holders of the certificate held by the Applicant were apparently eligible for membership); (c) the professional certificate held by the Applicant; and (d) body-figuring practitioners. He reported his findings to the Bar Council on 6 March 2014, which refused the application under para. 23 of the Code of Conduct of the Bar ("the Code"). Para. 23 stipulates, *inter alia*, that a practising barrister who wishes to engage in a supplementary occupation should apply and obtain the general or special permission of the Bar Council[2] . The Bar Council was not satisfied that the Applicant's engagement as a neuro-beautologist would be compatible with his practice as a barrister.

## Decision of CFI

The Applicant applied for judicial review of the Bar Council's decision ("the Decision") on two main grounds: (1) para. 23 of the Code unlawfully infringed his freedom of choice of occupation guaranteed under BL 33 which provided that Hong Kong residents should have freedom of choice of occupation; and (2) the reasons given by the Bar Council i.e. that the Applicant's intended supplementary occupation was not compatible with his practice as a barrister primarily because of its nature and lack of professional standing, were inadequate.



[1] Reported at [2016] 5 HKLRD 542.

[2] As required by para. 23(3)(a) of the Code (the Supplemental Occupation Rule).

On Ground (1), the Judge identified the following issues: (i) whether the Decision is amenable to judicial review; (ii) whether para. 23 of the Code unlawfully restricts the freedom of choice of occupation and is unconstitutional; four further issues arose: (a) whether BL 33 is engaged by para. 23 of the Code; (b) assuming BL 33 is engaged, whether the restriction is prescribed by law; (c) whether there is a rational connection to the legitimate aim pursued; and (d) whether the restriction satisfied the requirement of proportionality. On Ground (2), the only question identified by the Judge was whether the Decision should be set aside for the failure to give adequate reasons.

The Judge held that BL 33 was engaged and that para. 23 of the Code did not satisfy both the 'prescribed by law' requirement and the 'rationality' requirement and thus the "proportionality" requirement did not arise for determination.

Regarding Ground (2), the Judge held that the Bar Council had not given the Applicant an adequate indication as to why it had refused his application.

The CFI therefore allowed the Applicant's application for judicial review, quashed the Bar Council's decision, and granted a declaration that para. 23 of the Code infringed BL 33 insofar as it prevents a barrister from engaging in any supplementary occupation without the prior permission of the Bar Council.

## Decision of CA

### Whether BL 33 was engaged

The Bar Council appealed to the CA and argued that in light of the CFA decision in *GA v Director of Immigration*[3], BL 33 is not engaged.

The CA took the view that whether BL 33 is engaged by para. 23 of the Code turns on the true meaning of BL 33. The CA held that BL 33, like other provisions in Chapter III of the Basic Law, should be given 'a generous interpretation' in order to give to Hong Kong residents 'the full measure' of the rights and freedoms so constitutionally guaranteed. The proper interpretation of BL 33 should be informed by its context and purpose.

Had it been free from authorities, the CA would have considered that BL 33, in receiving a generous interpretation, should arguably also comprise two limbs: first, a resident shall not be forced to work in any or any particular field of occupation against his wishes. Secondly, a resident shall have the freedom to work in any or any particular field of occupation of his choice (assuming work is otherwise available and he is otherwise qualified to do so, etc.). This second limb, is quite different from, and indeed far less extensive in content than, a right or guarantee


[3] Reported at (2014) 17 HKCFAR 60.


that there will be available employment to take up, or in other words, a general right to work. The latter is a right guaranteed under ICESCR 6, which thus far has no domestic force.

The CA made it clear that the CFA decision in *GA v Director of Immigration* had ruled out the possibility of BL 33 having the second limb stated above, i.e. that a resident shall have the freedom to work in any or any particular field of occupation of his choice (if work is available etc.).

The CA explained that this case was in truth covered by the decision in *GA v Director of Immigration*, which held that the right conferred by BL 33 was a passive or negative right of freedom to choose an occupation. It does not imply a right to take up available employment in the first place. Nor does it confer an unqualified right to obtain employment, which is necessarily subject to market forces and legal constraints, such as visa and qualification requirements.

The CA concluded by distilling two propositions from the CFA decision in *GA v Director of Immigration*: (i) under the common law, a general right to work did not exist; and (ii) BL 33, on a proper construction, only protected against conscription to particular fields of occupation. It did not confer a right to work in general. Following the CFA decision in *GA v Director of Immigration*, it is clear that BL 33 does not confer a general right to work.

## Common law right to work

The Applicant submitted that a right to work has always existed under the common law, which recognizes a person's right to choose his own occupation. The common law right is elevated to a constitutional status by virtue of BL 33. The Applicant also submitted that the Basic Law is not


a freeze-frame. It is a living instrument intended to meet changing needs and circumstances. In construing it, the court must take into account the evolving social context. Given the present social context, BL33 must now be construed to include a general right to work.

The CA rejected the Applicant's above argument. The CA held that while it was well established that a "constitution" such as the Basic Law was capable of growth and development over time to meet new social, political and historical realties since the time of its enactment, when in a particular case the court was asked to depart from a long held position in interpreting the Basic Law, the court would approach the matter with extreme caution to ensure that such departure was truly warranted so as to reflect the underpinning societal changes and realities. Otherwise, the court would act beyond its constitutional role by writing new, or re-writing existing, social policy in the guise of constitutional interpretation.

In this regard, the CA noted that the CFA handed down its judgment in *GA v Director of Immigration* on 18 February 2014, some 32 months before the CA decision, holding unequivocally that BL 33 confers no general right to work. The CA could not see, on the materials before it, any significant societal changes since February 2014 that would warrant a departure from the decision in *GA v Director of Immigration* that BL 33 confers no general right to work.

## Proportionality test

The CA held that since BL 33 does not confer a general right to work, it is not engaged by the restriction in para. 23 of the Code, and no questions of proportionality arise for determination.

## Whether reasons given adequate

The CA took the view that the reasons given by the Bar Chairman in his letter dated 7 March 2014 i.e. that the Bar Council was not satisfied that the Applicant's engagement as a neuro-beautologist would be compatible with his practice as a barrister, were very brief. So too were the minutes of the Bar Council meeting of 6 March 2014, which did not add much to the adequacy of the reasons. Accordingly,



the CA found that the Judge was correct in holding that the reasons were inadequate.

The CA took the view that in determining that neuro-beautology is not a compatible supplementary occupation, the Bar Council, collectively representing the profession's views on the norms and standards acceptable to the profession, is exercising a value judgment involving the considerations set out in the affirmation of the Honorary Secretary filed in the proceedings before the CFI. The CA observed that it was not enough to expect that the Applicant, even with his professional training as a barrister, would be able to figure out the exact reasons why his application was rejected by the Bar Council on the ground of incompatibility. The CA considered that the reasons set out in the Honorary Secretary's affirmation should have been provided to the Applicant when the decision was communicated to him. That said, the CA held that the Judge below ought to have accepted that the reasons disclosed in the course of the proceedings were adequate and refused to quash the decision on the ground of inadequate reasons.

For the above reasons, the CA allowed the Bar Council's appeal and dismissed the Applicant's application for judicial review with costs to the Bar Council.

Judgment Update

# Sam Woo Marine Works Ltd v The Incorporated Owners of Po Hang Building

FACV No.10 of 2016 (29 May 2017)[1]

CFA

## Background

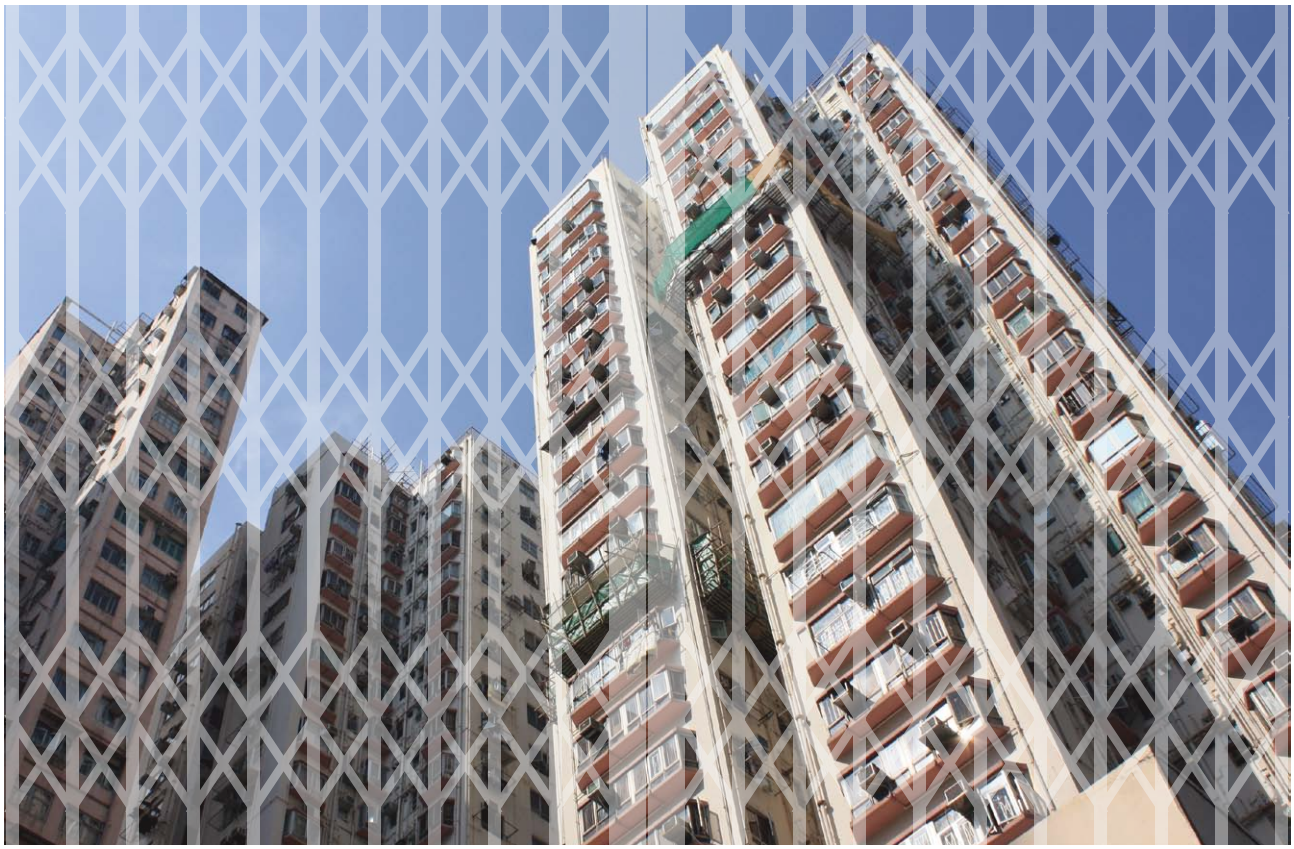
The issue before the CFA was the constitutionality of s. 63B of the District Court Ordinance, Cap. 336 ("DCO"). The DCO gives a limited right of appeal from decisions of the District Court ("DC") in civil cases. S. 63(1) provides that such appeals can only proceed with leave of a judge or the CA. By s. 63A(2), such leave shall not be granted unless the appeal has a reasonable prospect of success or there is some other reason in the interests of justice for hearing the appeal. Further, s. 63B provides that no appeal lies from the CA's decision to refuse (or grant) leave. The appellant (Sam Woo Marine Works Ltd) sought to challenge the constitutionality of s. 63B in respect of an appeal from a decision of the CA refusing leave to appeal to it against an order of the DC, contending that it is inconsistent with BL 82 which materially states: "The power of final adjudication of the [HKSAR] shall be vested in the [CFA] of the Region...".

The appellant was the owner of a shop on the ground floor of Po Hang Building, of which the respondent was the Incorporated Owners' corporation ("IO"). The appellant erected a metal fence and door enclosing a service lane running adjacent to the building and forming a portion of its common parts. The IO brought proceedings against the appellant in the DC alleging breach of the Deed of Mutual Covenant (to which the appellant was a party) and seeking mandatory injunctions requiring the fence and door to be removed and the lane reinstated.

The appellant failed to file a defence in time, leading to the IO's application for judgment in default. The appellant applied for an extension of time to file its defence and counterclaim, contending that the IO's claim was defeated by limitation and that the appellant had acquired title to the service lane by adverse possession. The DC refused the appellant leave to file its pleadings out of time and entered judgment in favour of the IO.

The appellant then applied to the DC for a stay of execution and for leave to appeal to the CA. That application was dismissed on the basis that an

[1] Reported at (2017) 20 HKCFAR 240.



appeal had no reasonable prospect of success and there was no other reason why the appeal should be heard in the interests of justice. The appellant next applied to the CA for leave to appeal against the Judge's decision refusing leave to file pleadings out of time and entering judgment in the IO's favour. Leave was refused as the CA remained unpersuaded that the appellant's case was reasonably arguable. The appellant proceeded to seek the CA's leave to appeal to the CFA against the decision of the CA refusing leave to appeal to itself from the DC. The CA held that given the finality provision in DCO s. 63B, this was on its face an incompetent application. However, the appellant sought to contend that s. 63B is inconsistent with BL 82 and thus unconstitutional. Applying an earlier CA decision[2] and the reasoning of the Appeal Committee in *HLF v MTC*[3] , the CA upheld the constitutionality of s. 63B as a proportionate restriction and dismissed the application. Leave to appeal to the CFA was sought from the Appeal Committee on both the constitutionality and adverse possession issues. Leave was granted only on the following questions:

(i) Is s. 63B of DCO inconsistent with BL 82 and thus unconstitutional?

(ii) Does the CFA have jurisdiction to entertain an appeal from a judgment of the CA refusing leave to appeal to it?

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[2] *Hong Kong Housing Society and Secretary for Justice v Wong Nai Chung* HCMP 880/2009 (unreported, 22 September 2010) (CA).

[3] Reported at (2004) 7 HKCFAR 167.

## Construction of the statutory provisions

### The appellant's argument

The appellant sought to argue that as a matter of statutory construction, a refusal of leave, being a 'decision' or 'order' of the CA, is a 'judgment' as defined by s.19 of the Hong Kong Court of Final Appeal Ordinance, Cap. 484 ("HKCFAO"), and is therefore within the jurisdiction of the CFA by virtue of s. 22(1)(b) of the HKCFAO; and thus BL 82 is not engaged, hence, on the true construction of the relevant statutory measures, the finality provision in DCO s.63B does not take effect. The appellant's argument involves two main propositions: (i) that s. 63B is inconsistent with s. 22(1)(b); and (ii) that s. 22(1)(b) is the controlling provision which trumps s. 63B. If it is accepted, then the first question on which leave was given does not arise and the second question must be answered "Yes".

### Later law prevails

The CFA found that the DCO amendments which include s. 63(1) laying down the requirement for leave to appeal to the CA was enacted later than ss. 19 and 22(1)(b) of HKCFAO. Those amendments thus expressly exclude that class of "decision" by the CA from the ambit of s. 22(1)(b). In so far as it cannot be reconciled with s. 22(1)(b), the rule is that the earlier provisions give way to the later[4] . It follows that s. 63B is not somehow trumped by s. 22(1)(b) but (subject to its constitutional validity) operates as a finality provision qualifying the latter section. It is true that s. 22(1)(b) was amended in 2014. The CFA opined that the 2014 amendment is not in any way inconsistent with s. 63B and does not impliedly override or qualify that section.

### The reasoning in *Lane v Esdaile*

Applying a line of authority beginning with *Lane v Esdaile*[5] leads to the conclusion that ss. 63(1), 63A(2) and 63B read together should be construed as investing with finality a decision of the CA refusing leave to appeal to itself from a first instance judgment of the DC. In *Lane v Esdaile*, the House of Lords held that on a purposive construction of the provisions, given the requirement to obtain the CA's leave to appeal from the first instance judgment, that court's refusal of leave was final and there was no jurisdiction to entertain the appeal.

The reasoning of *Lane v Esdaile* has repeatedly been applied for more than 100 years. Lord Hoffmann's explanation of *Lane v Esdaile's* approach to construction[6] in giving the advice of the Privy Council was adopted by the Appeal Committee in *HLF v MTC*, where the CA had refused to give the applicant leave to appeal (required by DCO s. 63) against ancillary relief orders made at first instance in matrimonial proceedings. Adopting the reasoning of *Lane v Esdaile* that the leave requirement seeks to prevent frivolous proceedings and that such purpose will be defeated if a right to appeal exists against a

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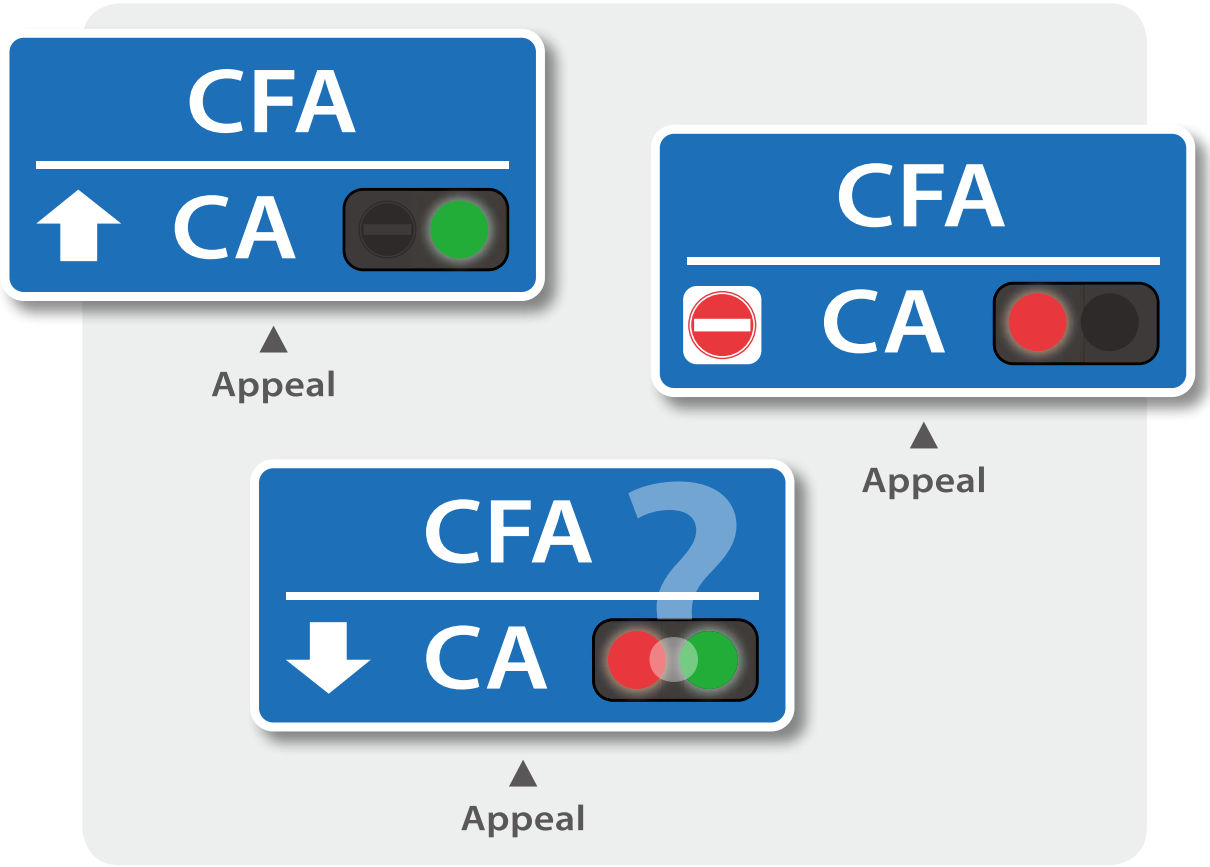
4 Oliver Jones, *Bennion on Statutory Interpretation*, 6th Edition states the principle as follows:
"Where a later enactment does not expressly repeal an earlier enactment which it has power to override, but the provisions of the later enactment are contrary to those of the earlier, the later by implication repeals the earlier in accordance with the maxim *leges posteriores priores contrarias abrogant* (later laws abrogate earlier contrary laws)."

5 Reported at [1891] A.C. 210.

6 "Their Lordships consider that the principle in [*Lane v Esdaile* as explained in *Ex parte Stevenson*], is that a provision requiring the leave of a court to appeal will by necessary intendment exclude an appeal against the grant or refusal of leave, notwithstanding the general language of a statutory right of appeal against decisions of that court. This construction is based upon the 'nature of the thing' and the absurdity of allowing an appeal against a decision under a provision designed to limit the right of appeal." *Kemper Reinsurance Co v Minister of Finance (Bermuda)* [2000] 1 A.C. 1 (PC) at 13.




decision to grant or refuse leave, and noting that no constitutional challenge was being mounted, the Appeal Committee concluded that no appeal lay to the CFA.

The CFA considered that it was unnecessary in the present case to imply a finality provision by a process of purposive construction. Ss. 63(1), 63A(2) and 63B are plainly intended, *inter alia*, to enable the CA to filter out unnecessary, unmeritorious or frivolous would-be appeals. For the CFA to entertain an appeal against the CA's refusal of leave to appeal to itself would be to render those sections illusory and would result in absurdity. The CFA concluded that on its true construction, DCO s. 63B operates as a finality provision.

## The proportionality test

The CFA considered that the combined effect of DCO ss. 63(1), 63A(2) and 63B is to create a limitation on the power of final adjudication of the CFA vested in BL 82. It is a constraint which has to be justified on a proportionality analysis, as held in *A Solicitor v Law Society*[7] and *Mok Charles Peter v Tam Wai Ho*[8]. The approach for the proportionality analysis to determine the constitutionality of the limitation on the CFA's function of final adjudication was recently reviewed in *Hysan Development Co Ltd v Town Planning Board*[9]. The elements of the applicable test in the present case were set out as follows: (i) to pursue a legitimate aim; (ii) to be rationally connected to advancing that aim; (iii) to be no more than is necessary to accomplish that

[7] (2003) 6 HKCFAR 570 at para. 30.
[8] (2010) 13 HKCFAR 762 at paras. 21-29, per Ma CJ.
[9] (2016) 19 HKCFAR 372 in Sections E, F and G of the judgment.

aim; and (iv) to strike a fair balance between the general interest and any individual rights intruded upon.

## Legitimate aims and rational connection

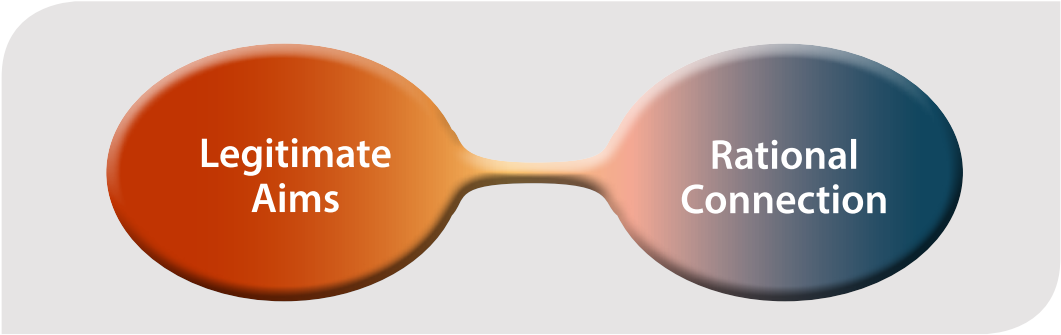
The CFA found that the statutory scheme created by ss. 63(1), 63A(2) and 63B of DCO has two broad aims. First, by having the CA screen out cases which have no reasonable prospect of success on appeal, it promotes the proper and efficient use of judicial resources and the avoidance of oppressive and unproductive appeals. Secondly, in the context of a court of limited jurisdiction, the scheme aims to maintain a reasonable proportionality between litigation costs and the amounts at stake by restricting the available tiers of appeal. The CFA held that it is plain that the above two broad aims are legitimate aims and that the restriction of rights of appeal by ss. 63(1), 63A(2) and 63B is rationally connected to their achievement.

## No more than necessary

The appellant submitted two main arguments to contend that the finality provision goes disproportionately beyond what is necessary. Firstly, s. 63B imposes an absolute ban so that it ought to be held to fail the proportionality test. Secondly, the appellant also submitted that it is the CA rather than the CFA itself which decides what cases should be excluded as having no reasonable prospect of appeal. The appellant contended that in allocating the screening process to the CA in itself constitutes an unnecessary and disproportionate restraint on the CFA's power of final adjudication.

The CFA rejected the first argument and held that the DCO provisions limiting the right of appeal plainly do not erect a total ban on appeals. The CFA noted that the CA is entrusted with vetting the prospects of a potential appeal and enjoined to refuse leave unless the criteria specified in s. 63A(2) are met. Conversely, if the application relates to an appeal which does have a reasonable prospect of success or in respect of which there is some other reason in the interests of justice for hearing the appeal, the CA may be expected to grant leave. If leave is granted and the appeal is determined, the parties could apply for leave to appeal to the CFA. If the s. 22(1)(b) criteria are satisfied, leave could be expected to be granted and the final appeal duly heard by the CFA in the exercise of its power of final adjudication.

Regarding the second argument, the CFA found that it ignores the legitimate aims identified above as the first step of the analysis, namely, the aims of promoting the proper use of judicial resources, the proper role of the CFA, and the economic proportionality in litigation. In extending the argument to cover applications for leave to appeal from all judicial tribunals, it also ignores other rules aimed at fostering an equality of arms between




the parties such as well-resourced employers or businesses on the one hand and employees and consumers with modest means on the other. The CFA opined that access to justice afforded by such tribunals would be wholly undermined if a well-resourced litigant were able to drag poorer opponents up successive appellate levels all the way to the CFA's Appeal Committee, requiring unaffordable costs to be incurred and greatly delaying resolution of their claims.

Accordingly, the CFA held that the appellant's objection to the appellate process being halted at the level of the CA is not an argument about the proportionality of the statutory measures designed to achieve the aforesaid aim but an argument which disavows that legitimate aim itself. Moreover, it failed to address the legitimate aim of preventing the apex Court from being unduly burdened with appeals so as to enable it to concentrate on appeals of importance to the entire legal system.

## The overall balance

The CFA said that the fourth step in the proportionality analysis was not of direct significance in the present case as no individual constitutional rights were infringed. While the provision is a restriction on the CFA's power of final adjudication, it is in the general interest to avoid the waste of judicial resources and to promote economy in litigation. It is beneficial both to the parties and to the courts that appeals which have no reasonable prospects of success should not be allowed to proceed.

## Conclusion

In conclusion, the CFA held that the restrictions in question are proportionate and constitutionally valid limitations on the Court's power of final adjudication and do not go beyond what is reasonably necessary for the achievement of the legitimate aims identified. The CFA found that the questions for which leave was granted should therefore be answered in the negative and unanimously dismissed the appeal.

**Appeal Dismissed**


# Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs

FACV No. 12 of 2016 (11 July 2017)[1]
CFA

## Background

In July 2009, a political party (The League of Social Democrats) proposed that one member from each of the five geographical constituencies within the LegCo should resign in order to trigger by-elections in the constituencies in which the five resigning members would stand. On 25 January 2010, one member from each of the five constituencies did resign. These five resignations triggered by-elections in the relevant constituencies. The five resigning members all took part in the by-elections and were re-elected. The voter turnout was, however, low and other major political parties did not take part in the by-elections. The cost of the by-elections was about $126 million.

In June 2011, the Government introduced a Bill providing that where a member of the LegCo resigned, his or her place would be filled by the candidate with the largest number of votes who was not elected in the previous general election. On 22 July 2011, a Consultation Paper on Arrangements for Filling Vacancies in the LegCo was issued by the Respondent seeking the public's views on the incident of the five resigning members which was termed as a "mischief" as the Government regarded it as an "abuse" for a member to resign in order to cause a by-election in which that member intended to stand. The results of the consultation were published in a report which concluded with a proposal that any member who resigned from the LegCo would be prohibited from taking part in any by-election within six months of resignation. On 3 February 2012, the Government introduced what is now s. 39(2A) of the Legislative Council Ordinance, Cap. 542 ("LCO"). The Bill was passed on 1 June 2012. S. 39(2A) provides that a member of the LegCo who has resigned is disqualified from being nominated as a candidate at a by-election[2] consequent on that member's resignation.

## The proceedings below

The Applicant applied for judicial review on the ground that s. 39(2A) was unconstitutional. The application was dismissed by the CFI, which accorded a wide margin of appreciation to the LegCo in the proportionality analysis and held that the provision was constitutional. The Applicant appealed to the CA. In dismissing the appeal, the CA similarly accorded a wide

[1] Reported at (2017) 20 HKCFAR 353.

[2] If:-
(a) within the 6 months ending on the date of the by-election--
(i) the person's resignation under section 14 as a Member took effect; or
(ii) the person was taken under section 13(3) to have resigned from office as a Member; and
(b) no general election was held after the relevant notice of resignation or notice of non-acceptance took effect.

margin of appreciation to the LegCo, and gave much weight to the fact that the matter involved political judgment. The Applicant's application for leave to appeal to the CFA was dismissed by the CA. Subsequently, on 29 September 2016, the Applicant was granted leave to appeal to the CFA by the Appeal Committee on the following question of great general or public importance:-

> "Is section 39(2A) of the LCO inconsistent with BL 26 and/or Article 21 of the BoR ("BoR 21"), and therefore unconstitutional?"

The challenge is based on BL 26 and BoR 21:-

(a) BL 26 states:-

> "Permanent residents of the HKSAR shall have the right to vote and the right to stand for election in accordance with law."

(b) BoR 21 states:-

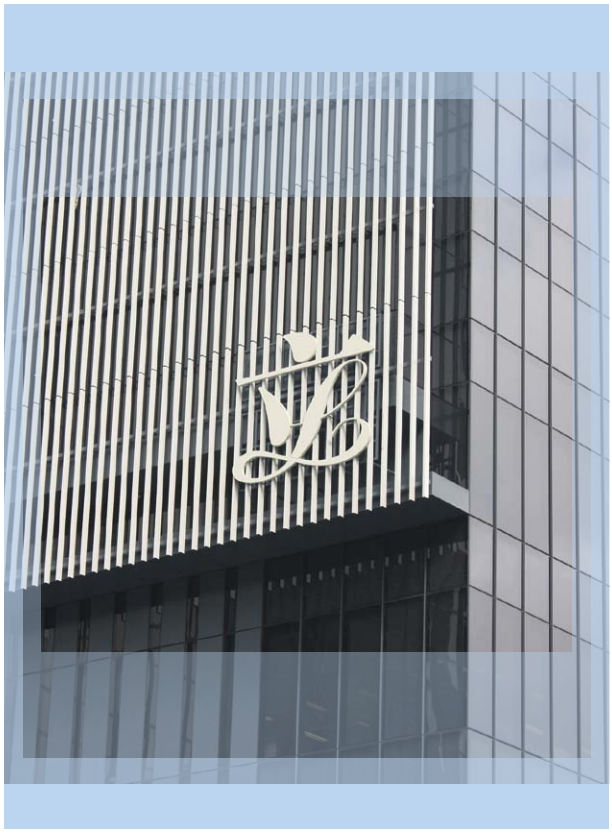
> **"Right to participate in public life**
>
> Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions--
>
> (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) to have access, on general terms of equality, to public service in Hong Kong."

## The context of elections to the LegCo under the Basic Law and the LCO

Notwithstanding the absence of express qualifications to the right set out in BL 26, the CFA noted that it must be read together with BoR 21 which does contain qualifications. It is accepted that the right to stand for election is not an absolute right and that the words "without unreasonable restrictions" in BoR 21 require the application of the proportionality test. The CFA observed that the relevant approach to constitutional challenges on provisions such as s. 39(2A) has to be seen in the context of elections to the LegCo and the position of members of the LegCo under the Basic Law and the LCO. The LCO sets out detailed provisions regarding elections to the LegCo. It is relevant to note that any member who has resigned is eligible for re-election as a member but is subject to the disqualification provisions contained in s. 39 of the LCO. Regarding LegCo members, the powers and functions of them are set out in BL 73 and 74. Under BL 79(2), the President of the LegCo shall declare that a LegCo member is no longer qualified for the office if, *inter alia*, the member, with no valid reason, is absent from meetings for three consecutive months without the consent of the President of the LegCo.



## Constitutional challenges - the legal approach

While the determination of constitutionality is a question of law for the courts to determine, the general approach in cases involving challenges to legislation or other measures said to contravene constitutionally guaranteed rights is set out in the recent CFA decision in *Hysan Development Co. Ltd. v Town Planning Board*[3] in which the CFA held that, where the guaranteed right is not absolute, the law may validly create restrictions limiting such rights. It is for the Court to determine the permissible extent of those restrictions and it does so by a process referred to as a "proportionality analysis".

Three prior steps must be satisfied by the person asserting unconstitutionality, namely, identification of a constitutionally guaranteed

[3] (2016) 19 HKCFAR 372 at paras. 43-44.


right, identification of the relevant legislation or measure said to infringe such constitutional right, and identification of the infringement itself. The next step in the analysis is to look at the constitutional right itself to see whether there are any inbuilt qualifications contained in the Basic Law or expressly stipulated in the BoR.

In the present case, the relevant right is the right to stand for election contained in BL 26 and BoR 21 and this right has been infringed by the restriction contained in s. 39(2A) of the LCO. The former provision contains no express qualification, while the latter does. On the essence of the proportionality analysis to be adopted, the CFA referred to its observations made in *Hysan*. The proportionality analysis involves four steps:

> "(a) whether the intrusive measure pursues a legitimate aim; (b) if so, whether it is rationally connected with advancing that aim; (c) whether the measure is no more than necessary for that purpose, and (d) whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual."[4]

Regarding the third step, in its reference to "no more than necessary", the CFA observed that there was a need for clarification particularly when viewed against the concept of margin of appreciation. The CFA held in *Hysan* that it is critical to bear in mind when looking at the impugned measure to check whether, in the circumstances of the case, (a) the stricter test of the measure being "no more than necessary" to deal with its legitimate aim; or (b) the test of

[4] See *Hysan* at paras. 134 -135.

the measure merely being "manifestly without reasonable foundation", ought to be applied.

The CFA then summarized the relevant principles in *Hysan*, under which the "no more than necessary" test is a test of reasonable necessity. Under the "reasonable necessity" test, if the court is satisfied that a significantly less intrusive and equally effective measure is available, the impugned measure may be disallowed. An alternative standard which may be applied at the third stage is to ask whether the encroaching measure is "manifestly without reasonable foundation".

The difference between the two standards is one of degree and they are on the same spectrum of reasonableness. The choice of the standard depends on the circumstances of the case and the factual bases claimed for the incursion. The CFA emphasized that, though it is a matter of degree, there are three aspects to consider:-

(a) The nature of the right in question and the degree to which it has been encroached on.

(b) The identification of the relevant decision-maker (in the case of legislation, this will be the Legislature).

(c) Relevance of the margin of appreciation.

The CFA said that the term "margin of appreciation" refers to that area of discretion which the Court will accord to a decision-maker, or, in the case of legislation, to the legislature. It reflects the separate constitutional and institutional responsibilities of the judiciary and other organs of government. In *Hysan* the CFA held that a "manifest" standard may apply where the decision-maker is likely to be better placed than the court to assess what is needed in the public interest. Examples are where the decision-maker has special access to information; special expertise in its assessment; or an overview enabling him to assess competing and possibly prior claims for scarce resources. The Court might also refrain from intervening because the measure reflects a predictive or judgmental decision which it was the institutional role of the decision-maker to take and as to which no single "right answer" exists.

The CFA agreed with the Respondent that political decisions or legislative provisions reflecting political judgments are often precisely those areas where the courts are likely to afford a large margin of appreciation. Where electoral laws involve political or policy considerations, a wider margin of appreciation ought generally to be accorded.

The Applicant argued that where a fundamental right, such as the right to vote, is concerned, no margin of appreciation should be accorded to the Legislature. However, the CFA considered that any encroachment on constitutionally guaranteed rights must be carefully scrutinized by the courts. The margin of appreciation is only one factor in the overall consideration of proportionality by the court, albeit that depending on the circumstances it may assume a greater or lesser degree of importance. It will usually be determinative in the sliding scale as to whether the court will veer towards applying the test of "no more than necessary", or that of "manifestly without reasonable foundation". In either situation, of course, a consideration of the extent of the encroachment on the constitutional right will be important. At all times, it will be essential for the court to keep firmly in mind the value of the right in question.

Lastly the fourth step requires the court, in any determination of whether constitutional rights have been infringed, to take an overall, balanced view of societal and individual interests against each other which lies at the heart of any system for the protection of human rights.

## Application to the present case

Applying the four-step approach in its proportionality analysis, the CFA found that there was clearly a legitimate aim sought to be achieved by the enactment of s. 39(2A) of the LCO, i.e. to deter the resignation of members of the LegCo in order to trigger by-elections in which the resigning members would stand, thus avoiding the adverse impact on the electoral system caused by such resignation. The adverse impact would include an adverse effect on the operation of the LegCo and, in addition, were such resignations to become a common occurrence, the integrity of the Legislature would be undermined and respect for the electoral process lowered. In this regard, the CFA agreed with the Respondent's contention that the Court does not have to be convinced whether the aims are politically correct or even that it agrees with these aims from a political standpoint. The responsibility of the Court is to be satisfied from a legal viewpoint that the aim is, first, identifiable and, secondly, legitimate in the sense that it lies within constitutional limits.

The CFA noted that the Applicant's answer to the question of legitimate aim was simply to emphasise the importance of the right to stand for election and the assertion that there was a lack of cogent evidence to support the aim of the legislation. The CFA considered that this was difficult to accept. The resignation of the five members, followed by the public consultation and the debate within the LegCo, all demonstrated that the aim of the legislation was to deter the mischief identified. Rational connection of s. 39(2A) to the legitimate aim was also established in that s. 39(2A) sought to make it less likely that a member of the LegCo would resign voluntarily in order to provoke a by-election.

The CFA held that, in this case, it was inappropriate to adopt a strict "no more than necessary" test. The CFA considered that a wide margin of appreciation ought to be accorded. The consequence of a wide margin of appreciation given to the LegCo meant that, in the present context, the appropriate test regarding the legislative choice made in s. 39(2A) should be that of "manifestly without reasonable foundation". Since the present case involved matters of political judgment or prediction, some leeway should be permitted to the Legislature to determine what would be an appropriate way of dealing with the perceived mischief.

The Applicant submitted that even if it were accepted that a legitimate aim existed, the line had been drawn far too widely so that every LegCo member who resigned, whatever the reason and even if such were a good reason, would be

caught by the disqualification provisions. Seen in this way, s. 39(2A) represented a disproportionate response to the problem: it went far beyond what was necessary or was at all reasonable or (in the language of BoR 21) it was an "unreasonable restriction". It was submitted that the line could be drawn much more precisely so that certain defined situations could be identified.

The CFA did not accept the argument that the line drawn in the present instance (s. 39(2A)) can be faulted. By reason of the margin of appreciation to be accorded, the CFA considered that the line drawn fell within the range of reasonable options open to the Legislature to adopt in order to deal with the perceived mischief. It was within its political judgment or assessment to adopt this option. Citing Lord Bingham of Cornhill's passage in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*[5] adopted in *Fok Chun Wa v Hospital Authority*[6], the CFA held that even though this may result in 'hard' cases, this does not mean that the line is impermissibly drawn. The Legislature is entitled to draw the line it has.

The fourth step requires a court to take an overall view in the proportionality exercise to ensure that any encroachment on a constitutional right was fully justified. The CFA held that this fourth step was satisfied by the Respondent for the following reasons:-

(a) The first three steps of the proportionality exercise are satisfied and in most cases, this will point towards the fourth step being satisfied as well.

(b) The encroachment on the constitutional right to stand for election is a relatively small one. It only applies to by-elections (and not general elections) and the bar is solely against the resigning member. As far as he or she is concerned, s. 39(2A) cannot be said to bear harshly on the resigning member since, having been elected on a four year mandate and perfectly entitled to stay in office as a legislator, he or she has chosen voluntarily to resign with full knowledge of the consequences. Even then, the bar is only for six months.

(c) As far as voters in the relevant constituency are concerned, the by-election is held in any event and their choice of candidate is unrestricted (except for the resigning member).

Based on the above reasons, the CFA dismissed the Applicant's appeal.


[5] [2008] 1 A.C. 1312, at para. 33, where Lord Bingham of Cornhill said:-"A general rule means that a line must be drawn, and it is for Parliament to decide where. The drawing of a line inevitably means that hard cases will arise falling on the wrong side of it, but that should not be held to invalidate the rule if, judged in the round, it is beneficial."

[6] (2012) 15 HKCFAR 409, at para. 71.

# The determination of the Appeal Committee of the CFA on the application for leave to appeal from Sixtus Leung Chung-hang, Yau Wai-ching v CE of the HKSAR, Secretary for Justice

FAMV Nos. 7, 8, 9 and 10 of 2017 (1 September 2017)[1]

CFA

The above applications for leave to appeal to the CFA concerned the taking of the oath of a Legislative Councillor by the two applicants, Mr Sixtus Leung Chung-hang ("Leung") and Ms Yau Wai-ching ("Yau") after the LegCo election in September 2016. The President of the LegCo determined that their actions did not constitute a valid taking of the oath and he decided that they should be given a further opportunity to do so. Before they were able to do that, proceedings were commenced by the then CE and the Secretary for Justice on the question whether in the circumstances Leung and Yau were entitled to re-take their oaths and the consequences of non-compliance with the constitutional requirement under BL 104.

## Background

BL 104 provides:

> "When assuming office, the Chief Executive, principal officials, members of the Executive Council and of the Legislative Council, judges of the courts at all levels and other members of the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China."

The Oaths and Declarations Ordinance, Cap. 11 ("ODO") stipulates, in s. 16, that the LegCo Oath shall be in the form set out in Part IV of Schedule 2. S. 21 of ODO provides for the consequences of non-compliance[2].

Leung and Yau were respectively elected as a member of LegCo in the general election held in September 2016. They were duly asked to take

[1] Reported at (2017) 20 HKCFAR 390.

[2] Section 21 of the ODO reads:
"Any person who declines or neglects to take an oath duly requested which he is required to take by this Part, shall -
(a) if he has already entered on his office, vacate it, and
(b) if he has not entered on his office, be disqualified from entering on it."

the LegCo oath before the Clerk to LegCo at its meeting on 12 October 2016. Instead of taking the LegCo oath in the form stipulated in Schedule 2 to the ODO, each of them made several material alterations to it, supplementing with various actions. For example, when asked to take their respective oaths, they publicly declared they would act in the interest of, or bear allegiance to, "the Hong Kong nation"; mispronounced "China" or "People's Republic of China"; and displayed a banner stating "Hong Kong is not China". On 18 October 2016, the President decided that the oaths taken by Leung and Yau on 12 October 2016 were invalid, whilst at the same time, decided to permit them to re-take their oaths at the next meeting of LegCo on 19 October 2016, if they made a request in writing. Both Leung and Yau submitted a request.

The CE and Secretary for Justice, on 18 October 2016, commenced legal proceedings to: (i) seek declaratory and injunctive relief against Leung and Yau in relation to their respective entering on the office of a LegCo member, and; (ii) seek relief to quash the President's decision of 18 October 2016 and to declare that Leung and Yau's oaths of office could not be re-administered.

## NPCSC Interpretation

On 7 November 2016, after the hearing of the proceedings in the CFI but before judgment was given, the NPCSC issued an interpretation of BL 104 (the "Interpretation")[3]. The Interpretation states primarily that (1) oath taking is the legal prerequisite and required procedure for public officers specified in BL 104 to assume office. No public office shall be assumed, no corresponding powers and functions shall be exercised, and no corresponding entitlements shall be enjoyed by anyone who fails to lawfully and validly take the oath or who declines to take the oath. (2) Oath taking must comply with the legal requirements in respect of its form and content. An oath taker must take the oath sincerely and solemnly, and must accurately, completely and solemnly read out the oath prescribed by law. (3) An oath taker is disqualified forthwith from assuming the public office specified in the Article if he or she declines to take the oath. An oath taker who intentionally reads out words which do not accord with the prescribed wording, or takes the oath in a manner which is not sincere or solemn, shall be treated as declining to take the oath. The oath so taken is invalid and the oath taker is disqualified forthwith from assuming the public office specified in the Article. (4) The person administering the oath has the duty to ensure that the oath is taken in a lawful manner and shall determine that an oath taken is in compliance with this Interpretation and the requirements under the laws of the HKSAR is valid, and that an oath which is not taken in compliance with this Interpretation and the requirements under the laws of the HKSAR is invalid.

In its judgment dated 15 November 2016, the CFI declared, among other orders, that the LegCo oaths taken by Leung and Yau were invalid and they were disqualified from assuming the office of members of the LegCo and acting as such. On their appeals, the CA affirmed the decision of the CFI and dismissed their appeals by its judgment of 30 November 2016. The CA further dismissed Leung's and Yau's applications for leave to appeal to the CFA in its judgment dated 16 January 2017.

Leung and Yau applied to the Appeal Committee of the CFA for leave to appeal on questions of law which, by reason of their great general or public importance, or otherwise, ought to be submitted to the CFA for decision.

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[3] *Interpretation of BL 104 of the HKSAR of the PRC by the NPCSC*, adopted by the Standing Committee of the Twelfth NPC at its Twenty-fourth Session on 7 November 2016.


## Issues

The issues raised by Leung and Yau were very similar, involving:

(i) the applicability of the non-intervention principle;

(ii) the proper construction of s. 21 of the ODO;

(iii) the ambit and effect of the Interpretation; and

(iv) the proper construction of s. 73 of the Legislative Council Ordinance, Cap. 542 ("LCO"), which relates to the question whether disqualification for declining or neglecting to take the LegCo oath is automatic.

## Non-intervention principle

The Appeal Committee considered it important to first recognize the proper scope of the principle of non-intervention as decided by the CFA in *Leung Kwok Hung v President of the Legislative Council (No.1)*[4]. In that case, the CFA acknowledged the doctrine of separation of powers including the principle that the Courts will recognise the exclusive authority of the legislature in managing its own internal process in the conduct of its business, in particular its legislative process, whilst also stating that it is important to recognize that the principle of non-intervention is necessarily subject to constitutional requirements.

The Appeal Committee held that in the context of the present case, the principle of non-intervention cannot apply in respect of the court's duty to rule on the question of compliance with the constitutional requirements of BL 104, and that it is a matter of obligation and not discretion for the courts of the HKSAR to exercise their judicial power conferred by the Basic Law.

Thus, given BL 104 imposes a constitutional requirement on members of LegCo (Leung and Yau in the present case) to take a LegCo oath in accordance with the law, the courts are plainly

[4] Reported at (2014) 17 HKCFAR 689.

duty bound to consider the question whether Leung and Yau had duly taken the LegCo oath, and if not, the consequences that entail. The "non-intervention principle" does not preclude such judicial inquiry.

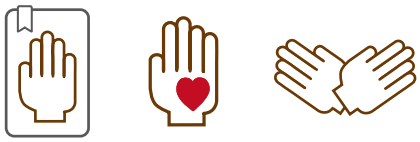
## Proper construction of section 21 of ODO and section 73 of LCO

While s. 21 of the ODO provides for the consequence of vacating the office where a member of LegCo declines or neglects to take the LegCo oath, Leung and Yau argued that s. 21 of ODO should not be construed as requiring a member of LegCo who declines or neglects to take the LegCo oath to vacate his office automatically by operation of law. The Appeal Committee did not agree to this argument and held that where a member has been incontrovertibly found by a court to have declined or neglected to take the LegCo oath, as in the case of Leung and Yau, there is no discretion or judgment to be exercised by the President of LegCo to request or allow the member to re-take the LegCo oath at another sitting of LegCo.

The Appeal Committee rejected Yau's argument that s. 21 of the ODO does not impose a requirement of solemnity. The Appeal Committee held that construed in the light of the context and purpose of s. 21 of the ODO, which include the provisions of BL 104, it is plainly to be implied that the requirement to take the LegCo oath is a requirement to take that oath in an objectively solemn manner. This requirement is now expressly stipulated in the Interpretation.

The Appeal Committee rejected Leung's argument that the words "who declines or neglects to take an oath" should be interpreted so that a person who fails to take a valid oath, but is willing to do so with minimal delay, neither "declines or neglects" for the purposes of s. 21 of the ODO. On the facts of the present case, Leung and Yau manifestly refused and wilfully omitted – and therefore declined and neglected – to take the LegCo oath. The Appeal Committee found that there is no reasonable basis for the argument that disqualification in these circumstances amounts to a disproportionate interference with any constitutional rights.

The Appeal Committee rejected Yau's argument that the circumstances in which a person is disqualified from acting as a member are confined only to the circumstances provided for in s. 15 of the LCO[5].



[5] Section 15 of the LCO reads:

"(1) A Member's office becomes vacant if the Member—
(a) resigns in accordance with section 14 or is taken to have resigned from that office in accordance with section 13; or
(b) dies; or
(c) subject to subsection (2), alters either the Member's nationality or the fact as to whether the Member has a right of abode in a country other than the People's Republic of China as declared under section 40(1)(b)(ii); or
(d) is the President and has been found under the Mental Health Ordinance (Cap. 136) to be incapable, by reason of mental incapacity, of managing and administering his or her property and affairs; or (Replaced 25 of 2003 s. 4)
(e) is declared in accordance with Article 79 of the Basic Law to be no longer qualified to hold that office.

(1A) A person disqualified under subsection (1)(d) is eligible for re-election if, under the Mental Health Ordinance (Cap. 136), it is subsequently found that the person has become capable of managing and administering his or her property and affairs. (Added 25 of 2003 s. 4)

(2) Subsection (1)(c) does not apply to a Member elected at an election for a functional constituency specified in section 37(3) unless the Member has declared under section 40(1)(b)(ii) that he or she has Chinese nationality or has no right of abode in a country other than the People's Republic of China and subsequently he or she—
(a) acquires a nationality other than Chinese nationality; or
(b) acquires a right of abode in a country other than the People's Republic of China.

(3) For the purposes of subsection (1)(e), the kind of misbehaviour for which a Member may be censured under Article 79(7) of the Basic Law includes (but is not limited to) a breach of an oath given under section 40(1)(b)(iii)."


## The Interpretation

Regarding the Interpretation, the Appeal Committee first recapitulated certain basic propositions which have been authoritatively established by the CFA including that under the constitutional framework of the HKSAR, the Basic Law is a national law of the PRC, having been enacted by the NPC pursuant to Article 31 of the Constitution of the PRC, that the NPCSC's power to interpret the Basic Law reflects Article 67(4) of the PRC Constitution, which empowers the NPCSC to interpret all national laws, that the exercise of interpretation of the Basic Law under PRC law is one conducted under a different system of law to the common law system in force in the HKSAR, and includes legislative interpretation which can clarify or supplement laws, that an interpretation of the Basic Law issued by the NPCSC is binding on the courts of the HKSAR, and that it declares what the law is and has always been since the coming into effect of the Basic Law on 1 July 1997.

The Appeal Committee took the view that the questions raised by Leung and Yau regarding the Interpretation (for instance, the retrospective effect of the Interpretation and the Interpretation being an amendment) have already been authoritatively determined by the CFA, that there is no warrant for revisiting the aforesaid proposition, and that Leung's and Yau's contentions questioning their correctness are not reasonably arguable. The Appeal Committee further held that the Interpretation is clear in its scope and effect, that disqualification of Leung and Yau is the automatic consequence of their declining or neglecting to take the LegCo oath, and that it is binding on the courts of the HKSAR as regards the true construction of BL 104 at the material time when Leung and Yau purported to take their oaths. In any event, in respect of the other questions raised by Leung and Yau on the Interpretation in relation to the true construction of BL 104, given the proper construction of s. 21 of the ODO as held by the courts below and the unchallenged findings of fact of those courts, the Appeal Committee took the view that the outcome of the present case would be the same irrespective of the Interpretation.

## Conclusion

The Appeal Committee dismissed Leung's and Yau's applications for leave to appeal with costs. The Appeal Committee was satisfied that Leung's and Yau's appeals against the decisions below, declaring them to have been disqualified from the office of LegCo member and precluding the re-taking of their LegCo oaths, were not reasonably arguable, and that there was no reasonable prospect of the Court differing from the conclusions of the courts below.