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HCAL 83/2012

IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST  
NO 83 OF 2012

IN THE MATTER of an Application  
by the Applicant for Leave to Apply  
for Judicial Review pursuant to  
Section 39 of the Chief Executive  
Election Ordinance, Cap 569 and/or  
Order 53, rule 3 of the Rules of the  
High Court, Cap 4A

and

IN THE MATTER of Articles 35  
and 47 of the Basic Law

and

IN THE MATTER of Sections 32 of  
the Chief Executive Election  
Ordinance, Cap 569

and

IN THE MATTER of Section 26 of  
the Elections (Corrupt and Illegal  
Conduct) Ordinance, Cap 554

and

IN THE MATTER of Sections 21J  
and/or 21K of the High Court  
Ordinance, Cap 4

LEUNG KWOK HUNG Applicant

AND

HCAL 84/2012

**IN THE HIGH COURT OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
COURT OF FIRST INSTANCE  
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST  
NO 84 OF 2012**

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IN THE MATTER of an Application  
by HO CHUN YAN, ALBERT for  
Leave to Apply for Judicial Review  
pursuant to Section 39 of the Chief  
Executive Election Ordinance,  
Cap 569 and/or Order 53, rule 3 of  
the Rules of the High Court, Cap 4A

and

IN THE MATTER of Articles 35  
and 47 of the Basic Law

and

IN THE MATTER of Sections 32 of  
the Chief Executive Election  
Ordinance, Cap 569

and

IN THE MATTER of Section 26 of  
the Elections (Corrupt and Illegal  
Conduct) Ordinance, Cap 554

and

IN THE MATTER of Sections 21J  
and/or 21K of the High Court  
Ordinance, Cap 4

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HO CHUN YAN, ALBERT

Applicant

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(Heard together)

Before: Hon Lam J in Court

Dates of Hearing: 12 and 13 July 2012

Date of Judgment: 30 July 2012

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## J U D G M E N T

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### *Refusal of leave in HCALs 83 and 84 because of HCAL 85*

1. I refuse to grant leave to apply for judicial review in these proceedings. Except the challenge based on Article 47 of the Basic Law (which I shall deal with in the latter part of this judgment), the grounds raised for challenging the return of the Putative Respondent as duly elected Chief Executive in March 2012 in the intended judicial review are the same as the grounds raised in the Election Petition lodged in HCAL 85 of 2012. Given that these grounds would be examined in the context of HCAL 85 of 2012, parallel proceedings by way of judicial review should not be allowed.

2. A number of arguments were put forward on behalf of the Applicants in the course of the hearing to contend that judicial review should be permitted in this instance. On behalf of Mr Leung Kwok Hung, Mr Dykes SC submitted that as his client does not fall within any one of the categories of persons who can lodge an election petition under Section 33(1) of the Chief Executive Election Ordinance Cap 569 ["CEEEO"] he could not challenge the election by way of election petition. Counsel further submitted that election petition should not be the only

means to challenge the election as there could be compromise or collusion between rivaling candidates to stultify potential challenges.

3. For reasons given below, I am of the view that on proper construction of Section 32 of CEEO election petition is the only means to challenge an election based on the grounds set out in that section. The matters relied on in the intended judicial review, including Mr Leung's judicial review, are matters within the scope of Section 32. Therefore, they can only be brought to the court by an election petition. Thus, as Mr Leung is not a person within Section 33(1), he has no locus standi to bring similar challenge by way of judicial review.

4. In any event, on the facts of the present case, there is no basis for suggesting collusion or compromise between Mr Albert Ho and the Putative respondent. Mr Ho is actually prosecuting an election petition in HCAL 85 of 2012. Thus, even if I am wrong on the conclusion that election petition is the only means for challenging an election based on grounds set out in Section 32, as a matter of discretion, in light of HCAL 85 of 2012 and in the absence of any suggestion of collusion between Mr Ho and the Putative Respondent, the court does not see any proper basis for permitting a parallel challenge by Mr Leung by way of judicial review.

5. In so holding, I have not overlooked Mr Dykes' submission that Mr Leung might like to appeal in the event that Mr Ho did not do so in the context of election petition. It is inappropriate to speculate whether Mr Ho would fail in the election petition and, if he shall fail, whether he would appeal. Suffice to say I do not think this is a proper ground for

allowing Mr Leung to pursue a parallel challenge by way of judicial review.

6. Mr Lee SC on behalf of Mr Ho submitted that notwithstanding his election petition he should be allowed to mount a parallel challenge by way of judicial review. Counsel pointed to the difference in the statutory time limits for bringing proceedings to explain why it was considered necessary to have two sets of proceedings on the same subject<sup>1</sup> between the same parties on foot: section 34 of the CEEO provides a strict time limit of 7 working days after the declaration of the election result for election petition whilst section 39 provides a more generous time limit of 30 days from the publication of the declaration of result for judicial review with power given to the court to override such time limit if specified criteria under Section 39(2) are satisfied.

7. I do not agree that this is a good justification for having two sets of proceedings. Mr Mok SC, on behalf of the Putative Respondent, informed the court that, amongst other grounds, the 7-day time limit under Section 34 would be relied upon in his client's application to strike out the election petition in HCAL 85 of 2012. I understand from Mr Lee that the striking out would be resisted, insofar as it relates to the 7-day time limit, on the following bases,

- (a) Notwithstanding Section 34, the court has the power to extend time and time should be extended in HCAL 85;
- (b) If not, Section 34 is unconstitutional.

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<sup>1</sup> That is putting aside the challenge based on Art 47 of the Basic Law for a moment. I shall deal with that separate challenge at the later part of this judgment.

8. Contentions relevant to these arguments would have to be examined at the striking out hearing on 15 August 2012. If Mr Lee were held to be correct in either of his submissions, the time bar point would not be an obstacle in the challenge by way of election petition. If Mr Lee were held to be incorrect, the court would have to come to at least one of the following conclusions,

(a) There is no power to extend time and Section 34 is constitutionally justified in terms of the proportionality test in *Charles Mok v Tam Wai Ho* (2010) 13 HKCFAR 762;

(b) There is power to extend time but on the facts and circumstances of HCAL 85, the power should not be exercised in favour of Mr Ho.

9. Were the court come to either of those conclusions, I do not think it is reasonably arguable that on the facts and circumstances of the present case, time should be overridden by the court under Section 39(2).

10. Thus analysed, there is little purpose to be served by permitting another set of proceedings by way of judicial review to be on foot. Actually, without good and cogent reasons, the commencement of two sets of proceedings between the same parties on the same subject matters raising the same issues is an abuse of process.

11. Therefore, as a matter of discretion, this court does not deem it right to grant leave to Mr Ho and Mr Leung to apply for judicial review as regards the challenge to the election. That challenge could and should be litigated in the context of the election petition in HCAL 85 of 2012.

*Refusal of leave because of Section 32*

12. In addition, as a matter of law, I come to the clear conclusion that Section 32(1) prohibits challenges to election on the grounds set out in that section by any form of proceedings (including judicial review) other than by way of election petition under that section. This seems to be quite clear if one were to read the Chinese version of the section together with the English version. I quote both versions here,

“An election may be questioned only by an election petition on the ground that-

(a) the person declared by the Returning Officer under section 28 as elected was not duly elected because-

(i) he was not eligible to be nominated as a candidate under section 13;

(ii) he was disqualified under section 14 from being nominated as a candidate;

(iii) he should have been disqualified under section 20(1) from being elected but was not so disqualified;

(iv) he engaged in corrupt conduct or illegal conduct at the election;

(v) another person engaged in corrupt conduct or illegal conduct in respect of him at the election in connection with his candidature;

(vi) corrupt conduct or illegal conduct was generally prevalent at the election; or

(vii) material irregularity occurred in relation to-

(A) the election;

(B) the poll at the election; or

(C) the counting of votes in respect of the election;  
or

(b) the candidate declared by the Returning Officer under section 22(1AB)(c) as not returned at the election is not returned because material irregularity occurred in relation to-

(i) the election;

(ii) the poll at the election; or

(iii) the counting of votes in respect of the election.”

A		A
B	“選舉只可藉提出選舉呈請而受質疑，而提出選舉呈請的理由，須是一	B
C	(a) 選舉主任根據第 28 條宣布當選的人因以下理由而非妥為當選—	C
D	(i) 該人根據第 13 條沒有資格獲提名為候選人；	D
E	(ii) 該人根據第 14 條喪失獲提名為候選人的資格；	E
F	(iii) 該人根據第 20(1)條本應已喪失當選資格，但他並沒有被取消該資格；	F
G	(iv) 該人在有關的選舉中作出舞弊行為或非法行為；	G
H	(v) 另一人在有關的選舉中就該人而作出與該人的參選有關的舞弊行為或非法行為；	H
I	(vi) 有關的選舉中普遍存在着舞弊行為或非法行為；或	I
J	(vii) 有關乎—	J
K	(A) 有關的選舉；	K
L	(B) 該選舉的投票；或	L
M	(C) 就該選舉進行的點票，	M
N	的具關鍵性的欠妥之處；或	N
O	(b) 被選舉主任根據第 22(1AB)(c)條宣布為在選舉中不獲選出的候選人因為有關乎—	O
P	(i) 有關的選舉；	P
Q	(ii) 該選舉的投票；或	Q
R	(iii) 就該選舉進行的點票，	R
S	的具關鍵性的欠妥之處，而不獲選出。”	S
T		T
U		U
V		V
	13. In <i>Lau San Ching v Appollonia Liu</i> [1994] 3 HKC 122, the majority of the Court of Appeal came to a similar conclusion in respect of the 1994 district board election based on Section 30(2) of the then Electoral Provisions Ordinance. There are, however, differences in the relevant legislative provisions and I would not regard that decision to be determinative of the construction of CEEO.	



14. Mr Lee referred to the following matters to suggest that I should conclude it is at least reasonably arguable (applying the test for granting leave in judicial review in *Chan Po Fun*<sup>2</sup>) that it is open to challenge the election by judicial review,

- (a) The references or implications arising from the other statutory provisions: Sections 29, 38, 39 of the CEEO and section 22(1)(c) of the Hong Kong Court of Final Appeal Ordinance Cap 484 [“HKCFAO”];
- (b) The difference in wordings in the ouster clause under the Legislative Council Ordinance Cap 542 [“LCO”] and the District Councils Ordinance Cap 547 [“DCO”];
- (c) The Legislative Council Brief and the speech of the Secretary for Constitutional Affairs in connection with the enactment of the CEEO;
- (d) The possibility of discovery of grounds for challenging the election after the expiration of 7 days.

15. Counsel argued that this court shall follow the approach of the Court of Final Appeal in *Chan Pun Chung v HKSAR* (2000) 3 HKCFAR 392 and adopt an interpretation that overrides or rectifies the defects in the wordings of Section 32 to give effect to the clear intention of legislature permitting parallel challenge by way of judicial review. Counsel suggested the word “only” in Section 32 should be moved to be placed after “election petition” in the English version and the word “只” should be deleted in the Chinese version. As a result the opening sentence in the revised versions are as follows,

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<sup>2</sup> *Po Fun Chan v Winnie Cheung* [2008] 1 HKLRD 319

“An election may be questioned by an election petition only on the ground that—”

“選舉可藉提出選舉呈請而受質疑，而提出選舉呈請的理由，須是—”

16. I am unable to accept that this is the proper interpretation of Section 32. In my judgment, the matters relied upon by Mr Lee, whether taken individually or collectively, do not arguably lead to the conclusion that there was a clear legislative intent to allow parallel challenge to election on the grounds stated in Section 32 by way of judicial review. I do not think the positioning of the word “only” in that section and the word “只” in the Chinese version are there due to inadvertence by the draftsman and the Legislature. Thus, the criteria laid down by Lord Nicholls for remedial construction in *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586 are not met in the present case. It is also relevant to bear in mind the following observations of Lord Millett in *China Field Ltd v Appeal Tribunal (Buildings) (No 2)* (2009) 12 HKCFAR 342 at para 36,

“...There can be no quarrel with the principle that statutory provisions should be given a purposive interpretation, but there has been a distressing development by the courts which allows them to distort or even ignore the plain meaning of the text and construe the statute in whatever manner achieves a result which they consider desirable. It cannot be said too often that this is not permissible. Purposive construction means only that statutory provisions are to be interpreted to give effect to the intention of the legislature, and that intention must be ascertained by a proper application of the interpretative process. This does not permit the Court to attribute to a statutory provision a meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing: see *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574. ...”

17. I shall now explain my above conclusion by reference to each matter Mr Lee relied upon. Sections 29 and 38 read as follows,

“A person declared under section 28 as elected at an election is presumed to be duly elected until he is ruled by the Court or the Court of Final Appeal pursuant to the determination of an election petition or otherwise as not duly elected.

根據第 28 條獲宣布在選舉中當選的人，除非被原訟法庭或終審法院依據選舉呈請的裁定或其他裁定而判定為並非妥為當選，否則該人須被推定為妥為當選。” (Section 29)

“A-

(a) determination of the Court under section 37(1); or

(b) ruling by the Court or the Court of Final Appeal,

that a person who was originally declared as elected at an election was not duly elected does not invalidate acts purporting to have been done by the person as the Chief Executive before the determination or ruling, as the case may be.

如一

(a) 原訟法庭根據第 37(1)條裁定；或

(b) 原訟法庭或終審法院判定，

本已獲宣布為在選舉中當選的人並非妥為當選，該項裁定或判定(視屬何情況而定)並不令該人在該項裁定或判定(視屬何情況而定)作出前本意是以行政長官身分作出的作為失效。” (Section 38)

18. The purposes of these provisions are plain. They provide for the interim legitimacy of a Chief Executive whom has been declared as elected until he or she is ruled or determined by the court to be otherwise. The validity of acts of such a Chief Executive would not be invalidated by the subsequent ruling or determination of the court. Bearing in mind the purposes of the provisions, there is every need for the draftsman to cast a net as wide as possible to cater for every contingency, no matter how unlikely or implausible that may be.

19. Mr Lee submitted that these provisions, by the use of the words “or otherwise” in Section 29 and the reference to a ruling by the Court of First Instance in Section 38(b) in a context other than an election petition, point to the possibility of challenging the election by legal proceedings other than election petition, more particularly by judicial review. In a nutshell, the point is that these words cannot be referring to a ruling of the court in an election petition because that has already been referred to in the other parts of the same section.

20. I accept that these words do envisage that there could be avenues for challenging whether a Chief Executive is duly elected (妥為當選) other than election petition. However, it does not follow that such avenues include judicial review challenging the result of the election based on grounds set out in Section 32.

21. It is axiomatic that a piece of legislation should be construed as a whole and a construction that one section is repugnant with another section in the same ordinance is, so far as it is possible, to be avoided. In other words, one section may provide the context for another section and vice versa. In the present case, Section 32 forms part of the context for the construction of Sections 29 and 38(b) and vice versa. It is necessary to note the use of different expressions by the draftsman to describe the nature of the challenge in different sections. Section 32 refers specifically to an election being “questioned” (受質疑) in an election petition. Section 37 then provides that in an election petition the court shall determine whether a candidate is duly elected. The plain meaning of Section 32 is that questioning of election on the grounds set out in that

section must be brought by way of election petition. Election is defined under Section 32(3).

22. But there could be other grounds of challenges (other than those specified under Section 32) which lead to a ruling by the court that the candidate was not duly elected. Mr Pao on behalf of the Secretary for Justice suggested that those challenges may take the form of challenges direct against something other than the questioning of the election itself: challenge to the formation of the election committee, challenge to the constitutionality of certain provisions in the CEEO other than those coming within the scope of Section 32. Mr Mok, adopting this part of the submissions of Mr Pao, characterized such challenges as systemic challenges.

23. Mr Lee argued that such systemic challenges are within the scope of Section 32 as they could be regarded as “material irregularity occurred in relation to the election”. The Chinese version of this expression is “關乎有關的選舉的具關鍵性的欠妥之處”. Reading the two versions together, I think it is arguable that the systemic challenges outlined by Mr Pao are not within the scope of this expression. In this connection, some support can be derived from the decision of P Chan J (as he then was) in *Chow Wing Kan v The Returning Officer* [1997] HKLRD 449.

24. I do not need to reach a conclusive view in this regard. In the light of the judgment of *Chow Wing Kan*, bearing in mind the purposes of Sections 29 and 38, one can hardly blame the draftsman for being over-cautious in catering for a possibility that there could be ruling

by the court that a Chief Executive is not duly elected in proceedings other than election petition based on grounds not set out in Section 32. I cannot accept Mr Lee's submission that such possibility is fanciful.

25. In the light of these considerations, there is no inconsistency between giving full effect to the clear meaning of Section 32 and the provision for other avenues of challenge in Sections 29 and 38.

26. Turning to Section 39 of CEEO and Section 22(1) of the HKCFAO, Mr Lee relied on the references in these provisions to judicial review or other proceedings which put in issue "whether the candidate declared ... as elected at an election can lawfully assume the office of the Chief Executive". Counsel submitted that these provisions recognized the possibility of challenging the due election of a candidate by means of judicial review as opposed to election petition.

27. The Chinese version of the relevant parts of these provisions is,

“獲宣布在選舉中當選的候選人能否合法地就任為行政長官作為爭論點”。

28. The answer to the earlier point based on Sections 29 and 38(b) provide the answer to this submission. It is possible to challenge the legality of a candidate in assuming the office of Chief Executive by judicial review on grounds other than those set out in Section 32. But as far as challenges coming within the scope of Section 32, they must be proceeded by election petition.

29. Further, as pointed out by Mr Mok, in addition to the systemic challenges discussed above, the legality in the assumption of office by a successful candidate can also be challenged in terms of non-compliance with Section 31 (declaration of not being member of any political party and undertaking to such effect) or non-compliance with Article 44 of the Basic Law due to developments in the intervening period between the declaration of election result and the assumption of office, eg in the unlikely scenario of the acquisition of a right of abode by such candidate in a foreign country in the meantime.

30. As regards the comparison with LCO and DCO, I do not think any mileage can be gained out of the different ways in which the ouster provisions were formulated in Section 61 of the LCO and Section 49 of the DCO on the one hand and Section 32 of the CEEO on the other. The meaning of Section 32, having regard to both the Chinese and English versions, is very clear.

31. Nor, in the light of the above analysis in terms of the internal context of CEEO, do I derive much assistance from a comparison of Section 38 of CEEO with Section 71 of the LCO and Section 59 of the DCO.

32. Though the offices of members of the Legislative Council are important in the constitutional regime of Hong Kong, it is trite that the Chief Executive plays a different role and there could be different considerations in terms of the need for certainty in the legitimacy of the holder of such office. Further, unlike membership of the Legislative Council, the Chief Executive is appointed by the Central People's

Government in accordance with Article 45 and his removal, as further discussed below when I deal with the challenge based on Article 47, can only be achieved by the Central People's Government, see Section 4 of the CEEO.

33. Thus, the regimes under the LCO and DCO operate in different context.

34. Mr Lee referred this court to the Legislative Council Brief on the CEE Bill and the speech of the Secretary for Constitutional Affairs in the Legislative Council in moving for the Bill in the Second Reading. Counsel demonstrated that the administration made statements to the effect that it is open to challenge whether a Chief Executive is duly elected by judicial review.

35. Admittedly, there are statements to such effect. At the same time, there is no elaboration in these statements as to the grounds upon which such judicial review can be mounted and whether they could overlap with the grounds that can be pursued by way of election petition under Section 32. Thus, these statements are consistent with the above analysis on the permissible scope of judicial review in challenging whether a Chief Executive is duly elected.

36. Further, in view of the clear wordings of Section 32 and the stricter time limit, it would be strange that the legislature also provides for a parallel avenue for challenges on the same grounds by way of judicial review. The obvious question is: if such parallel judicial review is permissible, why did the legislature enact Section 32 in the first place



when non-compliance with it can be ignored if one chooses to proceed by way of judicial review?

37. Mr Lee submitted that the legislature intended Section 32 for clear cases of challenge, eg in respect of miscounting of votes, whereas Section 39 is for more subtle cases. I cannot accept this submission. This is plainly not what Section 32 says.

38. Thus, the answer to Mr Lee's submissions on Sections 29 and 38(b) CEEO also provide the answer to counsel's point based on these documents.

39. As regards the possibility of discovering facts which may fall within the scope of Section 32 after the expiry of the 7-day limit, Mr Lee cited the example of offences in respect of election return which shall be filed within 30 days after the date of publication of the result of the election. But errors in the filing of election returns are not amongst the illegal conducts under Part 3 of the Elections (Corrupt and Illegal Conduct) Ordinance Cap 554 ["ECICO"]. They are dealt with under Part 6 of that ordinance. Section 32(2) of the CEEO defines illegal conducts coming within that section as those specified under Part 3 of the ECICO. The relevant illegal conduct, for the purpose of this argument, is the incurring of election expenses exceeding the prescribed amount under Section 24 of ECICO.

40. For present purposes, I am prepared to proceed on the assumption that there could be illegal conducts that were only discovered after the expiry of the 7-day limit. But in my judgment, this only points

to the possibility of the 7-day limit as being open to challenge on the principle of proportionality (which shall be debated in the context of HCAL 85, and I therefore express no view on its validity at this stage). It does not assist in deciphering whether the legislature intended challenges on the same ground can be made by way of judicial review despite the clear wordings to the contrary in Section 32.

41. I therefore reject the submission of Mr Lee that there is a clear legislative intent to permit parallel challenge on the grounds set out in Section 32 of the CEEO by way of judicial review under Section 39. There is no basis for applying the remedial or rectified construction of Section 32 as advocated by Mr Lee.

42. Mr Dykes referred to the possibility of collusion between candidates to preclude a challenge by election petition even in a case where proper grounds exist. Therefore, counsel said, it is necessary to preserve the possibility of challenge by way of judicial review.

43. I do not think this argument avails him in the construction of Section 32. There is no challenge to the constitutionality of Section 33 which restricts the categories of persons who may lodge an election petition. Mr Leung does not come within any one of the categories. The absence of challenge as to the legality of the holding of the office of Chief Executive does not necessarily mean that election misconducts by a successful candidate can be swept under the carpet when there is no complaint by those coming within the scope of Section 33. Such misconducts, if they fall within the scope of the ECICO, can still be investigated and if the evidence so justifies, there can be prosecutions

under that ordinance. In a sufficiently serious case, a person convicted by the court for offences under the ECICO will be subject to enormous political pressure to resign and, if such person does not resign, there may be a case for triggering the mechanism under Article 73(9) of the Basic Law.

44. For these reasons, since the intended judicial review proceeded on grounds that come within the scope of Section 32, they should be canvassed in an election petition.

*The Article 47 challenge*

45. Article 47(1) of the Basic Law provides,

“The Chief Executive of the Hong Kong Special Administrative Region must be a person of integrity, dedicated to his or her duties.”

46. The Chinese version, which has precedence in case of conflict with the English version<sup>3</sup>, reads,

“香港特別行政區行政長官必須廉潔奉公、盡忠職守。”

47. Mr Ho and Mr Leung contend in their respective Form 86 that the Putative Respondent, by reason of his conducts in dealing with the issues of illegal structure in his residence, is not a person of integrity and as such not a person that can become the Chief Executive.

48. Mr Mok on behalf of the Putative Respondent and Mr Pao on behalf of the Secretary for Justice contended Article 47 does not provide a platform for the court to examine the integrity of the Chief

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<sup>3</sup> See *Gurung Deu Kumari v Director of Immigration* [2010] 5 HKLRD 219 at para 60

Executive in legal proceedings. First, counsel argued that Article 47 only requires the Chief Executive to conduct himself with integrity in performing his duty and power as Chief Executive. It cannot be construed as if it were a disqualification provision. Second, construing Article 47 together with Articles 45 and 73(9) and Section 4 of the CEEO, the court does not have the power to remove a Chief Executive based on Article 47.

49. On the meaning of the phrase “廉潔奉公” (which was rendered as “a person of integrity” in the English version of Article 47(1), Mr Mok referred to the oath of the Chief Executive prescribed under the Oaths and Declarations Ordinance Cap 11. The words of Article 47(1) are repeated in the oath, which (both English and Chinese versions) are as follows,

“I, \_\_\_\_\_, swear that, in the office of Chief Executive of the Hong Kong Special Administrative Region of the People's Republic of China, I will uphold the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, bear allegiance to the Hong Kong Special Administrative Region of the People's Republic of China and serve the Hong Kong Special Administrative Region conscientiously, dutifully, in full accordance with the law, honestly and with integrity, and be held accountable to the Central People's Government of the People's Republic of China and the Hong Kong Special Administrative Region.”

“本人，謹此宣誓：本人就任中華人民共和國香港特別行政區行政長官，定當擁護《中華人民共和國香港特別行政區基本法》，效忠中華人民共和國香港特別行政區，盡忠職守，遵守法律，廉潔奉公，為香港特別行政區服務，對中華人民共和國中央人民政府和香港特別行政區負責。”

50. In the oath, the attribute of integrity is clearly referring to how the Chief Executive should conduct himself in serving Hong Kong as Chief Executive. Mr Mok submitted that the same construction should

be applied in respect of the reference to “廉潔奉公” and “a person of integrity” in Article 47(1). As such, this cannot be read as referring to conduct before the Chief Executive has assumed office.

51. On the other hand, Mr Dykes submitted that integrity of a person cannot be built up overnight after a person had become a Chief Executive. Thus, conducts of the Chief Executive prior to his assumption of office is also relevant.

52. The same phrase “廉潔奉公” appears in the oaths of the members of Executive Council as well as members of the Legislative Council and the principal officials and they are rendered in similar manner as the oath of the Chief Executive in the English versions. The judicial oath is slightly different in that it refers to “奉公守法，公正廉潔” which is rendered as “in full accordance with the law, honestly and with integrity”.

53. The Chinese dictionaries tend to break the phases into two parts. In 《辭源》(published by 商務印書館 in 1995), “廉潔” was given this meaning: “公正，不貪污”. The expression was given the following meaning in 《辭海》(published by 中華書局): “清廉；清白。與‘貪污’相對。”

54. As for “奉公”，《辭源》said it means “以公事為重，不徇私情。”《辭海》gave it this meaning: “奉行公事。如：克己奉公；奉公守法。”

55. When the two expressions are put together, the phrase refers to the clean and proper conduct of oneself in public office.

56. The other attribute mentioned in Article 47(1) is “盡忠職守” (rendered in English as “dedicated to his or her duties”). Clearly, it is referring to the performance of the Chief Executive of his role as such.

57. Though the English version of Article 47(1) is not that clear, reading it together with the Chinese version (which has precedence in terms of the proper construction of the Basic Law) and the other parts thereof, I agree with Mr Mok’s submission that it does not refer to the personal conducts of the Chief Executive before his assumption of office.

58. Therefore, the Applicants cannot rely on Article 47(1) to challenge the Putative Respondent’s holding of the office of Chief Executive by reference to matters prior to his assumption of office.

59. Further, I agree with the submission that given the specified mechanism in the Basic Law for impeachment of a Chief Executive under Article 73(9) and his removal by the Central People’s Government pursuant to that mechanism and the clear wording of Section 4 of the CEEO, apart from the power that the court may exercise in election petition and the systemic challenges and illegality of assumption of office on the grounds discussed in the earlier parts of this judgment, the court does not have the power to remove a Chief Executive. The mechanism of Article 73(9) is there to safeguard that impeachment of a Chief Executive should be carefully and duly considered by the Legislative Council and investigated by an independent committee chaired by the Chief Justice. It

is only when a motion of impeachment is passed by a two-thirds majority, the matter would be reported to the Central People Government for decision. The process ensures that the matter will be considered not simply from the point of view of legal merits of a charge against the Chief Executive. It also gives recognition to the constitutional position that the appointment of the Chief Executive is in the hand of the Central People Government.

60. In light of that, it would be extraordinary that such safeguards and the constitutional design in the mechanism for removal of Chief Executive could be completely circumvented by a parallel challenge by judicial review.

61. On the whole, I do not think Article 47(1) of the Basic Law provides a proper juridical basis for a judicial review seeking the removal of the Chief Executive. In substance, this is what the Applicants tried to achieve in their contentions based on Article 47(1).

*Disposition*

62. I therefore refuse to grant leave for this challenge.

63. Though submissions were advanced on the arguability of the Applicants' case on false statements, I do not propose to rule on that in this judgment having regard to my above conclusions. Those arguments can be revisited in the context of HCAL 85 of 2012.

64. On the question of costs, Mr Pao informed the court that the Secretary for Justice is not seeking costs. As between the Applicants and

the Putative Respondent, unless parties reach agreement on costs within 5 days, written submissions on costs should be lodged within 10 days. After reading those submissions, this court will either give a ruling on paper or direct for a hearing on costs.

(M H Lam)  
Judge of the Court of First Instance  
High Court

Mr Philip Dykes, SC and Mr Hectar Pun, instructed by Ho, Tse, Wai & Partners, for the Applicant in HCAL 83/2012

Mr Martin Lee, SC, Mr Jeffrey Tam and Mr Carter Chim, instructed by Lam & Lai, for the Applicant in HCAL 84/2012

Mr Jin Pao, instruct by the Department of Justice, for the 1<sup>st</sup> Respondent in HCAL 83/2012 and the 2<sup>nd</sup> Respondent in HCAL 84/2012

Mr Johnny Mok, SC and Mr Abraham Chan, instructed by Sit, Fung, Kwong & Shum, for the 2<sup>nd</sup> Respondent in HCAL 83/2012 and the 1<sup>st</sup> Respondent in HCAL 84/2012

Mr Jin Pao, instructed by the Department of Justice, for the Secretary for Justice