

FAMV Nos. 21, 22, 24, 25, 26,
32, 33 and 34 of 2012

FAMV No. 21 of 2012

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MISCELLANEOUS PROCEEDINGS NO. 21 OF 2012 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM HCAL NO. 84 OF
2012)

HO CHUN YAN, ALBERT

Applicant
(Applicant)

FAMV No. 22 of 2012

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MISCELLANEOUS PROCEEDINGS NO. 22 OF 2012 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM HCAL NO. 83 OF
2012)

LEUNG KWOK HUNG

Applicant (Applicant)

FAMV No. 24 of 2012

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MISCELLANEOUS PROCEEDINGS NO. 24 OF 2012 (CIVIL)

(ON APPLICATION FOR LEAVE TO APPEAL FROM HCAL NO. 85 OF
2012)

Between:

SECRETARY FOR JUSTICE

Intervener
(Applicant)

and

HO CHUN YAN, ALBERT

Petitioner
1st

LEUNG CHUN YING

Respondent
(1st
Respondent)

THE HON MR JUSTICE POON SHIU-CHOR, JEREMY
(RETURNING OFFICER FOR THE CHIEF EXECUTIVE
ELECTION)

2nd
Respondent
(2nd
Respondent)

FAMV No. 25 of 2012

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MISCELLANEOUS PROCEEDINGS NO. 25 OF 2012 (CIVIL)

(ON APPLICATION FOR LEAVE TO APPEAL FROM HCAL NO. 85 OF
2012)

Between:

HO CHUN YAN, ALBERT

Petitioner
(Applicant)

and

LEUNG CHUN YING

1st
Respondent
(1st
Respondent)

THE HON MR JUSTICE POON SHIU-CHOR, JEREMY
(RETURNING OFFICER FOR THE CHIEF EXECUTIVE
ELECTION)

2nd
Respondent
(2nd
Respondent)

SECRETARY FOR JUSTICE

Intervener

FAMV No. 26 of 2012

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MISCELLANEOUS PROCEEDINGS NO. 26 OF 2012 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM HCAL NO. 85 OF
2012)

Between:

LEUNG CHUN YING

1st
Respondent
(Applicant)

and

HO CHUN YAN, ALBERT

Petitioner
(1st
Respondent)

THE HON MR JUSTICE POON SHIU-CHOR, JEREMY

2nd

(RETURNING OFFICER FOR THE CHIEF EXECUTIVE
ELECTION)

Respondent
(2nd
Respondent)

and

SECRETARY FOR JUSTICE

Intervener

FAMV No. 32 of 2012

IN THE COURT OF FINAL APPEAL OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

MISCELLANEOUS PROCEEDINGS NO. 32 OF 2012 (CIVIL)

(ON APPLICATION FOR LEAVE TO APPEAL FROM HCAL NO. 85 OF
2012)

Between:

HO CHUN YAN, ALBERT

Petitioner

and

LEUNG CHUN YING

1st
Respondent
(1st
Respondent)

THE HON MR JUSTICE POON SHIU-CHOR, JEREMY
(RETURNING OFFICER FOR THE CHIEF EXECUTIVE
ELECTION)

2nd
Respondent
(2nd
Respondent)

and

SECRETARY FOR JUSTICE

Intervener
(Applicant)

FAMV No. 33 of 2012

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MISCELLANEOUS PROCEEDINGS NO. 33 OF 2012 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM HCAL NO. 85 OF
2012)

Between:

HO CHUN YAN, ALBERT

Petitioner
(Applicant)

and

LEUNG CHUN YING

1st
Respondent
(1st
Respondent)

THE HON MR JUSTICE POON SHIU-CHOR, JEREMY
(RETURNING OFFICER FOR THE CHIEF EXECUTIVE
ELECTION)

2nd
Respondent
(2nd
Respondent)

and

SECRETARY FOR JUSTICE

Intervener

FAMV No. 34 of 2012

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
MISCELLANEOUS PROCEEDINGS NO. 34 OF 2012 (CIVIL)
(ON APPLICATION FOR LEAVE TO APPEAL FROM HCAL NO. 85 OF
2012)

Between:

LEUNG CHUN YING

1st Respondent
(Applicant)

and

HO CHUN YAN, ALBERT

Petitioner
(1st
Respondent)

THE HON MR JUSTICE POON SHIU-CHOR, JEREMY
(RETURNING OFFICER FOR THE CHIEF EXECUTIVE
ELECTION)

2nd
Respondent
(2nd
Respondent)

and

SECRETARY FOR JUSTICE

Intervener

Appeal Chief Justice Ma, Mr Justice Ribeiro PJ and Mr Justice
Committee: Tang PJ

Date of Hearing: 9 November 2012

Date of Determination: 13 November 2012

DETERMINATION

Chief Justice Ma, Mr Justice Ribeiro PJ and Mr Justice Tang PJ:

A. These applications

1. These eight applications for leave to appeal arise out of three substantive judgments and one judgment on costs delivered by Lam JA in connection with the Chief Executive elections held on 25 March this year.

(a) In the first judgment,^[1] (as Lam J) he refused Mr Leung Kwok Hung (“Mr Leung”) and Mr Albert Ho Chun Yan (“Mr Ho”) leave to apply for judicial review (“the JR judgment”). He also ordered them to pay the costs.^[2]

(b) In the second judgment (“the striking out judgment”),^[3] he refused to strike out Mr Ho’s election petition in its entirety, striking out only that aspect of it which concerned the first statement discussed in Sections C.2 and C.3 below.

(c) In the third judgment (“the petition judgment”),^[4] he refused Mr Ho an extension of time and dismissed his election petition.

2. These applications relate to those three judgments (and the costs judgment) as follows:

(a) In FAMV 21^[5] and FAMV 22, Mr Ho and Mr Leung seek to challenge the JR judgment and to overturn the award of costs.

(b) In FAMV 24 and FAMV 26, the Secretary for Justice and Mr Leung Chun Ying (“Mr C Y Leung”) seek to question Lam JA’s conclusion in the striking out judgment that the seven-day time limit for lodging election petitions is unconstitutional. Mr C Y Leung also seeks to challenge Lam JA’s refusal to strike out the election petition; while in FAMV 25, Mr Ho seeks to contest Lam JA’s refusal in that judgment to nullify the time limit altogether instead of reading in a judicial discretion to extend time.

(c) In FAMV 32 and FAMV 34, Mr C Y Leung and the Secretary renew their challenge to the finding of unconstitutionality which underpins the petition judgment; while in FAMV 33, Mr Ho seeks to challenge Lam JA’s refusal of an extension of time in that judgment on the footing that Mr Ho’s complaint has no real prospect of success.

B. The Court’s jurisdiction

3. Mr C Y Leung and the Secretary for Justice have expressed concern

as to whether the Court has jurisdiction to entertain their applications for leave to appeal against Lam JA's decision in the striking out and election petition judgments that the time limit in section 34 of the Chief Executive Election Ordinance ("CEEO")[\[6\]](#) is unconstitutional. The Secretary concedes that on its face, section 22(1)(c) of the Court's statute does not provide for such jurisdiction but invites the Appeal Committee to adopt a remedial interpretation acknowledging such jurisdiction as falling obviously within the legislative intention.

4. With respect, the concession is unnecessary. In our view, purposively construed, the Court of Final Appeal plainly has the necessary jurisdiction and no remedial interpretation is called for.

B.1 The statutory relevant provisions

5. Section 22(1)(c) of the Hong Kong Court of Final Appeal Ordinance [\[7\]](#) governs the Court's jurisdiction for present purposes:

"(1) An appeal shall lie to the Court—

(c) at the discretion of the Court, from—

(i) a determination of the Court of First Instance under section 37(1) of the Chief Executive Election Ordinance (Cap 569);

(ii) a judgment or order of the Court of First Instance in—

(A) an application for judicial review under section 21K of the High Court Ordinance (Cap 4); or

(B) any other proceedings under that Ordinance, which put in issue whether the candidate is duly determined to be not returned at an election under section 26A (4) of the Chief Executive Election Ordinance (Cap 569) or whether the candidate declared under section 28 of that Ordinance as elected at an election can lawfully assume the office of the Chief Executive..."

6. Section 37(1) of the CEEO referred to in section 22(1)(c)(i) relevantly provides:

"(1) The Court shall determine-

...

(b) an election petition questioning an election at which a candidate was declared as elected by ruling that-

(i) the candidate is duly elected; or

(ii) the candidate is not duly elected.

(2) At the end of the trial of an election petition, the Court shall announce its determination by means of a written judgment.”

B.2 Construction of section 22(1)(c)

7. Section 22(1)(c) is self-evidently concerned as a whole with establishing a discretionary leap-frog appeal directly from the Court of First Instance to the Court of Final Appeal.^[8] This informs a purposive construction.

8. The Secretary’s anxiety arises from the fact that Lam JA disposed of Mr Ho’s election petition without reaching the point of ruling whether Mr C Y Leung was or was not duly elected, as provided for under section 37(1)(b). His Lordship struck out one aspect of the petition and refused an extension of time for pursuing the balance. It follows, as the Secretary rightly concludes, that section 37 is inapplicable and that the Court’s jurisdiction cannot be founded on section 22(1)(c)(i). We do not accept the contrary submission made on behalf of Mr Ho that “the CFI has effectively made a final determination on the election petition under section 37(1)(b).”^[9]

9. Turning to section 22(1)(c)(ii)(B), the Secretary’s view is that the words “under that Ordinance” present an obstacle. Since they come immediately after a reference to a judicial review under the High Court Ordinance (“HCO”), he reads them as a reference to “any other proceedings under the HCO” and concludes that election petitions, being proceedings under the CEEO rather than the HCO, fall outside its scope.

10. We do not agree with that construction. Viewed purposively, the phrase “under that Ordinance” should be understood as a reference to the CEEO referred to in section 22(1)(c)(i), and not to the HCO referred to in section 22(1)(c)(ii)(A).

11. That conclusion flows from the structure and content of section 22(1)(c). It is, in our judgment, a provision entirely concerned with arrangements for leap-frogging from the Court of First Instance to the Court of Final Appeal *in proceedings under the CEEO*.

(a) Section 22(1)(c)(i) expressly gives the Final Court a discretion to accept an appeal directly from the Court of First Instance's determination of an election petition under section 37 of the CEEO.

(b) Section 22(1)(c)(ii) does the same in relation to judgments and orders of the Court of First Instance in cases falling within sub-paragraphs (A) and (B).

(c) Sub-paragraph (A) refers to section 21K of the HCO. But that is an unhelpful distraction. Section 21K is purely descriptive of judicial review applications in general and adds nothing in the context. In catering for leap-frog judicial review appeals, section 22(1)(c)(ii)(A) must have in contemplation judicial reviews under section 39 of the CEEO which contains a reference to section 21K. [\[10\]](#)

(d) This is because the statutory intention is plainly *not* to permit leap-frog appeals to the CFA from *all* CFI judicial review judgments or orders coming within the descriptive language of section 21K. As section 14(1) of the HCO [\[11\]](#) and Order 53 r 13 of the High Court Rules [\[12\]](#) make clear, the general rule remains that appeals from judicial review decisions in the Court of First Instance go to the Court of Appeal. The context of sub-paragraph (A) within section 22(1)(c) makes it clear that the exceptional leap-frog procedure is intended only to apply to judicial reviews mounted under the CEEO.

(e) The drafting of sub-paragraph (B) is also less than ideal, but the meaning which emerges from its subject-matter is clear. It provides for a discretionary leap-frog appeal from a judgment or order of the Court of First Instance in proceedings other than judicial review proceedings which “put in issue” the outcome of an election whether under section 26A(4) or under section 28 of the CEEO.

12. So construed, no jurisdictional difficulty arises. The Secretary's application for leave to appeal in the election petition proceedings comes within sub-paragraph (B). It is an application regarding orders of the Court of First Instance in proceedings under the CEEO which put in issue whether Mr C

Y Leung, declared under section 28 as elected, can lawfully assume the office of Chief Executive.

C. The challenge to the partial striking out and the petition judgment

13. The effect of the Lam JA's decisions (i) to strike out part of the election petition in the striking out judgment; and (ii) to dismiss the remainder of the petition in the petition judgment was (subject to appeal) to put an end to the challenges of Mr Ho and Mr Leung to Mr C Y Leung's election. The critical question is therefore whether leave to appeal should be granted in respect of those two decisions. We address that question first.

C.1 The relevant statutory provisions

14. The sections in the CEEO relevant to Mr Ho's case in that context are the following.

(a) First, there is section 32(1)(a)(iv) which sets out the ground relied on by Mr Ho (and also by Mr Leung, asserted via a proposed judicial review[\[13\]](#)) to question the election:

“(1) 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 – (iv) he engaged in corrupt conduct or illegal conduct at the election...”

(b) Section 32(2) defines the relevant concepts in section 32(1)(a)(iv) by reference to the Elections (Corrupt and Illegal Conduct) Ordinance (“ECICO”)[\[14\]](#):

“(2) In this section –

corrupt conduct means corrupt conduct within the meaning of Part 2 of the [ECICO]; ...

illegal conduct means illegal conduct within the meaning of Part 3 of the [ECICO].”

(c) The section in the ECICO relied on by Mr Ho is section 26 which materially provides:

“(2) A candidate engages in illegal conduct at an election if the candidate publishes a materially false or misleading statement of fact about the candidate ... for the purpose of-

(a) promoting the election of the candidate...; or

(b) prejudicing the election of the other candidate or candidates.

(3) For the purposes of this section, statements about a candidate or candidates include (but are not limited to) statements concerning the character, qualifications or previous conduct of the candidate or candidates.

(4) In a prosecution for an offence of having engaged in illegal conduct under subsection (1) or (2), it is a defence to prove that the defendant believed on reasonable grounds that the statement was true at the time when it was made.

15. Section 2 contains a definition of the word “candidate”, relevantly stating that it:

“(a) means a person who stands nominated as a candidate at an election; and

(b) also means a person who, at any time before the close of nominations for an election, has publicly declared an intention to stand as a candidate at the election ...”

C.2 The nature of Mr Ho’s case

16. Mr Ho complains of two statements made by Mr C Y Leung as constituting materially false or misleading statements falling within ECICO section 26(2) and thus supplying a basis for questioning Mr C Y Leung’s election.

17. The first statement was alleged to have been made by Mr C Y Leung on 14 May 2011, some ten months before the election and over six months before he declared his candidacy on 27 November 2011. It was alleged that he told certain journalists whom he had invited to dinner at his home that there were no unauthorised building works (“UBWs”) on his properties and that this had been confirmed by two lawyers and an architect/surveyor.[\[15\]](#) It was further alleged that on the following day, that statement was reported in the media and that Mr C Y Leung knew that this would occur.

18. The second statement relied on by Mr Ho was allegedly made during a television debate held on 13 February 2012 involving the three candidates in the Chief Executive election. In the course of that debate, Mr C Y Leung is alleged to have accused another candidate, Mr Henry Tang, of having lied to the public “in order to conceal the problem of your UBWs”, criticising him for having acknowledged the existence of such UBWs only after they had been revealed in press reports and questioning his integrity.[\[16\]](#)

19. Mr Ho’s case is that the first statement was materially false or misleading because, contrary to what Mr C Y Leung had told the journalists, it

was later shown that he did in fact have UBWs at his residence. As to the second statement, Mr Ho's case is that the statement made in attacking Mr Tang, either alone or read together with the first statement, must be understood to mean that unlike Mr Tang, Mr C Y Leung did not have any UBWs at his residence, an assertion later shown to be false and misleading.

C.3 Lam JA's decision on the first statement and the proposed ground of appeal

20. Lam JA struck out the first statement in the striking out judgment. Applying this Court's decision in *Mok Charles Peter v Tam Wai Ho*,^[17] which concerns illegal conduct in connection with election expenses under ECICO section 24, his Lordship concluded that "a statement published before the public declaration of candidacy and the election period cannot be a statement within the scope of Section 26."^[18] Since the first statement was allegedly published on 14 May 2011, well before such public declaration or election period, it was held to be an untenable ground for an election petition.

21. For the purposes of the present leave application, Mr Ho accepts that making the statement on 14 May 2011 (assuming it were to be proved) would not fall within section 26 of the ECICO.^[19] He had, however, also sought to persuade Lam JA that publication of that statement had continued into the relevant section 26 period. He now seeks leave to pursue that argument on appeal.

22. The Judge records^[20] how the "continuation" point was put:

"... he alleged that the 1st Respondent had continued to publish the statement. In particular, at para 110, he pleaded,

'...[Mr CY Leung] could have easily retracted those statements before his public declaration of candidacy by telling the truth to the press. He did not do so. Instead, he left those statements 'in a place' including, inter alia, paper media and the Internet, where they were likely to be read by the general public and voters during the election period or the period of candidacy. ...'"

23. Lam JA rejected that argument. He held that it was going much too far to characterise non-retraction by a candidate of a statement made months earlier, stored in media archives over which the candidate had no control, as continued publication of that statement.^[21]

24. We should say at once that we consider Lam JA’s decision on this point to be obviously correct and do not consider the continued publication point to be reasonably arguable.

25. The ground relied on by Mr Ho (and Mr Leung) for questioning the election is, as we have seen, the contention that Mr C Y Leung “engaged in corrupt conduct or illegal conduct at the election...” as provided for by CEEO section 32(1)(a)(iv). While it is true that an election petition is not a criminal proceeding, that section defines “corrupt or illegal conduct” by reference to section 26 of the ECICO which creates a serious offence punishable by up to one year’s imprisonment on summary conviction; and up to three years’ imprisonment on conviction on indictment. As is well-established, where in civil proceedings an allegation is made of criminal misconduct, the person making the allegation is required to prove it by evidence of a commensurate cogency.[\[22\]](#)

26. It is unsustainable to contend that the requirement to prove a materially false or misleading statement uttered for the purpose of promoting or prejudicing a particular candidate at a specific election, should be construed so loosely as to deem, months later, non-retraction in the aforementioned circumstances to be the making such a statement with such intent. Moreover, in seeking to project the first statement forward in time and to deem it a statement made during the election period, the “continuation” argument ignores the question whether there may have been a belief on reasonable grounds that the statement was true “at the time when it was made” – a defence provided for by ECICO, section 26(4). Such a defence may be relevant if the second statement was made in May 2011 in reliance on professional advice. The availability or otherwise of that defence is obviously not a point which we need to decide.

27. We accordingly refuse leave to appeal in respect of Lam JA’s decision to strike out the first statement.

C.4 Lam JA’s decision on the second statement and the election petition

28. Lam JA went on to dismiss the petition, holding that Mr Ho’s challenge based on the second statement had no real prospect of success. Mr

Ho seeks leave to appeal that decision on three proposed grounds, namely, that:

- (a) Lam JA was wrong to read in a discretion to extend time, the proper course being to strike down the seven-day time limit altogether;
- (b) having decided that he had power to extend time, Lam JA was wrong to adopt the real prospect of success test as the test for whether time should be extended; and
- (c) he was in any event wrong when applying that discretionary test to hold that the petition's grounds, based on ECICO section 26, had no real prospect of success.

C.5 The first ground: nullifying the time limit

29. In our view, the first ground is not reasonably arguable and leave to pursue it must be refused. Assuming for present purposes that the Judge was right to hold that the time limit was unconstitutional because it was too strict, the suggestion that he should have simply struck it down, leaving no time limit whatsoever for lodging election petitions is irrational, contrary to the self-evident legislative intent and impossible to justify in the public interest.

30. In cases where there is a finding of unconstitutionality, the Court seeks to grant a remedy which carries out as far as possible the legislative intent consistently with the constitutional requirements.^[23] It was argued on Mr Ho's behalf that it was beyond Lam JA's power to apply the remedy of reading in a discretion to extend time since, when passing the CEE Bill, the legislature had expressly declined to provide for such a power. That argument is misplaced. Choice of the constitutional remedy only arises where the Court has already decided that the law is unconstitutional. The legislature's reasoning which led to that very unconstitutionality cannot function as a bar to applying a remedial measure appropriately aimed at giving effect, so far as possible, to the legislative intent in a manner consistent with constitutional requirements.

31. The relevant intent of the legislature in enacting the CEEO provisions

concerned is plainly and obviously to provide a mechanism for arriving at a clear-cut lawful election result with a minimum of delay, avoiding any damaging period of prolonged uncertainty. It would be completely at odds with that policy for the Court to take it upon itself to abolish the time limit altogether. The suggestion that the reading in remedy was beyond Lam JA's power is not reasonably arguable.

C.6 The second ground: the real prospect of success test

32. Having decided that he should read in a discretion to extend time, Lam JA had to decide what test should be employed before such discretion was exercised in favour of an extension.

33. Lam JA held, in line with the principle of minimal remedial intervention just mentioned, that he had to take account of the underlying legislative policy of setting strict time limits. He found guidance in section 39 which laid it down that an extension of time in judicial review cases should not be granted unless the Court was satisfied that an extension was “in the interest of justice”. This led Lam JA to conclude that in exercising his discretion, apart from the length of and reasons for delay and possible prejudice to other parties; it was important to have regard to the merits of the challenge. He held that it would obviously be against the public interest to grant an extension of time where the challenge was of doubtful merit and settled on the “real prospect of success” test for the grant of an extension.[\[24\]](#)

34. It was contended on Mr Ho's behalf that the proper test for an extension of time was simply whether the election petition grounds were arguable, that is, that the test applicable to whether proceedings should be struck out summarily should apply. It was submitted that since Lam JA had declined to strike out the election petition insofar as it was based on the second statement, he should not have refused a time extension by adopting a more stringent “real prospect of success” standard.

35. In our view, assuming for present purposes that Lam JA was right to read in a discretion to extend time, we consider his approach to determining the threshold test unassailable. It would be contrary to commonsense and the interests of justice if an extension were to be granted where there was no real

prospect of success on the merits, bearing in mind the obviously important statutory policy of rapidly resolving election disputes.

C.7 The third ground: whether real prospect of success

36. Lam JA held that Mr Ho had no real prospect of successfully establishing that the 2nd statement was a materially false or misleading statement falling within ECICO section 26 and thus no real prospect of successfully establishing the section 32(1)(a)(iv) ground for questioning the election. He arrived at that conclusion holding that the focus had to be on the second statement itself in deciding whether it was caught by section 26(2) and after conducting a careful examination of that statement in the context of the wide-ranging television debate.^[25] As indicated above, Mr Ho submits that it is at least reasonably arguable that Lam JA was wrong and that the second statement, taken either alone or together with the first statement, must be understood to mean that unlike Mr Tang, Mr C Y Leung did not have any UBWs at his residence, an assertion later shown to be false and misleading.

37. In our view, a fundamental flaw in the argument advanced by Mr Ho (and Mr Leung) involves confusing (i) the meaning of a statement, with (ii) a basis for criticising the making of that statement. This may be illustrated by taking the well-known English proverb: “People who live in glass houses should not throw stones”. That is obviously good advice since such stone-throwing may rebound on the person who throws the stones, with much damaging effect. Thus, it is a proverb which one may cite when criticising a person who is perceived to be vulnerable to the very attack that he is directing at someone else. But a person who throws stones may or may not live in a glass house. He may or may not be acting in accordance with the proverbial advice. There is no logical basis for deducing from the fact that he is throwing stones that he is thereby declaring that he does not live in a glass house.

38. Reliance by the applicants on the second statement involves such a fallacy. The meaning of the second statement is clear. It was an attack on Mr Tang’s integrity for having UBWs and concealing their existence. To say, as the applicants do, that Mr C Y Leung was himself vulnerable to the very same attack, is to criticise him for having made that attack on Mr Tang, given his

own alleged vulnerability. But that is a very different thing from saying that the *meaning* of his statement denigrating Mr Tang was a claim that he, Mr C Y Leung, did not have any UBWs at his residence.

39. The law under discussion is only concerned with the meaning of the second statement, assuming that it is proved to have been made. It requires proof to the requisite standard that by reason of its content it bore a materially false or misleading meaning and that it was uttered for the purpose of promoting or prejudicing a relevant candidate at a specific election, without a belief on reasonable grounds that the statement was true at the time when it was made. Those requirements cannot be met merely by contending, as the applicants do, that Mr C Y Leung was susceptible to the very same attack which he was making on Mr Tang.

40. In our view, if Lam JA fell into error at all, it was an error in Mr Ho's favour. His Lordship had indicated in the striking out judgment,[\[26\]](#) that he was prepared to apply certain defamation law concepts, and was willing to approach the meaning of the 2nd statement, "giving due allowance to the permissible loose-thinking on the part of a reasonable audience."[\[27\]](#) But even on that basis, he concluded that there was no real prospect that a reasonable person would understand the second statement to mean that Mr C Y Leung was asserting the absence of UBWs at his own properties. It was, his Lordship held, "a quantum leap" to infer from his attack on Mr Tang, that Mr C Y Leung was "at the same time making a statement about his own properties."

41. While we do not seek to decide the point at present, it appears at least strongly arguable that he adopted too relaxed an approach to establishing the content of the statement relied on for establishing conduct constituting a criminal offence under section 26. Lam JA was content to treat "loose-thinking on the part of a reasonable audience" as permissible, no doubt having in mind defamation cases[\[28\]](#) which approach published statements on the basis that readers are allowed to import their own extrinsic experiences and to "read between the lines", in deciding whether the imputation has a defamatory meaning. A more demanding approach is called for where it is sought to establish the commission of a criminal offence as the relevant election petition ground. The Court would have to determine whether it is

proved to a standard equivalent to the criminal standard that the words, given their natural and ordinary meaning, constituted a materially false or misleading statement made with the purposes specified and without belief on reasonable grounds in the truth of the statement.

42. The second way in which Mr Ho seeks to rely on the second statement also lacks any legal basis. Perhaps implicitly recognizing that the content of the second statement taken alone will not get him home, he seeks leave to argue that it should be read together with the first statement which contains a positive assertion that there were no UBWs in Mr C Y Leung's residence. The first statement was of course struck out for the reasons discussed in Section C.3 above. The matters which must be proved if the election petition ground is to be established have just been set out in the preceding paragraph. The attempt to prove the alleged illegal conduct by stitching together two statements separated by some 10 months; one falling outside and the other within the election period; one made before and one made after the persons concerned became "candidates" as defined; rests on no sustainable construction of the relevant statutory provisions.

43. In our view, there are no reasonably arguable grounds for appealing Lam JA's aforementioned decision.

C.8 Conclusion as to FAMV 33 and FAMV 22

44. We conclude that the crucial aspects of the challenges asserted by Mr Ho against Mr C Y Leung's election are not reasonably arguable and that such challenges must therefore be brought to an end. We accordingly refuse leave to appeal on Mr Ho's Motion in FAMV 33. Since Mr Leung's challenges (even if he were to succeed on his challenge to the JR judgment) run along precisely the same lines, they must also fail and his Motion in FAMV 22 must likewise be dismissed. If any of the parties desire to make a costs application in relation to this decision, they have liberty to lodge and serve written submissions on costs within 14 days from the date of this Determination.

D. The other leave applications

45. Having reached the aforesaid conclusion, the other leave applications

become academic as between the parties. They concern issues anterior to the issues dealt with in Section C above so that, whatever the outcome regarding such anterior issues, the ultimate result is that the challenges mounted fail. In the normal case, the other leave applications would call for no further mention.

46. However, as the Court has previously held, notwithstanding the general rule that even in public law cases, it is a strong factor against granting leave that the issue has become academic as between the parties, it is not an absolute bar. If a sufficiently great public interest exists in having the issue decided by the Court, leave can be granted: *Secretary for Security v Sakthevel Prabakar*;[29] *Yeung Chun Pong v Secretary for Justice*[30] and *Chit Fai Motors Co Ltd v Commissioner for Transport*. [31]

47. We consider this is an exceptional case where, despite their academic status as between the parties, questions of law of great general or public importance do arise in relation to the following two questions, namely:

(a) Under the CEEO, how do challenges to a CE election pursuant to the election petition procedure in section 32 relate to challenges pursuant to the judicial review procedure in section 39? [32]

(b) Does the seven-day time limit laid down by CEEO section 34 involve any infringement of the right of access to a court guaranteed by Article 35 of the Basic Law, and if so, is such time limit unconstitutional? [33] This is a question which may have a bearing on other election time limits including the seven-day limit applicable to Election Committee Subsector elections [34] and the two-month time limits under the Legislative Council Ordinance, [35] the District Councils Ordinance [36] and the Village Representative Election Ordinance [37] respectively.

48. Accordingly, we give Mr Ho and Mr Leung leave to appeal on the first question; and Mr C Y Leung and the Secretary for Justice leave to appeal on the second question. Mr Ho and Mr Leung will be listed as applicants and Mr C Y Leung and the Secretary for Justice listed as the respondents. We appreciate that having failed on the substantive questions, Mr Ho and Mr

Leung may or may not wish to participate. If they decline to appear, the Court will give consideration to the appointment of an *amicus*.

49. In any event, we consider that the costs orders made against each of Mr Ho and Mr Leung by Lam JA pursuant to his judgment dated 28 September 2012 merit examination by the Court and exceptionally grant Mr Ho and Mr Leung leave to appeal against those costs orders on the “or otherwise” ground.

50. Any procedural directions needed in consequence of this Determination should be sought from the Registrar.

51. On Monday 12 November, after the hearing concluded on 9 November, leave was sought to lodge further submissions on behalf of Mr Ho. The document was considered *de bene esse* and leave was refused since it took the argument no further.

(Geoffrey Ma)
Chief Justice

(R.A.V. Ribeiro)
Permanent Judge

(Robert Tang)
Permanent Judge

Mr Martin Lee SC, Mr Hectar Pun, Mr Jeffrey Tam and Mr Carter Chim instructed by Lam and Lai, for the Applicant in FAMV 21, 25 & 33/2012, 1st Respondent in FAMV 26 & 34/2012 and Petitioner in FAMV 24 & 32/2012 (Ho Chun Yan Albert)

Mr Johnny Mok SC, Mr Abraham Chan instructed by Sit, Fung, Kwong & Shum, for the Applicant in FAMV 26 & 34/2012, 1st Respondent in FAMV 24, 25, 32 & 33/2012 (Leung Chun Ying)

Mr Stewart KM Wong SC, Mr Jin Pao instructed by the Department of Justice, for the Applicant in FAMV 24 & 32/2012 and Intervener in FAMV 25, 26, 33 & 34/2012 (Secretary for Justice)

Applicant in FAMV 22/2012: Leung Kwok Hung, in person, present

[1] HCAL 83/2012 and HCAL 84/2012, 30.7.12.

[2] HCAL 83/2012 and HCAL 84/2012, 28.9.12.

[3] HCAL 85/2012, 12.9.12.

[4] HCAL 85/2012, 5.10.12.

[5] In all of these applications, the FAMV numbers concerned are all 2012 numbers.

[6] Cap 569.

[7] Cap 484.

[8] This is reinforced by High Court Ordinance, Cap 4, section 14(3)(g) which eliminates appeals to the Court of Appeal in cases coming within section 22(1) (c).

[9] Skeleton §55.

[10] Section 39: (1) Notwithstanding any provision in the High Court Ordinance (Cap 4), no - (a) application for leave to apply for judicial review under section 21K of that Ordinance; or (b) other proceedings, which put in issue- (c) whether a candidate is duly determined to be not returned at an election under section 26A(4); or (d) whether the candidate declared under section 28 as elected at an election can lawfully assume the office of the Chief Executive, shall be made or commenced more than 30 days after the publication of the declaration under section 22(1AB)(d) or the publication of the result of the election under section 28 unless the leave of the Court has been obtained. (2) The Court may upon application grant the leave to make an application for leave to apply for judicial review or commence proceedings after the expiry of the 30 days referred to in subsection (1) if it is satisfied that- (a) the person making the first-mentioned application has used his best endeavours to make the secondmentioned application or commence the proceedings within the 30 days; and (b) granting the leave applied for is in the interest of justice.

[11] Section 14(1): Subject to subsection (3) and section 14AA, an appeal shall lie as of right to the Court of Appeal from every judgment or order of the Court of First Instance in any civil cause or matter.” The exceptions do not catch judicial review cases in general.

[12] O53 r 13: An appeal shall lie, from an order of a judge granting or refusing an application for judicial review, to the Court of Appeal, which may set aside or confirm any such order or substitute such order as ought to have been made.

[13] For brevity, we will refer simply to Mr Ho since his challenge spans all the issues arising and covers the narrower issues sought to be raised by Mr Leung. On common issues, Mr Leung’s position is the same as Mr Ho’s.

[14] Cap 554.

[15] Mr Ho’s Motion in FAMV 33, §34(1).

[16] Mr Ho’s Motion in FAMV 33, §34(2).

[17] [2012] 3 HKC 398.

[18] Striking out judgment, §140.

[19] Mr Ho’s Motion in FAMV 33, §47.

[20] Striking out judgment, §130.

[21] Striking out judgment, §§141-151.

[22] *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563; *HKSAR v Lee Ming Tee and Securities and Futures Commission* (2003) 6 HKCFAR 336, §71; *Nina Kung v Wang Din Shin* (2005) 8 HKCFAR 387, §§181-182.

[23] *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at §§77 and 78; *HKSAR v Ng Po On* (2008) 11 HKCFAR 91 at §47.

[24] Petition judgment §§20-28.

[25] Petition judgment §§40-46.

[26] At §§154 -175.

[27] Petition judgment §47.

[28] As in *Lewis v Daily Telegraph* [1964] AC 234 at 258; see *Oriental Daily Publisher Limited v Ming Pao Holdings Limited* FACV 1/2012 (26 September 2012), §98.

[29] (2003) 6 HKCFAR 397.

[30] FAMC 101/2005 (2 March, 2006).

[31] [2004] 1 HKC 465.

[32] Which had arisen in the context of FAMV 21 and FAMV 22.

[33] Which had arisen in the context of FAMV 24, FAMV 26, FAMV 32 and FAMV 34.

[34] CEEO, Schedule , Pt 4 Div 4, §39(1).

[35] Cap 542, section 65(1).

[36] Cap 547, section 53(1).

[37] Cap 576, section 43(1).