

# 立法會 *Legislative Council*

LC Paper No. LS118/08-09

## **Paper for the Bills Committee on Village Representative Election Legislation (Miscellaneous Amendments) Bill 2009**

### **Effect of the finding regarding "Tsing Yi Hui" (青衣墟) in a Judicial Review case<sup>1</sup>**

#### **Background**

At the meeting of the Bills Committee held on 10 July 2009, the Chairman requested advice on whether, in the light of the Court's finding in a judicial review case<sup>2</sup> that "Tsing Yi Hui" (青衣墟) is not an indigenous village, there was scope for the Secretary for Home Affairs (the Secretary) to reconsider the case of "Tsing Yi Hui" for the purpose of adding it to the list of "Indigenous Villages" in Schedule 2 of the Village Representative Election Ordinance (Cap. 576) (the Ordinance) so that the indigenous villagers of "Tsing Yi Hui" may elect their village representative according to the Ordinance.

#### **The Finding**

2. On 18 July 2003, the Secretary made a decision that "Tsing Yi Hui" was not eligible to be included in the schedules to the Ordinance. Mr. Lai Tak Shing (Mr. Lai) challenged the decision in the Court of First Instance<sup>3</sup> (CFI) and contended that the Secretary was obliged under section 67(1) of the Ordinance to amend Schedule 2 to add "Tsing Yi Hui". Hon Chung J in CFI made a finding of fact, at the request of the parties, that Mr. Lai had failed to establish that "Tsing Yi Hui" was an indigenous village and that "more probable than not" it was not<sup>4</sup> (The Finding). Hence, Mr. Lai's application for judicial review was dismissed.

3. On appeal to the Court of Appeal<sup>5</sup> (CA), Mr. Lai did not challenge the Finding. CA concluded that the Secretary had not exercised the discretion that was conferred on him by section 67(1) of the Ordinance to amend Schedule 2 to add "Tsing Yi Hui". However, even if the matter was to be remitted to the Secretary, he would be bound by the findings of fact made by Hon Chung J in CFI (including the

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<sup>1</sup> Constitutional and Administrative Law Proceedings No.82 of 2003 (HCAL 82/2003).

<sup>2</sup> Ibid note 1.

<sup>3</sup> Ibid note 1.

<sup>4</sup> Paragraph 40 of CFI's judgment.

<sup>5</sup> Civil Appeal No. 201 of 2005 (CACV 201/2005).

Finding) and it would be futile to remit the matter to him for reconsideration<sup>6</sup>. Mr Lai's appeal was therefore dismissed.

4. On further appeal to the Court of Final Appeal<sup>7</sup> (CFA), Mr. Justice Chan PJ in delivering CFA's judgment indicated that CFA would have regard to the Finding in determining Mr. Lai's entitlement to relief if it is decided that the Secretary has not properly exercised the power to add "Tsing Yi Hui" to the list of indigenous villages in Schedule 2 of the Ordinance. However, CFA concluded that notwithstanding that section 67(1) of the Ordinance is in open terms and that no criterion is expressed in the Ordinance as to how and under what circumstances this power is to be exercised, on a true construction of section 67(1) of the Ordinance, the Secretary was not empowered to add or delete any indigenous or existing village to or from the Schedules and it is not the intention of the Legislature to confer such a wide power on the Secretary<sup>8</sup>. Rather, section 67(1) of the Ordinance is aimed at giving power to the Secretary to correct errors and mistakes in matters of detail appearing in the Schedules which may be discovered subsequent to the enactment of the Ordinance and from time to time<sup>9</sup>. The appeal was therefore dismissed without CFA having to address the question of the effect of the Finding for the purpose of section 67(1) of the Ordinance.

### **Resolution of factual dispute on judicial review**

5. The starting point in judicial review is that it is unsuitable for resolving issues of fact. Nevertheless, the judicial review court may need to make findings of fact (with or without oral evidence), especially if crucial to whether a ground for intervention is made out<sup>10</sup>. There are cases which support the view that it may be appropriate to resolve factual disputes on judicial review<sup>11</sup>. Therefore, the court in judicial review cases may make findings of fact if it is appropriate to do so.

### **Conclusion**

6. Although it is not usual for a court to make findings of fact in judicial review cases (as indicated by CA in paragraph 44 of the judgment), as the matter now stands, the Finding is nevertheless a finding of fact that has been made by CFI and held by CFA to be a relevant factor that it would have regard to as to the entitlement to relief if the Secretary has not properly exercised the power to add "Tsing Yi Hui" to the list of indigenous villages in Schedule 2 of the Ordinance. However, as CFA has ruled that the Secretary has no such power, the Finding cannot have any relevance for

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<sup>6</sup> Paragraphs 40, 51 and 52 of CA's judgment.

<sup>7</sup> Final Appeal No. 5 of 2007 (Civil) (FACV 5/2007).

<sup>8</sup> Paragraph 40 of CFA's judgment.

<sup>9</sup> Paragraph 49 of CFA's judgment.

<sup>10</sup> Judicial Review Handbook by M. Fordham (5<sup>th</sup> Ed) para.17.3. This paragraph in a previous edition was cited in *Lai Tak Shing –v- Director of Home Affairs* [2006] HKCU 1692 at [50] (i.e. CACV 201/2005).

<sup>11</sup> Judicial Review Handbook by M. Fordham (5<sup>th</sup> Ed) para.17.3.5.

the purpose of the exercise of the Secretary's power under section 67(1) of the Ordinance.

7. As CFA has not found it necessary to address the question of the effect of the Finding, CA's judgment as regards the effect of the Finding as mentioned in paragraph 3 above remains an authoritative finding on that matter, which finding in fact accords with the Administration's position. It would therefore appear that it would be up to the Secretary to decide whether there is any cause to reconsider the case of "Tsing Yi Hui" for the purpose of adding it to the list of "Indigenous Villages" in Schedule 2 of the Ordinance e.g. where there is further or fresh evidence other than that adduced to CFI in support of the inclusion of "Tsing Yi Hui" into the Ordinance.

8. If the Secretary reconsiders that there is a case for "Tsing Yi Hui" to qualify as an indigenous village, it is then for the Legislature<sup>12</sup>, not the Secretary, to decide by way of adding it to Schedule 2 of the Ordinance through enactment of an amendment bill.

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<sup>12</sup> In paragraph 51 of CFA's judgment, in answer to Counsel's submission that "it is possible for new indigenous villages to be discovered and new existing villages to emerge and that the Secretary should have the power to add or remove villages to or from the Schedules", Mr. Justice Chan PJ opined that "if and when it is deemed necessary or appropriate to add or delete any indigenous or existing village to or from the Schedules, it is, I think, properly a matter for the Legislature and not the Secretary."