CB(2)1546/98-99(01)

1998. No. AL112

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

BETWEEN

CHAN WAH	Appiicant
and	
HANG HAU RURAL COMMITTEE	First Respondent
SAI KUNG DISTRICT OFFICE	Second Respondent
CHEUNG KAM CHUEN	Intervener

Before the Hon Mr Justice Findlay, in Court

Date of hearing: 9 march 1999
Date of handing down of judgment: 12 March 1999

Mr Philip Dykes, SC, and Mr S Yan, instructed by Messrs CC Lee & Co, for the applicant.
Mr Sing Hon Keung, the Chairman of the first respondent.
Mr Johnny Mok and Ms Fanny Wong, instructed by the Department of Justice, for the second respondent.
Mr James Collins, instructed by Messrs Clarke & Liu, for the intervener.

JUDGMENT

This is an application under Order 53 seeking relief in respect of a decision by the first and second respondents not to register the applicant as a voter for the Hang Hau Po Toi O Village Representative Election in March 1999.

The applicant was born in Po Toi O village in 1932. He has lived and worked there ever since. He is not descended through the male line from a person resident in the New Territories in 1898. This apparently is the qualification necessary to be accepted as an “indigenous villager”. He is, however, married to an indigenous villager.

In September 1998. the applicant saw a notice issued by the first respondent to the

election of the Po Toi O Village Representative. According

to the Election Rules issued by the first respondent the applicant was eiigible to vote in the election. The applicant submitted his application to be registered as a voter to the second respondent. His name was published in a provisional list of voters. but was excluded from the final list. By a letter dated 23 November 1998 by the second respondent. the applicant was told-"You have submitted to our Department the application form in respect of [the Hang Hau Po Toi O Village - Village Representative Election - Electorate Registration]. Based on the following reasons, our Department cannot admit your application to register as a qualified voter:-You are not an indigenous villager. You are informed that your name will not be entered in the formal electorate list."

The District Officer of the Sai Kung District, Mr Yau Sai-yan, says that the first respondent met on 4 September 1998. It decided to amend certain Model Rules promulgated by the Heung Yee Kuk, which would allow persons such as the applicant to vote, so that these people were disenfranchised. The second respondent says that the view of the first respondent was that "the voting rights of non-indigenous villagers in indigenous villages would be subject to the agreement of the indigenous villagers". In a letter dated 7 September 1998, the first respondent wrote to the second respondent about rules for the election. Strangely, it did not make specific mention of the disenfranchisement, merely hinting at it by saying that a "recognised villager" could vote. Equally strangely, the second respondent seems to have ignored the first respondent's decision because it published the election rules as seen by the applicant, including the provision deleted by the first respondent, so that these said that the applicant was eligible.

On 16 September 1998, the second respondent heard from a number of indigenous villagers of Po Toi O village who said that they objected to non-indigenous villagers taking part in the election. A meeting followed this at which the second respondent's attitude was that voter eligibility was a matter for the villagers and the first respondent, not the second respondent.

The first respondent expressed the view that it hoped that all villagers could participate in the election. but it wished to respect the opinion of the indigenous villagers so that non-indigenous villagers were excluded.

Following the publication of the provisional list of voters, the second respondent received objections from candidates to many names on the list on the ground that they were not indigenous villagers. The second respondent says again that decision as to who was included in the final list was for the village and the first respondent, not the second respondent. The second respondent says that a vetting committee was formed consisting of the existing village representative (Mr Cheung Kwan), the chairman and vice-chairman of the first respondent and 6 indigenous villagers. The committee met on 13 November 1998 and decided that over 300 people should be removed from the list. The letter of 23 November 1998 I have mentioned was sent by the second respondent "acting in accordance with the wishes of the [first respondent] and the village's vetting committee".

In these proceedings, the first respondent, like the second respondent, seeks to distance itself from decision to refuse voting rights to the applicant. Mr Sing says that the first respondent has only an advisory role, and the second respondent is responsible "for all administration and organisation, such as fixing the date of election and registering voters". He goes on to say, however, that the eligibility of a non-indigenous villager to vote has "to be decided and agreed by indigenous villagers".

According to Mr Mok, the attitude of the second respondent in these proceedings is "neutral". As I said to Mr Mok in court, I find it quite astonishing that the government has no view on this matter. Whether or not a person in Hong Kong has the right to vote in an election, albeit at a pretty low level, is, I would have thought. a matter of some importance; certainly of sufficient importance for the government to be concerned. The attitude adopted by the second respondent, both in the happenings leading up to the applicant being disenfranchised and in these proceedings. which. as Mr Dykes put it is verging on one of indifference. is very puzzling.

The intervener who was deciared to be a proper person to be heard in opposition to the application. does not distance himself from the matter. He says that he opposes the application. He does so on the basis that "Even since the establishment of the said village sometime before 1898. non-indigenous villagers were and still are traditionally not allowed to vote in the said election notwithstanding that they have been living in the said village for years." This, he says, is because the village representative has the task of identifying indigenous villagers for the purpose of such privileges as the entitlement to a "small house", and he could not do that easily if he were a non-indigenous villager. I would have thought that the main task of a village representative was to represent the village-the whole of the village-and he could better do that if the whole of the village had had a say in his election.

Mr Cheung Kwan, who was said by the second respondent to have been part of the vetting committee and who is the present village representative, says that he has never heard of any vetting committee. He supports the applicant's right to vote.

A "village representative" is, under the Heung Yee Kuk Ordinance (Chapter 1097), "a person elected or otherwise chosen to represent a village who is approved by the Secretary for Home Affairs". That does not help very much, so one must look elsewhere to see if the applicant has a right to vote in the election or other choice of the village representative. The broad purpose of the Kuk is represent the interests of "the people of the New Territories". There is not the slightest hint in the Ordinance, or elsewhere, that the "the people of the New Territories" means anything other than all the people of the New Territories; the phrase cannot possibly be construed, in the context of the Ordinance as a whole, as meaning only those people of the New Territories who are indigenous villagers.

Article 26 of the Basic Law says that "Permanent residents of the Hong Kong Special Administrative Region shall have the right to vote and the right to stand for eiection in accordance with law." The applicant is a permanent resident.

Article 39 of the Basic Law provides for the receipt of the International Covenant on Civil and Political Rights (ICCPR). Under Article 25 of the ICCPR the applicant has a right to take part in the conduct of public affairs. There can be no doubt that the election or choice of a village representative is a public affair. This right is not to be restricted by reason of the applicant's lineage. It can be subject to reasonable restrictions. One of these could be that if you have no connection with the village concerned, you may not vote or take part in the choice of that village's representative.

Of course it is so that the law need not provide for an election to an office. The law could have provided that the village representative would be the eldest inhabitant, or the inhabitant who had resided in the village for the longest period of time, and the applicant could not have complained about this. But once the law provides for an election or other method of choice by the village, only reasonable restrictions may be applied to exclude villagers from being eligible to vote

Without more, these provisions of the law lead the conclusion that the decision to debar the applicant from taking part in the choice of the representative of his village is unlawful.

The applicant also complains that he has been subject to unlawful discrimination forbidden by the Sex Discrimination Ordinance (Chapter 480). The undisputed evidence is that an non-indigenous villager woman married to a indigenous villager man may vote in an election of a village representative, but a non-indigenous villager man married to a indigenous villager woman may not do that. That is clear discrimination on the grounds of the man's sex, and is unlawful.

Unfortunately, I do not have the benefit of any legal argument from the respondents, but I think that Mr Collins, for the intervener, has said all that can be said in advancing a case against the conclusion I have just mentioned.

There is no doubt that indigenous villagers have some privileges. These include those relating to burial, those under the small house policy, and exemption from some rates. Mr Lau Koon Wah, an indigenous villager who made

an affirmation in support of the intervener, suggests that one of the "customary ancestral and other legal rights" enjoyed exclusively by indigenous villagers is "the right to participate in the selection of the village representative". It cannot possibly be so that there is a custom that indigenous villagers enjoy, to the exclusion of non-indigenous villagers, the right to choose village representatives under Chapter 1097 that only became law in 1959. That is nonsense. Indeed, Mr Coliins expressly disavows any reliance on an argument that indigenous villagers have a customary exclusive right to vote for a village representative. But putting custom aside, it is very difficult to see what is left.

Mr Collins says that the Kuk is not an institution representing all the people of the New Territories; that the Ordinance created or confirmed a system for representing only the indigenous inhabitants. For all I know, that may in fact be the way the Kuk works, but it is certainly not what is contemplated by the law.

Mr Collins also argues that there does exist a special privileged constituency of indigenous inhabitants in the New Territories, and this class is recognised by Article 122 of the Basic Law. This Article provides special protection is afforded to landed property held by indigenous villagers. This is undoubtedly so, but is nothing to the point. Nothing I have been shown indicates that this privileged constituency has exclusive voting rights in respect of village representatives.

The next argument is that the applicant may vote in other elections in Hong Kong so the ICCPR is satisfied. I do not accept this. Of course, there may be elections in Hong Kong from which the applicant may be barred from voting. The question is: Is that restriction reasonable? To disallow the applicant a vote in the Legal Functional Constituency is not unreasonable because he is not a lawyer, but it is unreasonable to refuse to allow him to vote for the representative of the village in which he was born and has lived and worked all his life on the ground that he is not an indigenous villager.

Mr Collins relies on Article 40 of the Basic Law, which says that the "lawful traditional rights and interests of the indigenous inhabitants of the

'New Territories' shall be protected by the Hong Kong Special Administrative Region", although he recognises that this begs the question as to what are such "lawful traditional rights". He accepts that there is no custom relating to the exclusive right to vote for the village representative, but he says. Chapter 1097 provides for the Kuk to protect this special interest group. and therefore, there is nothing unreasonable in restricting voting rights under that Ordinance to this sector of the community. As I have said, I cannot see anything in Chapter 1097 that sanctions the view that the Kuk is there exclusively to protect the interests of this special interest group. Of course, that is one of the Kuk's functions; to make sure that the rights of the indigenous villagers are not eroded, but this does not mean that it has no interest in protecting the rights of other New Territories inhabitants. And it certainly does not mean that any election or choice under that Ordinance may reasonably be restricted to indigenous villagers.

Mr Collins says that the law in Chapter 1097 simply acknowledges that the process of election of the village representative is entirely an internal affair of the village which may conduct that process of choice in any manner it pleases. What this submission means, but does not say so directly, is that the process of election is entirely an internal affair, not of the village, but of only some of the members of the village, who may not even be the majority of the regular inhabitants. The submission only has to be translated into what is meant for it to be rejected as unreasonable. It is interesting that, during his submissions, Mr Collins referred several times to "outsiders", meaning people like the applicant who may have lived in the village all their lives. I would not think of these people as "outsiders".

I find that there is nothing in what Mr Collins has submitted that persuades me that refusing to allow the applicant a vote in the choice of the representative for his own village is anything but a blatantly unreasonable restriction on his civil rights.

Mr Collins accepts that he is in difficulty in arguing that there has been no discrimination against the applicant on the grounds of his sex. He was driven to arguing that Chapter 480 was incompatible with the guarantees contained

in Article 40 of the Basic Law. There is nothing before me to show that one of the "lawful traditional rights and interests of the indigenous inhabitants" is the right to discriminate against a man on the ground of his sex. That argument is rejected.

So in my view the applicant has established an invasion of his civil rights and he is entitled to a remedy. The applicant asks for an order of mandamus and an injunction. The difficulty about that is that no one has been open enough to admit responsibility for the decision. There is a pointing of fingers by one respondent to the other, and a pointing at some vetting committee, although a person said to have been a member of that committee denies any knowledge of it. It is sufficient, I think, to make the appropriate declarations, and whoever makes the decision must take these, as long as they stand, as the law. I grant declarations in terms of paragraphs 3, 4(a) and 4(b) of the relief sought in Form 86A.

As to costs, there are some obvious complications in this case. The matter may have to be argued, but there is little doubt that both respondents had a hand in bringing about the situation in which the applicant was compelled to take proceedings to protect his rights, and, although their involvement in these proceedings has been half-hearted, neither respondent has said plainly that it does not contest the relief sought. In particular, the government's attitude has been less than a court is entitled to expect in this sort of matter. Protection of a person's rights in the public law area are, or should be, a matter of concern to the government. It is simply not good enough to refuse to take a view. At this stage it seems right to me that the applicant should have his costs from both respondents and the intervener. I make an order nisi accordingly.

JK FINDLAY
Judge of the High Court
Court of First Instance