1998 HCAL No. 71

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST

BETWEEN

CHIM PUI CHUNG	Applicant
and	
THE PRESIDENT OF THE LEGISLATIVE COUNCIL	Respondent

Before: The Hon. Mr. Justice Keith in Court

Date of Hearing: 8th September 1998

Date of Delivery of Judgment: 8th September 1998

J U D G M E N T

Introduction

Chim Pui Chung is a member of the Legislative Council. On 1st August, he was convicted of an offence of conspiracy, and two days later he was sentenced to 3 years' imprisonment. He has applied for leave to appeal

against his conviction and sentence, and that application is due to be heard on 12th November.

Art. 79 of the Basic Law provides:

> "The President of the Legislative Council … shall declare that a member of the Council is no longer qualified for the office under any of the following circumstances: …
>
> (6) When he or she is convicted and sentenced to imprisonment for one month or more for a criminal offence … and is relieved of his or her duties by a motion passed by two-thirds of the members of the Legislative Council present."

On 5th August, members of the Legislative Council decided to present a motion under Art. 79(6) seeking Mr. Chim's removal from office. There is no evidence before me as to when that motion was presented, but on 27th August the President of the Legislative Council decided that the motion be placed on the agenda for debate at the meeting of the Legislative Council due to take place tomorrow, i.e. Wednesday 9th September. On this application for leave to apply for judicial review, Mr. Chim seeks to challenge that decision of the President of the Legislative Council. In effect, he wants the debate postponed until after his appeal has been heard.

The papers were filed in the Registry shortly before 4:00 p.m. yesterday. They were placed before me not long after that. Since the Notice of Application requested a hearing of the application if leave was not granted on the papers, and in view of the need for the application to be decided quickly, I directed that there should be a hearing of the application this morning. That was too late for the hearing to be referred to in the Daily Cause List, but in view of the interest which I anticipated this application would arouse, I asked my clerk to notify the Press Office of today's hearing.

I also directed that the hearing be *inter partes*, because if I decided to grant leave to apply for judicial review, it would have been necessary to hear from the legal representatives of the President of the Legislative Council on the crucial issue of interim relief, without which the grant of leave to apply for judicial review would have been a dead letter.

The construction of Art. 79(6)

Two grounds are advanced for challenging the decision of the President of the Legislative Council to permit the motion to be debated tomorrow. The first relates to the proper construction of Art. 79(6). Mr. Philip Dykes S.C. for Mr. Chim argues that the words "convicted" and "sentenced" in Art. 79(6) relate to convictions and sentences which have been sustained on appeal. In other words, the power of the President of the Legislative Council to declare that a member is no longer qualified for office under Art. 79(6) is not triggered until all avenues of appeal from the original conviction and sentence have been exhausted and have failed.

There is nothing in the language of Art. 79(6) to justify that construction of it. If that construction had been intended, I would have expected express words to be used. In their natural and ordinary meaning, the words "convicted" and "sentenced" relate to a defendant having been convicted and sentenced by a court of first instance exercising an original jurisdiction.

I recognise that the provisions of the Basic Law should be construed, if possible, in such a way as to avoid anomalies. In that connection, I do not overlook Mr. Dykes' point that his construction of Art. 79(6) avoids the situation where, after a successful appeal against conviction

or sentence, the grounds for seeking a declaration by the President of the Legislative Council would no longer have existed. But I do not believe that the situation is anything like as anomalous as Mr. Dykes suggests. There is a need for the constituents of a member of the Legislative Council to continue to be represented in the Legislative Council. If the removal of a member, who has been convicted of a criminal offence and sentenced to a term of one month's imprisonment or more, has to be postponed for a number of months before his appeal can be heard, his constituents will be disenfranchised for that period of time. The absence of any express words in Art. 79(6) relating to the exhaustion of all avenues of appeal leads me to conclude that those responsible for drafting the Basic Law thought it more important that there be a full complement of members of the Legislative Council ensuring proper representation for the electorate than the right of a convicted individual member to have his or her seat in the Legislative Council held in abeyance while an appeal is being pursued.

Mr. Dykes relies on the fact that a declaration by the President of the Legislative Council depends, not merely on the fact of conviction and sentence, but on the vote of two-thirds of the members present as well. The fact that conviction and sentence do not automatically result in removal from office points, he says, to the construction for which he contends. I disagree. I think it demonstrates the very opposite. Conviction and sentence do not automatically result in removal from office even after all appeals have been heard. The fact that two-thirds of the members present have to vote for a member's removal reflects, therefore, not the need for all appellate procedures to be exhausted, but the desirability of leaving the ultimate decision as to whether a member's conviction or sentence should result in his removal from office to the good sense of members of the Legislative

Council. Thus, it is open to members of the Legislative Council to defer the question of a member's removal under Art. 79(6) until his appeal has been heard - for example, because the appeal is due to be heard shortly or the member is on bail pending appeal and therefore able to look after the interests of his constituents in the meantime, or for any other reason which commends itself to the members of the Legislative Council. Mr. Valentine Yim for the President of the Legislative Council has confirmed that the procedures of the Legislative Council make it possible for a member to propose that the debate on Mr. Chim's removal from office be deferred. If a member proposes that, that proposal will be debated, and if it is thought appropriate by a majority of the members present to defer the debate on Mr. Chim's removal to a later date, the debate will be deferred.

Mr. Dykes also relied by analogy on a series of cases in Malaysia and Singapore relating to provisions in the Federal Constitution of Malaysia and the Constitution of Singapore not dissimilar to Art. 79(6). I have not found those cases helpful. The crucial difference is that the Federal Constitution of Malaysia and the Constitution of Singapore provide for automatic disqualification from office in the event of conviction and sentence. It is true that the question as to whether the member has become disqualified is for the legislature to decide, but the fact that disqualification is automatic may well have dictated the construction which the Malaysian courts have placed on the words "convicted" and "sentenced", and which the Singapore courts have simply assumed was the correct one.

For these reasons, therefore, I do not think that the construction of Art. 79(6) contended for by Mr. Dykes is an arguable one.

The reasonableness of the President's decision

The second ground of challenge is that it was unreasonable for the President of the Legislative Council to place the motion seeking Mr. Chim's removal from office on the agenda for the Legislative Council's meeting tomorrow. It was unreasonable to do that, so it is said, when she knew, or ought to have known, that (a) Mr. Chim had applied for leave to appeal against his conviction and sentence, (b) that application was due to be heard in November, (c) Mr. Chim had also applied for bail pending appeal, and (d) his application for bail pending appeal is due to be heard on 22nd September. If his application for bail is granted, Mr. Chim will be able to serve his constituents despite his conviction and sentence until his appeal is heard.

The President's decision can only be successfully challenged on the ground of unreasonableness if, to use the words of Lord Diplock in *Council of Civil Service Unions v. Minister of the Civil Service* [1985] A.C. 374 at p.410G, the decision was "so outrageous in its defance of logic… that no sensible person who had applied his mind to the question to be decided could have arrived at it". In my judgment, the challenge to the decision of the President on the ground of unreasonableness is bound to fail. By placing the motion on tomorrow's agenda, she was not deciding that the issue had to be decided then. If any member thinks that it is premature for the issue to be debated, he can propose that the debate be deferred, for example, until after the appellate process has been completed. Thus, the challenge to the reasonableness of the President's decision for the debate to take place tomorrow is misconceived. Her decision merely gives members of the Legislative Council the opportunity to decide whether the issue should be debated tomorrow.

Conclusion

For these reasons, assuming in Mr. Chim's favour, but without deciding, that the court has power to review decisions of the President of the Legislative Council, this application for leave to apply for judicial review must be dismissed, though in conclusion, I should add two things. First, I would not want anyone to think that the dismissal of this application means that I think that the debate as to whether Mr. Chim should be removed from office should proceed tomorrow. I have simply been deciding whether it is arguable that the decision to place the issue on the agenda for tomorrow's meeting was legally flawed. Whether the debate should proceed is a matter entirely for the politicians to decide. Secondly, I have referred in this judgment to whether a particular point is arguable. That is a form of shorthand. The test which I have applied is the one laid down by Godfrey J. (as he then was) in the Court of Appeal in *R. v. Director of Immigration ex p. Ho Ming Sai* (1993) 3 HKPLR 557 at p.170:

> "Does the material before me disclose what might on further consideration turn out to be an arguable case?"

(Brian Keith)
Judge of the Court of First Instance

Mr. Philip Dykes S.C. and Ms. Y. Y. Chu, instructed by Messrs. Dixon Tang & Co., for the Applicant.

Mr. Valentine Yim, instructed by Messrs. Simmons & Simmons, for the Respondent.