

立法會

Legislative Council

LC Paper No. LS 15/02-03

Paper for the Bills Committee on Village Representative Election Bill

Purpose of the Paper

At the Bills Committee meeting on 22 October 2002, a member requested the Legal Service Division to advise on whether the proposed electoral arrangements for Village Representative elections in the Bill are consistent with—

- (a) the judgment of the Court of Final Appeal delivered in *Secretary for Justice & Others v. Chan Wah & Others* [2000]3HKLRD64 (**Annex 1**); and
- (b) the Heung Yee Kuk Ordinance (Cap. 1097).

Consistency with *Secretary for Justice & Others v. Chan Wah & Others*

Brief facts of *Secretary for Justice & Others v. Chan Wah & Others*

2. Two non-indigenous villagers challenged the validity of the 1999 electoral arrangements for the position of village representative at their respective villages by judicial review proceedings. In respect of the challenge, the Court of Final Appeal held, among other things, that—

- (a) exclusion of non-indigenous villagers from voting or standing for election at village representative elections was unreasonable and contrary to the right to participate in public affairs (article 21(a) of the Hong Kong Bill of Rights (**Annex 2**)); and
- (b) electoral arrangement under which non-indigenous women married to indigenous men had the right to vote but non-indigenous men married to indigenous women were excluded from voting, contravened section 35 of the Sex Discrimination Ordinance (Cap. 480) (**Annex 3**).

The right of the non-indigenous villagers to vote and stand for election at Village Representative elections

3. The Administration proposes in the Bill to address the Court's ruling relating to the right of the non-indigenous villagers to vote and stand for election at village representative elections by establishing, for an Existing Village (defined in the Bill), the office of resident representative with effect from 1.7.2003. There will be one Resident Representative for an Existing Village. The function of a Resident Representative is to reflect views on the affairs of the Existing Village on behalf of the residents of the Village. A Resident Representative will not deal with any affair relating to the lawful traditional rights and interests of indigenous inhabitants. A person is not eligible to be registered as an elector for an Existing Village unless, among other things, he has been resident of the Village for the three years immediately before applying to be registered. A person is eligible to be nominated as a candidate at an election for an Existing Village only, among other things, if he has been a resident of the Village for the six years immediately preceding the nomination.

4. The Bill also proposes to establish, for an Indigenous Village (defined in the Bill), the office of indigenous inhabitant representative with effect from 1.7.2003. There is also to be established for a Composite Indigenous Village (defined in the Bill) the office of indigenous inhabitant representative with effect from the same date. Both Indigenous Village and Composite Indigenous Village consist of indigenous inhabitants but a Composite Indigenous Village is composed of two or more indigenous villages. There will be one to five Indigenous Inhabitant Representatives for an Indigenous Village or a Composite Indigenous Village. A person is not eligible to be registered as an elector for an Indigenous Village or a Composite Indigenous Village unless, among other things, he is an indigenous inhabitant (defined in the Bill) of the Village, or a spouse of an indigenous inhabitant of the Village. A person could register as an elector for both an Indigenous Village (or a Composite Indigenous Village) and an Existing Village, if he is both an indigenous inhabitant of the Indigenous Village and a resident in the Existing Village. A person is eligible to be nominated as a candidate at an election for an Indigenous Village or a Composite Indigenous Village only, among other things, if he is an indigenous inhabitant of the Village.

Article 21 of the Hong Bill of Rights

5. The appeal was concerned with article 21(a) of the Hong Kong Bill of Rights. The limb referring to the distinction in article 1(1) of the Hong Kong Bill of Rights had not been seriously relied on in the appeal. That article refers to distinction such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. What had been relied on was the limb of unreasonable restrictions. The Court of Final Appeal held that the exclusion of non-indigenous villagers from voting or standing for election at village representative elections was unreasonable and contrary to article 21(a).

6. The wording of article 21(a) suggests that it can be satisfied either by imposing no restriction or reasonable restrictions on the right to participate in public life. The proposed electoral arrangements stated in paragraphs 3 and 4 have imposed certain restrictions on the right to vote or stand for election at Village Representative elections. These restrictions include the qualifications of certain people to vote and stand for election at Indigenous Inhabitant Representative elections, the qualifications of certain people to vote and stand for election at Resident Representative elections and the inequality of suffrage. The question at issue is then whether these restrictions are reasonable. In *Secretary for Justice & Others v. Chan Wah & Others*, the Court observed at p.654 of the judgment that "[t]he question whether restrictions are reasonable or unreasonable has to be considered objectively. One must have regard to the nature of the public affairs the conduct of which is involved and the nature of the restrictions on the right and the opportunity to participate and any reason for such restrictions.". In this respect, the Court in *R v. Secretary for the Civil Service & Anor, ex p AECS & Ors* (1995)5HKPLR490 (**Annex 4**), when considering article 21(c) (right of access to public service on general terms of equality), said at p.517 of the judgment that—

"It is for the Government to determine what restrictions are reasonably necessary, and the court's powers of intervention are limited. That is because, to adopt a phrase used by European human rights lawyers, the Government has a 'margin of appreciation' in the determination of what is reasonable. Provided that the reasonableness of a restriction is within the range of reasonable views which the Government can form, the courts cannot substitute their own view for that of the Government."

7. As mentioned in paragraph 5, the appeal in *Secretary for Justice & Others v. Chan Wah & Others* did not rely on the distinction in article 1(1) referred to in article 21(a). Would it make any difference if the restriction is attributable to one of the distinctions in article 1(1)? In *Association of Expatriate Civil Servants of Hong Kong v. Chief Executive of the HKSAR* [1998]2HKC138 (**Annex 5**), the Court considered whether prohibition of public officers from being legally represented at disciplinary hearing constituted unreasonable restriction on their right of access to public service on general terms of equality protected by article 21(c). The Court, when considering article 21(c), drew a distinction between a case in which article 1(1) is relied on or not. In that case, if the restrictions were attributable to one of the distinctions in article 1(1) in the context of article 21(c), it had to be shown that—

- (a) sensible and fair-minded people would recognize a genuine need for the preferential treatment,
- (b) the preferential treatment was both rational and rationally connected to the need which justified it, and

- (c) the preferential treatment was proportionate to that need, and was no more extensive than was necessary to achieve the objective which made the preferential treatment necessary.

In that case it was not contended that the restriction on legal representation was attributable to any of the distinctions mentioned in article 1(1). Despite that, the Court went on to say at p.153 of the judgment that it had also considered the restriction on legal representation against the three factors and concluded that those factors had been satisfied.

8. Apart from article 21(a), article 21(b) of the Hong Kong Bill of Rights is also relevant the electoral arrangements proposal in the Bill. Article 21(b) guarantees, without unreasonable restrictions, the right to equal suffrage. The proposed electoral arrangements allow an indigenous villager who is also a resident to have two votes to cast at an Indigenous Inhabitant Representative and a Resident Representative election respectively. Do the electoral arrangements contravene the right to equal suffrage? In *Lee Miu Ling v. The Attorney General* [1995]HKCA517 : (Annex 6), the plaintiffs made complaints against the constitutionality of the provisions of the Legislative Council (Electoral Provisions) Ordinance (Cap. 381) (now repealed) relating to the electoral arrangements for the functional constituencies. One of the complaints was that some people could vote in a geographical constituency and also in a functional constituency at the same time, while other people could only vote in a geographical constituency. In dismissing the complaint, the Court had not relied on the general test in *The Queen v. Man Wai-keung (No. 2)* [1992]2HKCLR207 (to be discussed later on in this paragraph) because it was of the view that the "inequality of suffrage" was consistent with article VII(3) of the Letters Patent and hence not unconstitutional. However, the Court's application of the general test in *The Queen v. Man Wai-keung (No. 2)* in dismissing another complaint about the disparity in the weight of each voter in different constituencies which varied in size is highly relevant to our discussion. While acknowledging that there was a departure from identical treatment, the Court agreed with *The Queen v. Man Wai-keung (No. 2)* that—

"Clearly, there is no requirement of literal equality in the sense of unrelentingly identical treatment always. For such rigidity would subvert rather than promote true even-handedness. So that, in certain circumstances, a departure from literal equality would be a legitimate course and, indeed, the only legitimate course. But the starting point is identical treatment. And any departure therefrom must be justified. To justify such a departure it must be shown : one, that sensible and fair-minded people would recognize a genuine need for some difference of treatment; two, that the difference embodied in the particular departure selected to meet that need is itself rational; and three, that such departure is proportionate to such need."

In this respect, the test in *The Queen v. Man Wai-keung (No. 2)* is materially the same as the three factors mentioned in *Association of Expatriate Civil Servants of Hong Kong v. Chief Executive of the HKSAR*.

Advice

9. The question whether the restrictions in the electoral arrangements proposed in the Bill are consistent with article 21(a) appears to be a question of reasonableness to be considered objectively having regard to all the circumstances of the case : *Secretary for Justice & Others v. Chan Wah & Others*. In deciding this question Members may have regard to whether the proposed electoral arrangements have best achieved a balance in the protection of the interests of the indigenous villagers and the non-indigenous villagers of the New Territories. In this connection, the Government has a "margin of appreciation" in the determination of what is reasonable : *R v. Secretary for the Civil Service & Anor, ex p AECS & Ors*. Assuming that the restriction is attributable to one of the distinctions mentioned in article 1(1), Members may further consider whether it has been established that—

- (a) sensible and fair-minded people would recognize a genuine need for the restriction,
- (b) the restriction is both rational and rationally connected to the need which justified it, and
- (c) the restriction is proportionate to that need, and is no more extensive than is necessary to achieve the objective which makes the restriction necessary : *Association of Expatriate Civil Servants of Hong Kong v. Chief Executive of the HKSAR*.

Sex Discrimination Ordinance

10. To address the Court's ruling on the inconsistency of some of the existing electoral arrangements with section 35 of the Sex Discrimination Ordinance (see paragraph 2(b)), the Bill proposes that a person is eligible to be registered as an elector for an Indigenous Village or a Composite Indigenous Village, if he is, among other things, an indigenous inhabitant of the Village or a spouse of an indigenous inhabitant of the Village. The Legal Service Division has written to the Administration to confirm whether it had consulted the Equal Opportunities Commission about the compatibility of the proposals in the Bill with the Sex Discrimination Ordinance. In response, the Administration consulted the Equal Opportunities Commission which has advised that, as far as it can anticipate matters, the provisions of the Bill are consistent with the Sex Discrimination Ordinance (**Annex 7**). We have nothing further to add in this respect.

Consistency with the Heung Yee Kuk Ordinance

Objects of the Heung Yee Kuk Ordinance

11. The object of the Heung Yee Kuk Ordinance ("the Ordinance") is to establish Heung Yee Kee. Section 9 of the Ordinance states the objects of the Heung Yee Kuk shall be—

- (a) to promote and develop mutual co-operation and understanding among the people of the New Territories;
- (b) to promote and develop co-operation and understanding between the Government and the people of the New Territories;
- (c) to advise the Government on social and economic developments in the interests of the welfare and prosperity of the people of the New Territories;
- (d) to encourage the observance of all such customs and traditional usages of the people of the New Territories as are conducive to their welfare and to the preservation of public morality; and
- (e) to exercise such functions as they may be invited to from time to time by the Chief Executive.

12. Section 9(a)-(d) refers to "the people of the New Territories". Neither the Hansard relating to the passage of the Heung Yee Kuk Bill, 1959 (**Annex 8**) nor the Ordinance shed any light on the meaning of the term. In *Secretary for Justice & Others v. Chan Wah & Others*, counsel for the indigenous villagers contended that as a matter of reality, Heung Yee Kuk represented predominantly the interests of the indigenous inhabitants of the New Territories and the village representatives had represented predominantly the interests of the indigenous villagers. In reply, the Court was of the view (at p.653 of the judgment) that even though there must have been a point in time when all villagers were indigenous. By definition, this was the case in 1898. But with the rapid change coming to the New Territories in the last few decades of the 20th century, economic and social forces had resulted in mobility. The Court then referred to the two villages in question and concluded that the non-indigenous villagers made up a substantial portion of their population. As to Heung Yee Kuk, the Court was of the view (at p. 653-4 of the judgment) that—

"its statutory functions are not limited to representing the interests of indigenous inhabitants. Whatever may have been the position in the past, the present composition of its Full Council is that there is now a significant portion (about 25%) who are non-indigenous inhabitants (see Cheung J's judgment at Tse Kwan Sang v. Pat Heung Rural Committee &

Another [1999]3HKLRD267 at p.281, [1999]3HKC457 at p.472). The amendment to the Kuk Ordinance in 1988 was evidently to facilitate the participation of non-indigenous inhabitants. Leaving aside the position as a matter of fact, and turning to the proper construction of the phrase, "a person ... to represent a village", should it be construed to mean to represent only the indigenous villagers? Even assuming that in 1959 when the Kuk Ordinance was enacted, the population in the villages consisted only of indigenous villagers, there is no justification for suggesting that the meaning of the statute was intended to be frozen at the time of its enactment. The Kuk Ordinance providing for the Kuk's incorporation and its functions looks to the future. As is usual with statutes, the Court should construe it in accordance with the need to treat it as continuing to operate as current law. See Halsbury's Law of England (4th ed., Reissue) Vol. 44(1), paras.1218 and 1473. So construing it, the phrase 'to represent a village' carries its ordinary meaning of representing the whole village. It cannot be read to mean only a part of the village. Accordingly, both indigenous villagers and non-indigenous villagers which make up its population would be represented."

Advice

13. It is clear from the analysis in *Secretary for Justice & Others v. Chan Wah & Others* that the object of the establishment of Heung Yee Kuk is to represent the interests of indigenous inhabitants and non-indigenous inhabitants of the New Territories. On this premise, the proposed electoral arrangements for non-indigenous inhabitants to vote and stand for election at Existing Village Representative elections are not inconsistent with the statutory functions of Heung Yee Kuk.

Prepared by

Legal Service Division
Legislative Council Secretariat
18 November 2002

possess a philosopher's stone which can turn a debit into an asset. The figure which Mr Fong Hup took from the development cost account represented the *cost* of the development; the figure which he entered in the balance sheet represented the *value* of the development. In the process he must be taken mentally to have set them off against each other, and because they cancelled each other out there was no net balance to bring into the profit and loss account.

The taxpayer's accounts contain a note explaining the treatment of interest. This is required by the Companies' Ordinance (Cap.32). Shareholders are entitled to be told whether interest has been capitalised and if so how much. They are entitled to know how much of the value of the assets shown in the balance sheet is attributable to capitalised interest, since this is a very weak indication of value. It is dependent on the directors' belief that the market value of the asset has appreciated since its purchase by an amount at least equal to the amount of interest which the company has incurred, and this may be optimistic. In the present case the note correctly shows the amount of interest payable as a debit and a like sum of capitalised interest as a credit. One figure represents the cost of interest taken from the development cost account. The other figure represents the matching amount of value taken to the balance sheet.

Conclusion

In my judgment the taxpayer's accounts in each of the first three years of trading were properly prepared in accordance with ordinary accounting principles and in conformity with the Ordinance and showed a true and fair view of the taxpayer's losses. In the computation of these losses interest was properly deducted by being debited and then set off against the corresponding increase in the value of property under development. The taxpayer now claims to bring forward losses which, because it capitalised the interest, it did not sustain. These fictitious losses arise from double counting. The process involves charging the interest to the development cost account in order to prevent the increased value of property under development creating a trading profit for the year to be carried into the profit and loss account, and at the same time charging it to the profit and loss account in order to increase the loss for the year.

I would allow both appeals and restore the orders of the Board of Review. It was accepted by both sides that costs here and in the Courts below should follow the event. Accordingly I would award the Commissioner his costs here and below.

Bokhary PJ

The Court unanimously allows both appeals, restores the orders of the Board of Review, and awards the Commissioner his costs here and in the Courts below.

A Secretary for Justice & Others Appellants
and
Chan Wah & Others Respondents

B
(Court of Final Appeal)
(Final Appeal Nos 11 and 13 of 2000 (Civil))

C Li CJ, Bokhary and Ribeiro PJJ and Silke and Lord Millett NPJJ
20–23 November and 22 December 2000

D *Elections — village representative elections — exclusion of non-indigenous villagers from voting or standing for election — exclusion contrary to right to participate in public affairs — Hong Kong Bill of Rights Ordinance (Cap.383) art.21(a)*

E *Human rights — right to participate in public affairs — taking part in conduct of public affairs — public affairs covered all aspects of public administration — reasonable restrictions on right — to be considered objectively — reasonableness varied from era to era*

F *Human rights — sexual discrimination — intention not necessary — test was whether less favourable treatment on grounds of sex — Sex Discrimination Ordinance (Cap.480) s.35*

G *Human rights — Bill of Rights — to engage Bill of Rights, Government or public authority or person acting on behalf of either must be involved*

H *Administrative law — judicial review — where genuine dispute between parties, courts could grant declarations of right*

I [Hong Kong Bill of Rights Ordinance (Cap.383) art.21(a); International Covenant on Civil and Political Rights art.25(a); Sex Discrimination Ordinance (Cap.480) s.35; Heung Yee Kuk Ordinance (Cap.1097) s.3(3)(a)]

J 選舉—鄉村代表選舉—摒除非原居民的投票或參選—摒除抵觸參與政事的權利—《香港人權法案條例》(第383章)第21(a)條

I 人權—參與政事的權利—參與政事—政事包括各方面的公共行政—合理限制權力—須客觀地考慮—是否合理因應不同的時候有不同的解釋

I 人權—性別歧視—不需有歧視的意圖—準則為有否因性別而給予較差的待遇—《性別歧視條例》(第480章)第35條

J 人權—人權法案—要引用人權法案,必須涉及政府或公共機關或代表兩者任可一方的授權人

J 行政法—司法覆核—當雙方有確實的爭議時,法院可批予權利聲明[《香港人權法案條例》(第383章)第21(a)條;《性別歧視條例》(第480章)第35條]

An indigenous villager was a person who was in 1898 a resident of an established village in Hong Kong or who was descended through the male line from that person. R1 and R2 were non-indigenous villagers. They challenged the validity of the 1999 electoral arrangements for the position of village representative at their respective villages. Under the respective electoral arrangements, R1 was excluded from voting and R2 was excluded from standing as a candidate on the ground that they were not indigenous villagers. Section 3(3)(a) of the Heung Yee Kuk Ordinance (Cap.1097) (the Kuk Ordinance) defined village representative as "a person elected ... to represent a village who is approved by the Secretary for Home Affairs" (the Secretary). Historically, the two villages had been entirely or predominantly indigenous but with rapid change in the last few decades, non-indigenous villagers now made up a substantial portion of their population. The Court of Appeal ruled in favour of R1 and R2 (see [2000] 1 HKLRD 411). The main issue before the Court of Final Appeal was whether the electoral arrangements were inconsistent with art.21 of the Kong Bill of Rights Ordinance (Cap.383). Article 21 provided "Every permanent resident shall have the right and opportunity ... without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives." The Court specifically considered whether a village representative upon election was engaged in the conduct of public affairs; and if so, were there unreasonable restrictions on the right and opportunity to take part, by standing as a candidate or voting, in the election of a village representative. Other issues which arose were whether: (a) the electoral arrangements in R1's village under which non-indigenous women married to indigenous men had the right to vote but non-indigenous men married to indigenous women were excluded from voting, contravened s.35 of the Sex Discrimination Ordinance (Cap.480); (b) art.40 of the Basic Law protected the right of indigenous villagers to vote and stand as a candidate in village representative elections, to the exclusion of others; and (c) the present judicial review was premature, in that the Secretary had not made a decision to approve the village representative, in either R1 or R2's case.

Held, dismissing the appeal and declaring that the Secretary was bound not to approve any village representative elected under the 1999 electoral arrangements (in substitution for the reliefs granted below), that:

Whether electoral arrangements inconsistent with art.21(a)

- (1) In order to engage the Hong Kong Bill of Rights Ordinance (Cap.383) at all, the Government or a public authority or a person acting on behalf of either of them must be involved since the Ordinance only bound them. This could be said to be the key to the Bill of Rights. Here, the Government was involved. Under s.3(3)(a) of the Kuk Ordinance, approval by the Secretary was

- essential before a person could become a village representative. Hence, in discharging his duty, the Secretary had to consider whether the electoral arrangements for the person elected were consistent with the Bill and would be bound not to approve where those arrangements were inconsistent with it. (See p.651C-1.)
- (2) At the village level, apart from certifying indigenous status, so as to facilitate claims in relation to traditional rights and interests of indigenous villagers, the village representative functions were to represent the village as a whole in liaising with the authorities on matters affecting the village and the welfare of the villagers. With the shift in the population in the villages, representing the village as a whole meant, as a matter of fact, representing both indigenous and non-indigenous villagers. Further, under s.3(3)(a) of the Kuk Ordinance, the phrase "to represent a village" carried with it the ordinary meaning of representing the whole village (comprising both the indigenous and non-indigenous villagers). (See pp.652I-654A.)
- (3) A village representative was engaged in the conduct of public affairs. First, "public affairs" in art.21(a) covered all aspects of public administration including at the village level and the village representative's functions at the village level were matters of public administration. Secondly, the village representative had a role to play beyond the village level. This role played directly or indirectly through chairmen and vice-chairmen of Rural Committees elected by village representatives from among themselves, extended to various bodies in the public arena; the Rural Committee in which the village was situated, the relevant District Council, the Heung Yee Kuk, a statutory advisory body on New Territories affairs and ultimately the Heung Yee Kuk as a functional constituency in the Legislative Council. (See p.654B-E.)
- (4) The question whether restrictions were reasonable or unreasonable had to be considered objectively. One must have regard to the nature of the public affairs the conduct of which was involved and the nature of the restrictions on the right and the opportunity to participate and any reason for such restrictions. What might be considered reasonable or unreasonable in one era might be different from those in quite a different era. Bearing in mind that the village representative by statute was to and in fact did represent the village as a whole and further had a role to play beyond the village level, the restriction on the ground of not being indigenous was not reasonable. Accordingly, the electoral arrangements were inconsistent with art.21(a). (See pp.654F-655E.)

Other issues

- (5) There was discrimination if there was less favourable treatment on the ground of sex. The intention or motive to discriminate was not a necessary condition of liability; it was perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate. Here, there was unlawful discrimination in R1's village. But for his sex, the non-indigenous *man* (married

- to an indigenous villager) would have received the same treatment, that was the right to vote, as the non-indigenous woman (married to an indigenous villager) (*R v Birmingham City Council, ex p Equal Opportunities Commission* [1989] 1 AC 1155, *James v Eastleigh Borough Council* [1990] 2 AC 751 applied). (See pp.655F–657B.)
- (6) Article 40 protected the lawful traditional rights and interests of indigenous inhabitants. The right to vote and stand as candidates in village representative elections to the exclusion of others (the political rights) were not directly covered by art.40. Nor could they be derived from the rights and interests expressly protected by art.40. Assuming (but without deciding) that it was possible and legitimate to deduce derivative rights from rights and interests provided for in the Basic Law, the political rights contended for could only be derived if they were necessarily implicit within the rights and interests expressly protected by art.40. This required the Court to conclude that the express rights and interests could not be adequately protected without the political rights. With the constitutional protection in art.40, there was no justification for doing so. (See pp.657C–658F.)
- (7) Where, as was the case here, there was a genuine dispute between the parties, the courts could grant declarations of right on a judicial review challenge. (See p.658G–J.)
- (8) It was unsatisfactory for any court to grant a declaration on a constitutional question without the benefit of full argument. (See p.659H–I.)

Mr Daniel Fung SC and Mr Johnny Mok, instructed by the Department of Justice, for the first and second appellants.

Mr Clive Grossman SC and Mr James Collins, instructed by Clarke & Kong and assigned by the Department of Legal Aid, for Cheung Kam Chuen.

Mr Philip Dykes SC and Mr Stephen Yam, instructed by Yuen & Partners and assigned by the Department of Legal Aid, for Chan Wah and Tse Kwan Sang.

Mr Michael Lunn SC as *amicus curiae*, for the Equal Opportunities Commission.

Third respondent, absent.

Fourth respondent, absent.

Legislation mentioned in the judgment

Basic Law of the Special Administrative Region arts.26, 39, 40, 68(2), 122

District Councils Ordinance (Cap.547) ss.9, 61

Government Rent (Assessment and Collection) Ordinance (Cap.515)

Heung Yee Kuk Ordinance (Cap.1097) Preamble, ss.2(2), 3, 3(3)(a), (3)(d)(i), 4, 9

Hong Kong Bill of Rights Ordinance (Cap.383) s.7(1), Pt.II arts.1(1), 21, 21(a)

- A International Covenant on Civil and Political Rights art.25
Legislative Council Ordinance (Cap.542) s.20A
Rating Ordinance (Cap.116) s.36
Sex Discrimination Ordinance (Cap.480) ss.5, 5(1)(a), 6(1), 7(1)(a), 35, 35(2), (3), (3)(c), (5)(a), Pts.III, IV

- B Cases cited in the judgment
Chan Wah v Hang Hau Rural Committee & Others [1999] 2 HKLRD 286, [1999] 2 HKC 160
Chan Wah & Another v Hang Hau Rural Committee & Others [2000] 1 HKLRD 411
- C James v Eastleigh Borough Council [1990] 2 AC 751, [1990] 3 WLR 55, [1990] 2 All ER 607, [1990] IRLR 288
R v Birmingham City Council, ex p Equal Opportunities Commission [1989] 1 AC 1155, [1989] 2 WLR 520, [1989] 1 All ER 769, [1989] IRLR 173
- D Tse Kwan Sang v Pat Heung Rural Committee & Another [1999] 3 HKLRD 267, [1999] 3 HKC 457

Other materials mentioned in the judgment

- E Convention of Peking (1898)
Halsbury's Laws of England (4th ed., Reissue) Vol.44(1), paras.1218, 1473
Sino-British Joint Declaration Annex III

- F Li CJ
Notwithstanding increasing urbanisation and the reduction in the number of villages as a result, there are still over 600 villages in the New Territories. Mr Chan Wah (Mr Chan), now in his late 60s, and Mr Tse Kwan Sang (Mr Tse), now in his late 40s, were both born and brought up and have lived all their lives in their respective villages. In the case of Mr Chan, Po Toi O Village in the Hang Hau area in Sai Kung District. In the case of Mr Tse, Shek Wu Tong Village in the Pat Heung area in Yuen Long District. Indeed, their parents had lived in their respective villages for sometime. Both are married with children.

Indigenous villager

- I By the Government Rent (Assessment and Collection) Ordinance (Cap.515), certain properties held by indigenous villagers are exempted from liability to pay Government rent. The Ordinance implements art.122 of the Basic Law which has its origin in Annex III to the Joint Declaration. The Ordinance defines "indigenous villager" to mean "a person who was in 1898 a resident of an established village in Hong Kong or who is descended through the male line from that person".
- J "Established village" is defined to mean a village that was in existence in 1898 and which the Director of Lands has satisfied himself was then in existence.

The villages concerned, Po Toi O Village and Shek Wu Tong Village, are established villages. (The latter is a branched off village from another village which existed in 1898 but nothing turns on this.) For the purposes of these proceedings, the term "indigenous villager" has been used in the same sense as in the Ordinance and the term "indigenous inhabitant" has been used in a similar sense. This is common ground although Mr Dykes SC for Mr Chan and Mr Tse has entered a *caveat* (as to the meaning of indigenous inhabitant in art.40 of the Basic Law) which is not material for present purposes.

Barring cases of exceptional longevity, persons who in 1898 were residents of villages in the New Territories are now dead. One is concerned with their descendants through the male line, that is by patrilineal descent. 1898 was a year of significance. That was the year in which the Convention of Peking between Great Britain and China was signed providing for the 99-years lease of the New Territories. In the late 19th century, and indeed a good part of the 20th, the New Territories was of course rural with inhabitants residing in villages.

It is evident that to be an indigenous villager, the person, who can establish patrilineal descent from an ancestor who was a resident of a village in 1898, need not be resident in the village. Indeed, there is no requirement for the person to have ever resided in the village at all. With economic and social forces resulting in mobility, a number of indigenous villagers have left the villages and a number of non-indigenous villagers are now part of the villages. Take the village of Po Toi O where Mr Chan has lived all his life. The evidence shows that of some 800 to 900 indigenous villagers, only some 300 to 400 still live there. And about 290 non-indigenous villagers were excluded from voting under the 1999 electoral arrangements for the position of village representative. In the case of Shek Wu Tong Village where Mr Tse has lived all his life, the evidence shows that 470 out of nearly 600 villagers are non-indigenous villagers.

Having resided in their respective villages all their lives, Mr Chan and Mr Tse can plainly be properly described as villagers of their village. But since they cannot establish patrilineal descent from ancestors who in 1898 were residents of villages in the New Territories, they are not and could not be *indigenous* villagers. In these proceedings, they have been called "non-indigenous villagers".

In the respective electoral arrangements made in 1999 for the position of village representative of the villages concerned, Mr Chan was excluded as a voter and Mr Tse was excluded from standing as a candidate. In Mr Chan's case, no election was held. In Mr Tse's case, an election was held and a village representative was elected.

Judicial review challenge

By judicial review proceedings, Mr Chan and Mr Tse have challenged the validity of these electoral arrangements. The grounds relied on are

that those arrangements are inconsistent with the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap.383) (the Bill of Rights Ordinance) and the Sex Discrimination Ordinance (Cap.480). They succeeded in the Court of First Instance. See *Chan Wah v Hang Hau Rural Committee & Others* [1999] 2 HKLRD 286 (Findlay J). Also at [1999] 2 HKC 160. *Tse Kwan Sang v Pat Heung Rural Committee & Another* [1999] 3 HKLRD 267 (Cheung J). Also at [1999] 3 HKC 457. They also succeeded in the Court of Appeal where the appeals were consolidated. See *Chan Wah & Another v Hang Hau Rural Committee & Others* [2000] 1 HKLRD 411 (Chan CJHC as he then was, Nazareth V-P and Mayo JA as he then was).

The appeal

The appellants to this appeal are: Mr Cheung Kam Chuen (Mr Cheung) and the Government with the Sai Kung District Office and the Secretary for Justice as parties. The Court of Appeal granted them leave to appeal. Mr Cheung is an indigenous villager of Po Toi O Village. Mr Chan and Mr Tse are respondents, as are the Rural Committees of the areas in which the villages are situated. Both Rural Committees were absent from the hearing. The Equal Opportunities Commission has helpfully provided the Court with the assistance of Counsel as *amicus curiae* .

The detailed facts are set out in the judgments in the Court of First Instance and the Court of Appeal. For the purposes of this appeal, it is unnecessary to refer to them.

The village representative

Since the validity of electoral arrangements for the position of village representative is in issue, it is important to understand the nature of this position.

The position of "village representative" is defined by statute to mean "a person elected or otherwise chosen to represent a village who is approved by the Secretary for Home Affairs (the Secretary). See s.3(3)(a) of the Heung Yee Kuk Ordinance (Cap.1097) (the Kuk Ordinance).

One is here concerned with "a person elected" as opposed to "a person ... otherwise chosen" whatever be the proper construction of that phrase. Three points should be made. First, to be a village representative the person concerned must be elected *and* approved by the Secretary. The approval is an integral part of the process to constitute the person a village representative. The Secretary can withdraw approval. His decision refusing approval or withdrawing it is subject to appeal to the Chief Executive in Council whose decision shall be final. See s.3(d)(i). Secondly, the function of the village representative is in the words of the provision to represent the village. The proper construction of this phrase is in issue and this will be dealt with later. Thirdly, the statute does not define the franchise for the election or the persons eligible to stand as candidates.

The village

In a document agreed by all Counsel, the functions of a village representative were set out as follows:

- (1) Assisting in certifying the indigenous status of villagers for the purpose of their applying to build houses under the small house policy.
- (2) Arranging for those villagers with the indigenous status to obtain exemption from rates and discounts on Government rent.
- (3) Witnessing and arranging for hillside burials.
- (4) Witnessing villagers' applications for succession to estates under the New Territories Ordinance.
- (5) Certifying the indigenous status of the descendants of people who come to Hong Kong from other countries and assisting them in applying for Hong Kong identity cards.
- (6) Liaising between various Government bodies (the District Office and Lands Office in particular) and villagers [on] various matters, including:
 - (a) Applications for building houses under the small house policy;
 - (b) Village removal, development clearance and resumption of lands;
 - (c) Passing on concerns and complaints made by the villagers to Government bodies; and
 - (d) Making Government policies and Government notices known to the villagers.

Some of these functions of the village representative are relevant only to indigenous villagers. See the functions in paras.1, 2, 3, and 6(a). They relate to the traditional rights and interests of indigenous villagers. By witnessing documents and certifying indigenous status, the village representative facilitates their claims to those rights and interests. It will be convenient to refer to such functions as "the certification and facilitation functions". The function to certify indigenous status of descendants who come from outside Hong Kong for the purpose of applying for Hong Kong identity cards also relates only to indigenous villagers (see para.5). The entitlement to identity cards is of course governed by law and does not relate to the traditional rights and interests of indigenous villagers. However, the function of witnessing applications for succession to estates relates to villagers, both indigenous and non-indigenous (see para.4).

As to the village representative's functions to liaise between Government and villagers, they plainly relate not merely to indigenous villagers, but to the village as a whole (see para.6 and sub-para.(b), (c) and (d)). Take as an example a village faced with the problem of flooding after heavy rain due to inadequate drainage. In liaising with

A Government bodies about this problem, the village representative would plainly be acting for the village as a whole and not only the indigenous villagers in it.

Beyond the village

The village representative has a role beyond the village. First at the Rural Committee level. Village representatives are automatically members of the Rural Committee of the area in which the village is situated and they elect the Chairman and Vice-Chairman of the Rural Committee from among themselves. (There are altogether 27 Rural Committees.)

Secondly, at the District Councils level. The Chairmen of Rural Committees elected by the village representatives are ex-officio members of the relevant District Councils. The District Councils have an advisory function in relation to various matters affecting the District as well as an executive function to undertake improvements and activities in the District where funds are made available for the purpose. See s.9 and s.61 of the District Councils Ordinance (Cap.547).

Thirdly, the village representative has a role in the Heung Yee Kuk (the Kuk) having regard to the Kuk's composition. The Kuk was a society founded in 1926. In 1959 it became a statutory body on the enactment of the Kuk Ordinance. Its Preamble acknowledged the Kuk's past contribution as an advisory body to the Government on New Territories affairs and a forum where leaders of opinion in the New Territories have been able to exchange views and stated that it was considered desirable that the Kuk should become a statutory advisory body with a constitution so framed as to ensure that it would as far as possible be truly representative of informed and responsible opinion in the New Territories.

The Kuk consists of the Chairman and two Vice-Chairmen who shall be members of the Executive Committee and shall be elected by the Full Council. See s.2(2).

The Executive Committee consists of: (a) ex-officio members, namely: (i) the Chairmen of Rural Committees (who as mentioned above are elected by the village representatives); and (ii) New Territories Justices of the Peace; and (b) ordinary members (not more than 15) who shall be Councillors of and elected by the Full Council. See s.4.

The Full Council consists of the following three categories of Councillors. See s.3. The role of the village representative is evident from their composition:

- (1) Ex-officio Councillors. They consist of the Chairmen and Vice-Chairmen of Rural Committees (who as mentioned above are elected by village representatives) and New Territories Justices of the Peace.
- (2) Special Councillors (a maximum of 21). They are elected from among village representatives (or such other persons as may be approved by the Secretary) by the Ex-officio Councillors. Each

of the three districts of Tai Po, Yuen Long and Southern District (which comprise the New Territories) shall elect not more than seven. A

- (3) Co-opted Councillors (a maximum of 15). This category was added by an amendment to the Kuk Ordinance in 1988. A member of a Rural Committee is not eligible and hence, a village representative being automatically such a member would not be eligible for co-option. However, candidates have to be nominated by the Executive Committee of the Kuk which includes Rural Committees' Chairmen (who are elected by the village representatives) and have to be confirmed by the Full Council, with village representatives having a role through the composition of the Ex-officio and the Special Councillors. In addition, the candidates have to be approved by the Secretary. B C

The Kuk's statutory objects are (see s.9): D

- (a) to promote and develop mutual co-operation and understanding among the people of the New Territories; E
 (b) to promote and develop co-operation and understanding between the Government and the people of the New Territories;
 (c) to advise the Government on social and economic developments in the interests of the welfare and prosperity of the people of the New Territories; F
 (d) to encourage the observance of all such customs and traditional usages of the people of the New Territories as are conducive to their welfare and to the preservation of public morality; and
 (e) to exercise such functions as they may be invited to from time to time by the Chief Executive. G

Although indigenous inhabitants would feature prominently in object (d), the objects in (a), (b) and (c) relate to the people in the New Territories and are not confined to its indigenous inhabitants.

Fourthly, the Kuk is and for some years has been a functional constituency of the Legislative Council. That constituency is composed of the Chairman and Vice-Chairmen of the Kuk and the Ex-officio, Special and Co-opted Councillors of the Full Council of the Kuk. See s.20A of the Legislative Council Ordinance (Cap.542). H

The issues

The issues in this appeal are:

- (1) Whether the Bill of Rights Ordinance is engaged and if so whether the electoral arrangements in question are inconsistent with it. I J

- A (2) Whether the electoral arrangements for Po Toi O Village are inconsistent with the Sex Discrimination Ordinance.
 (3) Whether art.40 of the Basic Law protects any right of indigenous villagers to vote and any right of indigenous villagers to stand as a candidate in elections for village representative to the exclusion of others. B
 (4) Whether the present judicial review challenge is premature and if not what is the proper remedy. C

The Bill of Rights Ordinance

Article 39 of the Basic Law provides among other things that the provisions of the International Covenant on Civil and Political Rights (ICCPR) as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region. The Bill of Rights Ordinance incorporates into the law of Hong Kong the provisions of the ICCPR as applied to Hong Kong. The Hong Kong Bill of Rights is set out in Pt.II of the Ordinance (the Bill of Rights). D

Section 7(1) of the Bill of Rights Ordinance provides that it binds only "(a) the Government and all public authorities; and (b) any person acting on behalf of the Government or a public authority". E

In order to engage the Bill of Rights Ordinance at all, the Government or a public authority or a person acting on behalf of either of them must be involved since the Ordinance only binds them. This could be said to be the key into the Bill of Rights. If the body involved is not the Government or a public authority or a body acting on behalf of either of them, the Ordinance does not bind that body and there is no question of the Bill of Rights being engaged at all. F

Here, the Government is involved. Under s.3(3)(a) of the Kuk Ordinance, approval by the Secretary is essential before a person elected to represent a village can become a village representative. The Secretary as part of the Government is plainly bound by the Bill of Rights Ordinance. In discharging his duty to decide whether to approve or not to approve, the Secretary, being bound by the Bill of Rights, has to consider whether the person elected to represent a village was elected in accordance with electoral arrangements which are consistent with the Bill and would be bound not to approve where those arrangements are inconsistent with it. In this way, the Bill of Rights Ordinance is engaged. Its provisions have to be interpreted and applied in order to decide whether there is any inconsistency between them and the electoral arrangements. G H I

Article 21(a)

Article 21 of the Bill of Rights set out in Pt.II of the Ordinance is in the following terms. (This corresponds with art.25 of the ICCPR.) J

Article 21**Right to participate in public life**

Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in art.1(1) and without unreasonable restrictions:

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in Hong Kong.

The present appeal is concerned with art.21(a). The limb referring to the distinctions in art.1(1) has not been seriously relied on. (That article refers to distinctions such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.) What has been relied on is the limb of unreasonable restrictions.

The crucial issues are: First, is the village representative, upon election and approval by the Secretary, engaged in the conduct of public affairs? Secondly, are there unreasonable restrictions on the right and opportunity to take part?

If the answers to both of these questions are affirmative, the electoral arrangements in question would be inconsistent with art.21(a). Mr Chan and Mr Tse are villagers in the villages concerned. They are permanent residents. Taking part directly would be by becoming a village representative, that is, by standing as a candidate, being elected and then obtaining the Secretary's approval. Taking part through freely chosen representatives (that is the village representative elected) would be by voting in the election. Mr Chan was denied the right and the opportunity to take part through freely chosen representatives as he was not allowed to vote. Mr Tse was denied the right and the opportunity to take part directly as he was not allowed to stand as a candidate.

Before turning to the crucial issues, it is important to consider the persons whom the village representative represents since that is relevant to both crucial issues.

The persons represented by the village representative

Mr Grossman SC for Mr Cheung, the indigenous villager, submits as follows: indigenous villagers are, as put in his written case, "something akin to a private club", with patrilineal descent from the inhabitants in villages in 1898 being the only criterion for membership. On its proper construction, when s.3(3)(a) of the Kuk Ordinance refers to "a person elected or otherwise chosen to represent a village", it means "to represent the indigenous villagers". Mr Grossman SC contends

A that as a matter of reality, the Kuk has represented predominantly the interests of the indigenous inhabitants of the New Territories and the village representatives have represented predominantly the interests of the indigenous villagers.

B As a matter of fact, there must have been a point of time when all villagers were indigenous. By definition, this was the case in 1898. For a good part of the 20th century, it may well be that with the relatively slow pace of economic and social change, mobility was relatively limited so that the villagers continued to be entirely or predominantly indigenous. In that situation, there would have been a close, if not virtually a complete, identity between the village and the indigenous villagers who make up its population. Apart from the certification and facilitation functions which are only relevant to indigenous villagers as they relate to their traditional rights and interests, the village representative represented the village, for example, in liaising with Government.

C And that meant representing the indigenous villagers since they made up predominantly the population of the village.

D But with rapid change coming to the New Territories in the last few decades of the 20th century, economic and social forces have resulted in mobility. As has been noted, in the two villages in question here, the non-indigenous villagers make up a substantial portion of their population. Indeed, in the case of Shek Wu Tong Village, they outnumber indigenous villagers. With such shifts in the make-up of the population of the two villages, the village representative in discharging his functions beyond certification and facilitation, would as a matter of fact no longer be representing only the indigenous villagers but the village as a whole consisting of both indigenous and non-indigenous villagers. This would be so for example, in his functions in liaising with the Government.

E As to the Kuk, its statutory functions are not limited to representing the interests of indigenous inhabitants. Whatever may have been the position in the past, the present composition of its Full Council is that there is now a significant portion (about 25%) who are non-indigenous inhabitants (see Cheung J's judgment at *Tse Kwan Sang v Pat Heung Rural Committee & Another* [1999] 3 HKLRD 267 at p.281, [1999] 3 HKC 457 at p.472). The amendment to the Kuk Ordinance in 1988 was evidently to facilitate the participation of non-indigenous inhabitants.

F Leaving aside the position as a matter of fact, and turning to the proper construction of the phrase, "a person ... to represent a village", should it be construed to mean to represent only the indigenous villagers?

G Even assuming that in 1959 when the Kuk Ordinance was enacted, the population in the villages consisted only of indigenous villagers, there is no justification for suggesting that the meaning of the statute was intended to be frozen at the time of its enactment. The Kuk Ordinance providing for the Kuk's incorporation and its functions looks to the future. As is usual with statutes, the Court should construe it in accordance with the need to treat it as continuing to operate as current law. See *Halsbury's Laws of England* (4th ed., Reissue) Vol.44(1), paras.1218 and 1473. So

construing it, the phrase "to represent a village" carries its ordinary meaning of representing the whole village. It cannot be read to mean only a part of the village. Accordingly, both indigenous villagers and non-indigenous villagers which make up its population would be represented.

Public affairs

Public affairs would cover all aspects of public administration including at the village level. Apart from the certification and facilitation functions which relate to the traditional rights and interests of indigenous villagers, the village representative represents the village as a whole in liaising with the authorities on matters affecting the village and the welfare of the villagers. Such matters concern public administration at the village level. Further, the village representative has a role to play beyond the village level. As summarised above, this role, played directly or indirectly through chairmen and vice-chairmen of Rural Committees elected by village representatives from among themselves, extends to various bodies in the public arena; the Rural Committee, the District Council, the Kuk and ultimately the Kuk as a functional constituency in the Legislative Council. Having regard to the functions of the village representative and the person's role beyond the village level, the village representative should be regarded as engaged in the conduct of public affairs within art.21(a) of the Bill of Rights. This is reflected by the requirement that to become a village representative, the person elected has to be approved by a public official, the Secretary.

Unreasonable restrictions

Having concluded that the village representative should be regarded as engaged in the conduct of public affairs, the next question which arises is whether the restrictions excluding Mr Chan from voting and Mr Tse from standing as a candidate are unreasonable restrictions.

The Court of course cannot attempt to lay down the restrictions that would be considered reasonable and those that would be regarded as unreasonable in the context of elections for village representatives generally. The Court is only concerned with the restrictions in these two cases. It should be noted that in the electoral arrangements in question, the indigenous villagers have the right to vote and the right to stand as a candidate and this has not been challenged.

The question whether restrictions are reasonable or unreasonable has to be considered objectively. One must have regard to the nature of the public affairs the conduct of which is involved and the nature of the restrictions on the right and the opportunity to participate and any reason for such restrictions. What may be considered reasonable or unreasonable restrictions in one era may be different from those in quite a different era.

Mr Chan and Mr Tse have lived in their respective villages all their lives and can plainly be properly regarded as villagers of each village.

- A But they have respectively been excluded from voting and from standing as a candidate on the ground that they are not indigenous, that is, they are not descendants by patrilineal descent of ancestors who in 1898 were residents of villages in the New Territories. But bearing in mind that the village representative by statute is to and in fact does
- B represent the village as a whole (comprising both the indigenous and the non-indigenous villagers) and further has a role to play beyond the village level, the restriction on the ground of not being indigenous cannot be considered a reasonable restriction.

Accordingly, the electoral arrangements in restricting Mr Chan from voting and Mr Tse from standing as a candidate are unreasonable and inconsistent with art.21(a) of the Bill of Rights.

- C Mr Fung SC for the Government refers to the principle of gradual and orderly progress in the method for forming the Legislative Council in the light of the actual situation in Hong Kong provided for in art.68(2) of the Basic Law. But that relates to the Legislative Council and is of no relevance. Mr Fung SC also relies on the fact that there are District Councils in the New Territories with a substantial number of elected members and that this provides for participation in the conduct of public affairs. That is true but is of no relevance either.
- D One is concerned with elections for village representative in the two villages in question. As concluded above, the electoral arrangements therefor are inconsistent with art.21(a) of the Bill of Rights.

The Sex Discrimination Ordinance

It is not disputed that where the electoral arrangements for village representative contravene the Sex Discrimination Ordinance, the Secretary is bound not to approve the person elected. Indeed, s.35(5)(a) in Pt.IV of that Ordinance specifically provides that:

- G Notwithstanding anything in the [Kuk] Ordinance or in any other Ordinance, [the Secretary] shall not approve a person as a village representative where that person ... has been elected ... by a procedure in which women have not been able to participate on equal terms with men, whether as candidates, nominees, electors or in some other relevant capacity.

Section 6(1) applies the relevant provisions in the Ordinance (s.5 and Pts.III and IV including s.35) relating to sex discrimination against women to men. They:

- I ... shall be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are necessary
- J ...

The Court of Appeal held, affirming the judgments in the Court of First Instance, that the electoral arrangements for the two villages in question

A in certain respects contravene the Sex Discrimination Ordinance. In Mr Tse's case, the Court of Appeal's judgment on discrimination has not been appealed. The Court is only concerned with the discrimination issue in Mr Chan's case which has been appealed by Mr Cheung, the indigenous villager. It should be noted that the Government has not appealed to this Court on any discrimination issue.

B In Mr Chan's case, the alleged discrimination consisted of the following. Under the election arrangements, non-indigenous women married to indigenous villagers had the right to vote. But non-indigenous men married to indigenous villagers were excluded from voting. This is alleged to be discrimination against men.

C Section 5(1)(a) of Sex Discrimination Ordinance provides:

A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Ordinance if:

- D (a) on the ground of her sex he treats her less favourably than he treats or would treat a man.

E Section 35(3)(c) provides:

It is unlawful for a person to discriminate against another person in:

- F (c) determining the eligibility of a person to vote in elections of members of a relevant body or the holder of a relevant position, or to take part in the selection of the holder of a relevant position;

G A relevant position includes the position of village representative within the meaning of the Kuk Ordinance. See s.35(2). As noted above, s.6(1) applies these provisions equally to the treatment of men.

H In determining whether a particular arrangement involves sex discrimination, the Court of Appeal correctly adopted the "but for" test enunciated by Lord Goff considering the Sex Discrimination Act 1975 in *R v Birmingham City Council, ex p Equal Opportunities Commission* [1989] 1 AC 1155 at p.1194A-C:

I There is discrimination under the statute if there is less favourable treatment on the ground of sex, in other words if the relevant girl or girls would have received the same treatment as the boys but for their sex. The intention or motive of the defendant to discriminate, though it may be relevant so far as remedies are concerned ... is not a necessary condition of liability; it is perfectly possible to envisage cases where the defendant had no such motive, and yet did in fact discriminate on the ground of sex.

J This test was applied in *James v Eastleigh Borough Council* [1990] 2 AC 751 where Lord Bridge pointed out that the test is an objective one (at p.765D).

A Applying this test, it is clear that there is unlawful discrimination here. But for his sex, the non-indigenous man (married to an indigenous villager) would have received the same treatment, that is the right to vote, as the non-indigenous woman (married to an indigenous villager).

B It should be noted that the argument that there was discrimination on the ground of marital status contrary to s.7(1)(a) was also relied on. That is, the married non-indigenous woman (married to the indigenous villager) compared to the single non-indigenous woman. However, it is unnecessary to deal with this ground as it is not relevant to Mr Chan's position.

C Article 40 of the Basic Law

D As concluded above, the electoral arrangements in question are inconsistent with the Bill of Rights and the Sex Discrimination Ordinance and the Secretary is bound not to approve a person elected under these arrangements.

E But that is not the end of the matter. Mr Grossman SC for Mr Cheung, the indigenous villager, relies on art.40 of the Basic Law which provides:

F The lawful traditional rights and interests of the indigenous inhabitants of the "New Territories" shall be protected by the Hong Kong Special Administrative Region.

G And he submits as follows. Article 40 protects the lawful traditional rights and interests of the indigenous inhabitants. To ensure the adequate protection of their rights and interests within art.40, one should derive from them that indigenous villagers have the political rights to vote and to stand as candidates in elections for village representative to the exclusion of others. It is accepted that these political rights are not directly covered by art.40. As put in his written case: "... it is not contended that there exists a distinct traditional right in indigenous villagers to vote for village representatives which is a right directly subject to protection by art.40". Presumably, the same goes for the right to stand as a candidate. What is argued is that the political rights are in the nature of derivative rights. The derivative rights are constitutionally protected and would prevail, notwithstanding any inconsistencies with the Bill of Rights and the Sex Discrimination Ordinance. And the Secretary should therefore not refuse to approve a person elected on the ground of such inconsistencies.

I If this submission of Mr Grossman SC were correct, it would mean that any legislation, including any legislative reform, which adversely affects the alleged derivative rights would be inconsistent with art.40 of the Basic Law.

J There is no doubt that the lawful traditional rights and interests of the indigenous inhabitants are protected by art.40. One is not concerned here with a comprehensive definition of the rights and

interests within art.40. It is not disputed that they include various property rights and interests such as exemption from Government rent and rates in respect of certain properties held by indigenous villagers and benefits relating to land granted to male indigenous inhabitants under what is known as the small house policy. The question is whether one could derive the political rights contended for from the lawful traditional rights and interests of the indigenous inhabitants within art.40.

This matter can be disposed of shortly. Assuming (but without deciding) in Mr Grossman SC's favour that it is possible and legitimate to deduce derivative rights from rights and interests expressly provided for in the Basic Law, the political rights contended for can only be derived if they are necessarily implicit within the rights and interests expressly protected by art.40. This would require the Court to conclude that the traditional rights and interests cannot be adequately protected without the political rights contended for. Even on this assumption, such rights cannot be deduced in the present case.

The lawful traditional rights and interests of indigenous inhabitants that are within art.40 are protected by the Basic Law. In addition, there is specific protection in domestic legislation in relation to some of them. For example, the Government Rent (Assessment and Collection) Ordinance and the Rating Ordinance (Cap.116) s.36 relating to exemption from Government rent and rates respectively. (The former is also subject to the protection in art.122 of the Basic Law.) With the constitutional protection in art.40, there is no justification for deriving the political rights contended for from the rights and interests within art.40 to ensure their adequate protection.

Whether challenge premature

In Mr Chan's case, no election has been held. In Mr Tse's case, the election was held. But the Secretary's approval of the person elected has not been sought. Mr Fung SC for the Government submits that in the absence of a decision by the Secretary to approve a village representative in either case, any judicial review is premature.

There is of course no decision by the Secretary which could be subject to a judicial review challenge since no decision has been made. But where there is a genuine dispute between the parties, the courts can grant declarations of right on a judicial review challenge.

There is plainly a dispute between the parties. Mr Chan and Mr Tse contend that the Secretary is bound not to approve any person elected under the electoral arrangements in question on the grounds that they are inconsistent with the Bill of Rights and/or the Sex Discrimination Ordinance. On the other hand, this is disputed by Mr Grossman SC for Mr Cheung, the indigenous villager. And Mr Fung SC for the Government disputes that the Bill of Rights is engaged or is applicable.

A *Proper relief*

As a result of the Court of Appeal's judgment, a number of declarations stand and also in Mr Tse's case an order of *mandamus* directing the relevant Rural Committee to register him as a candidate. Having regard to the conclusions reached above and the reasoning leading to them, it is sufficient and appropriate to grant the following declarations in substitution for *all* reliefs granted below which should in consequence be set aside.

(1) In Mr Chan's case:

A declaration that the Secretary for Home Affairs would be bound not to approve any person elected as village representative of Po Toi O Village under the 1999 electoral arrangements therefor on the grounds that such arrangements are inconsistent with art.21(a) of the Bill of Rights in the Hong Kong Bill of Rights Ordinance and/or with s.35(3) of the Sex Discrimination Ordinance.

(2) In Mr Tse's case:

An identical declaration to that in (1) above with the substitution of Shek Wu Tong Village for Po Toi O Village.

With these declarations, Mr Chan and Mr Tse have in effect wholly succeeded on the appeal.

This judgment is concerned and only concerned with the electoral arrangements in question for the position of village representative in the two villages concerned. The above legal result has been brought about by various forces of change. Changes in the make-up of the population of the two villages in question so that it now consists of a substantial number of non-indigenous villagers. As well as changes in the law, particularly the Bill of Rights Ordinance and the Sex Discrimination Ordinance, which have important consequences in the present context.

It should be noted that the reliefs which should be set aside included a declaration in Mr Chan's case that the electoral arrangements are inconsistent with art.26 of the Basic Law. The Court heard no argument on this matter. Apparently, hardly any arguments were addressed in the Courts below on it. In these circumstances, the declaration should be set aside. It is unsatisfactory for any court to grant a declaration on such a constitutional question without the benefit of full argument.

On this appeal, a number of legal authorities as well as academic writings on the New Territories were drawn to the Court's attention. It has not been necessary to refer to such materials in the judgment. The Court is grateful for the assistance rendered by all leading Counsel and their respective teams.

Costs

Full arguments as to costs were addressed. The following orders are appropriate:

- (1) Costs in favour of Mr Chan and Mr Tse in respect of 85% of their costs against the Government.
- (2) Costs in favour of Mr Chan and Mr Tse against Mr Cheung.
- (3) There be legal aid taxation of all relevant costs.

It follows from these orders that the Government and Mr Cheung are jointly and severally liable in respect of 85% of the costs of Mr Chan and Mr Tse while Mr Cheung alone is liable for the remaining 15%.

The reason for the 85% in (1) is that Government has not challenged the Court of Appeal's judgment on the discrimination issues. It is estimated that about 15% of the hearing before the Court was spent on such issues. As to (2), Mr Cheung is on legal aid (with a nil contribution). Both Mr Chan and Mr Tse are also on legal aid but subject to contribution. The order in (2) would not involve Mr Cheung having to pay anything and would free Mr Chan and Mr Tse from the risk of having to make any contribution.

Bokhary PJ

I agree with the judgment of the Chief Justice.

Ribeiro PJ

I agree with the judgment of the Chief Justice.

Silke NPJ

I agree with the judgment of the Chief Justice.

Lord Millett NPJ

I agree with the judgment of the Chief Justice.

Li CJ

The Court unanimously makes the two declarations set out in my judgment under the heading "*Proper relief*", sets aside all reliefs granted below and makes the orders on costs set out in my judgment under the heading "*Costs*".

A

B

C

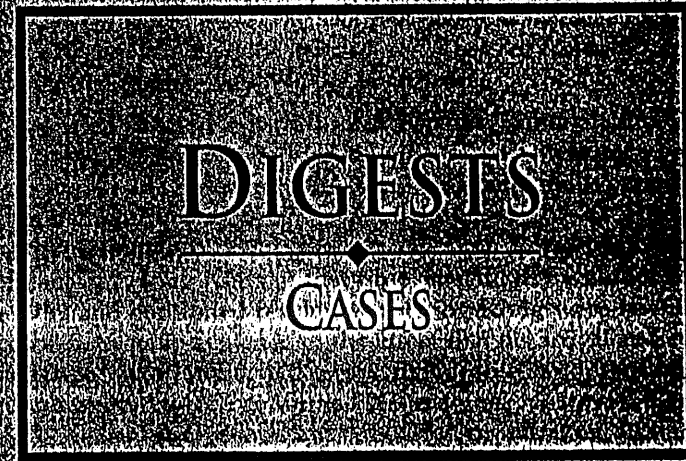
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第二十一條

參與公眾生活的權利

凡屬永久性居民，無分人權法案第一(一)條所列之任何區別，不受無理限制，均應有權利及機會——

- (甲) 直接或經由自由選擇之代表參與政事；
- (乙) 在真正、定期之選舉中投票及被選。選舉權必須普及而平等，選舉應以無記名投票法行之，以保證選民意志之自由表現；
- (丙) 以一般平等之條件，服香港公職。

[比照《公民權利和政治權利國際公約》第二十五條]

第二十二條

在法律前平等及受法律平等保護

人人在法律上一律平等，且應受法律平等保護，無所歧視。在此方面，法律應禁止任何歧視，並保證人人享受平等而有效之保護，以防因種族、膚色、性別、語言、宗教、政見或其他主張、民族本源或社會階級、財產、出生或其他身分而生之歧視。

[比照《公民權利和政治權利國際公約》第二十六條]

第二十三條

少數人的權利

屬於種族、宗教或語言少數團體之人，與團體中其他分子共同享受其固有文化，信奉躬行其固有宗教或使用其固有語言之權利，不得剝奪之。

[比照《公民權利和政治權利國際公約》第二十七條]

Article 21

Right to participate in public life

Every permanent resident shall have the right and the opportunity, without any of the distinctions mentioned in article 1(1) and without unreasonable restrictions—

- (a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) to have access, on general terms of equality, to public service in Hong Kong.

[cf. ICCPR Art. 25]

Article 22

Equality before and equal protection of law

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

[cf. ICCPR Art. 26]

Article 23

Rights of minorities

Persons belonging to ethnic, religious or linguistic minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

[cf. ICCPR Art. 27]

Advisory bodies

35. Discrimination in eligibility to vote for and to be elected or appointed to advisory bodies

(1) In this section, a reference to a relevant body means a public body, a public authority, a statutory advisory body, or a prescribed body.

(2) In this section, a reference to a relevant position includes membership of a public body, a public authority, and a prescribed position, and the positions of Village Representative or member or office-holder of a Rural Committee within the meaning of the Heung Yee Kuk Ordinance (Cap. 1097).

(3) It is unlawful for a person to discriminate against another person in—

- (a) determining the eligibility of a person to stand for election to a relevant body or relevant position, or to be selected for a relevant position;
- (b) the terms or conditions on which a person is considered eligible to stand for election to a relevant body or relevant position, or to be selected for a relevant position;
- (c) determining the eligibility of a person to vote in elections of members of a relevant body or the holder of a relevant position, or to take part in the selection of the holder of a relevant position;
- (d) the terms or conditions on which a person is considered eligible to vote in elections of members of a relevant body or the holder of a relevant position, or to take part in the selection of the holder of a relevant position;
- (e) considering whether a person should be appointed as a member of a relevant body, where some or all of the members of that body are appointed; or
- (f) considering whether a person should be appointed to a relevant position, approved as a member of a relevant body or recognized as holding a relevant position.

(4) This section shall have effect, notwithstanding the provisions of any Ordinance which provide that a person of a particular sex or marital status is not eligible to stand for election, or to be selected for, a relevant body or position, or to vote in elections for or to take part in the selection of members of a relevant body or the holder of a relevant position.

(5) Notwithstanding anything in the Heung Yee Kuk Ordinance (Cap. 1097) or in any other Ordinance, the Secretary for Home Affairs shall not—

- (a) approve a person as a Village Representative;
- (b) issue a certificate recognizing a body as a Rural Committee;
- (c) approve a person as a Special or Co-opted Councillor,

where that person or body (or any of its members) has been elected or otherwise chosen by a procedure in which women have not been able to participate on equal terms with men, whether as candidates, nominees, electors or in some other relevant capacity.

諮詢團體

35. 就諮詢團體的投票資格及被選入或委入該等團體的歧視

(1) 在本條中，已對任何有關團體的提述，指任何公共團體、公共主管當局、法定諮詢團體或訂明團體。

(2) 在本條中對任何有關職位的提述，包括任何公共團體及公共主管當局的成員，及訂明職位，及《鄉議局條例》(第 1097 章)所指的村代表或任何鄉事委員會的成員或職位擔任者。

(3) 任何人——

- (a) 在決定任何人晉身有關團體或獲得有關職位的參選資格，或被揀選獲得有關職位的資格方面；
- (b) 在任何人被考慮有資格參選晉身有關團體或獲得有關職位的條款或條件方面，或被考慮有資格被揀選獲得有關職位的條款或條件方面；
- (c) 在決定任何人於選舉有關團體的成員或有關職位的擔任者的投票資格方面，或參與揀選有關職位的擔任者的資格方面；
- (d) 在任何人被考慮有資格投票選舉有關團體的成員或有關職位的擔任者的條款及條件方面，或被考慮有資格參與揀選有關職位的擔任者的條款或條件方面；
- (e) (如有關團體的部分或全部成員由委任產生)在考慮任何人應否被委任為該團體的成員方面；或
- (f) 在考慮任何人應否被委任擔任於有關職位、應否獲認可為有關團體的成員或應否獲承認為擔任有關職位方面，

歧視另一人，即屬違法。

(4) 即使任何條例的條文規定某一性別或婚姻狀況的任何人沒有資格參選或被揀選晉身有關團體或獲得有關職位，或沒有資格在選舉中投票或參與揀選有關團體的成員或有關職位的擔任者，本條仍然具有效力。

(5) 即使《鄉議局條例》(第 1097 章)或其他條例有任何規定，凡任何人或團體(或其任何成員)是經由女性並未能與男性在平等的條款下以候選人、被提名入、投票人或其他有關身分參與的程序選舉或以其他方式選出，民政事務局局長不得——(由 1997 年第 362 號法律公告修訂)

- (a) 認可該人為村代表；
- (b) 發出承認該團體為鄉事委員會的證書；
- (c) 認可該人為特別或增選委員。

R v SECRETARY FOR THE CIVIL SERVICE AND THE ATTORNEY GENERAL, EX P THE ASSOCIATION OF EXPATRIATE CIVIL SERVANTS OF HONG KONG & ORS

HIGH COURT - MISCELLANEOUS PROCEEDINGS NO 3037 OF 1994
KEITH J
14-15, 18-22, 25-29 SEPTEMBER, 2, 4, 31 OCTOBER 1995

Human Rights - Bill of Rights - Right of equal access to the civil service - Permanent resident in art 21 of the Hong Kong Bill of Rights (Cap 383) refers to Hong Kong Permanent Resident as defined in the Immigration Ordinance (Cap 115) - Access to the civil service includes access to opportunities for promotion - Access on general terms of equality - Unreasonable restriction - Government enjoying a margin of appreciation in determining reasonableness - Discrimination and preferential treatment - Rationality - Pursuit of legitimate objectives - Proportionality and minimal impairment - Whether scheme restricting transfer of expatriate officers on overseas agreement terms to local pensionable and permanent terms a violation of the right of equal access to the civil service - Discrimination on the grounds of national or social origin - Reverse discrimination - 'Permanent resident' - Hong Kong Bill of Rights (Cap 383) arts 1, 21, 22 - Immigration Ordinance (Cap 115) Sch 1 - Basic Law art 24 - ICCPR arts 2, 25

Administrative Law - Judicial review - Standing - Representative or class action - When a representative body has standing to bring an action for judicial review on behalf of its members - Possibility of one of its members being affected by the decision impugned sufficient

Administrative Law - Judicial review - Whether mere proposal susceptible to judicial review

Administrative Law - Judicial review - Delay - What constitutes good reason for extending the 3-month period - Rules of the Supreme Court (Cap 4 sub leg) O 53 r 4(1) - Supreme Court Ordinance (Cap 4) s 21K(6) - Supreme Court Act 1981 [UK] s 31(6)

Statutes - Interpretation - Weight to be attached to statement of legislative intention - Compliance with the Basic Law desirable but not necessary if language of the legislation does not so permit

Words and Phrases - 'Permanent resident' - 'on general terms of equality' - 'public service' - 'citizen' - 'access to public service' - 'without unreasonable restrictions' - 'national origin' - 'returning to duty'

The applicants were a trade union of overseas officers of the Civil Service and four individual officers. They challenged a scheme introduced by the Secretary for Civil Service which imposed restrictions on, inter alia, their promotion and transfer to local pensionable terms of service. In general, civil servants are

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A employed on either overseas or local conditions of service. On their recruitment to the Civil Service, officers are appointed on either pensionable or agreement terms. The Government had decided that from 28 May 1985 all appointments of officers from overseas would be on agreement terms. Serving officers from overseas on agreement terms would be given a once-and-for-all option to apply for transfer to permanent terms, provided that a suitable local candidate was not likely to be available within the next five years or so. From 30 June 1992, even those overseas officers on agreement terms who had been appointed before 28 March 1985 were not permitted under any circumstances to transfer to permanent terms. Renewal of the agreement of an overseas officer was also subject to the unavailability of a qualified and suitable local replacement.

C On 30 July 1993, as a result of a threat of court action by the overseas officers, the Government decided that overseas officers on agreement terms who were permanent residents of Hong Kong would be allowed to transfer to local conditions of service (the original transfer scheme). The original transfer scheme allayed the worry of overseas officers who were also permanent residents of their being replaced by a qualified and suitable local candidate in future. However, the scheme met with a hostile reception from the associations representing local officers, as well as members of the responsible Legislative Council Panel. A private member's bill was passed to freeze the scheme.

D After many months of discussions, the Government revised the original transfer scheme. Under this revised scheme, an overseas officer on agreement terms was no longer permitted to apply for transfer to local conditions of service. Instead, he was permitted to apply for transfer to terms modelled on local conditions of service. Moreover, if there was a qualified and suitable local officer available to replace him, and if a local officer was recommended for promotion, the overseas officer would be offered appointment on terms modelled on local conditions of service at one rank below his existing rank, though he would retain his existing salary. Further, transferring officers would not be allowed to transfer to the permanent establishment for the duration of their agreements modelled on local conditions of service (the modified transfer scheme). In the meantime, the Government also proposed that all ranks other than basic ranks would be opened up for competition on the expiry of the agreements (whether overseas or local). This applied to all officers on agreement terms whose agreement expired on or after 1 September 1995 (the opening-up scheme). Under this scheme, the incumbent officer and officers one rank below would compete for the post, and the most meritorious officer would be appointed.

H Finally, as the Basic Law has required a number of senior posts to be held by Chinese citizens who are permanent residents of the Hong Kong SAR with no right of abode in any foreign country, the Government decided to limit the number of overseas officers who would be promoted to certain senior posts in the Administrative Service. The Attorney General introduced a Succession Posts Scheme accelerating the promotion of local officers in the Attorney General's Chambers to the senior directorate. The applicants challenged various features of the original transfer scheme, the modified transfer scheme, and the opening-up scheme. They also challenged the two decisions relating to the Succession Posts Scheme. On 24 June 1994, the Government published proposals for a uniform set of conditions of service for all civil servants. Two of the proposals were also challenged in these proceedings.

Held (upholding 5 out of 23 challenges):

Delay

(1) In the usual run of applications for judicial review, once leave has been granted, the court can only take into account undue delay on the part of the applicants if the delay has caused hardship, prejudice or detriment to good administration, and only to refuse to grant the applicants any relief relating to those decisions which leave to apply for judicial review has been granted. *Caswell v Dairy Produce Quota Tribunal for England and Wales* [1990] 2 AC 738 considered (at 512F-1).

(2) The challenges to some of the decisions involved were made more than three months after the dates when grounds for the application first arose. Although leave had been granted, the number of decisions being challenged, the relationship between each of them and the volume of material presented to the court at the leave stage made it impossible for the court to reach an informed and concluded view as to whether there was good reason for extending the period to apply for judicial review. In these circumstances, the court was free to revisit the question of delay at the substantive hearing. As the various decisions challenged were all made in the context of a continuing process by the Government to revise its employment policies, and as it would be premature for the applicants to lodge a challenge to particular features of the various schemes in their embryonic form until they were aware of the measures in their final form, the applicants had made out a sufficient explanation for the delay (at 513B-I).

Standing

(3) The fact that leave has been granted does not prevent the court from revisiting the issue of standing in the light of all the evidence at the substantive hearing (at 514B-F).

(4) On an application for judicial review by a representative body on behalf of its members, the body has standing if it is possible that at least one of its members is or will be affected by the decisions challenged and wishes the body to challenge

Editorial note: The court found the following 5 decisions inconsistent with art 21(3) of the Bill of Rights:

1. The decision that transferring officers would only be eligible to receive school passages and overseas education allowances for their dependent children attending full-time (holding no 18);
2. The decision prohibiting overseas officers on agreement terms from transferring to the permanent establishment under the Original and Modified Transfer Scheme (holding no 19);
3. The decision not to offer to transferring officers agreements that would last beyond 30 June 1995 (holding no 27);
4. The decision prohibiting transferring officers from applying to transfer to the permanent establishment under the Opening-up Scheme (holding no 28);
5. The decision requiring all transferring officers to undergo Chinese language training when proficiency in Chinese language has not been shown to be related to job performance (holding no 30).]

the decisions on his behalf. It is not necessary for the body to identify a member who is or will actually be affected by those decisions unless the members affected are limited in number and can be identified with ease. In normal circumstances, it is for the respondent to demonstrate that the challenges are academic by showing that, despite the terms of the decisions concerned and the breadth of their application, no member of the representative body could be affected by it (at 515A-E).

Right of access to public service

(5) The right of access to public service relates not only to initial entry to the Civil Service, but also includes access to the terms and conditions of service enjoyed by other officers as well as access to opportunities for promotion enjoyed by other officers (at 516I-517A).

(6) Article 21(c) of the Bill of Rights guarantees only general terms of equality. This means that (a) identical treatment for overseas and local officers is not required; (b) equality of treatment for all overseas and local officers is not required. If overseas officers are treated equally with all but a few local officers, the fact that they have not been treated equally with these few local officers does not necessarily mean that their right of access to the Civil Service on general terms of equality has been restricted (at 517D-F).

(7) The right of access to public service is to be enjoyed without any of the distinctions prohibited by art 1 of the Bill of Rights and without unreasonable restrictions. It is for the Government to determine what restrictions are reasonably necessary, and the court cannot substitute its own view for that of the Government if the reasonableness of a restriction is within the range of reasonable views which the Government can form (at 517F-I).

(8) A departure from the rights protected by art 21(c) of the Bill of Rights does not amount to an infringement of that right if the departure can be justified. It is for the Government to demonstrate that (a) the exercise of the rights protected by the Bill of Rights would have been irreconcilable with the achievement of an important objective on the part of the Government, and (b) that objective could not have been achieved by means which did not involve a departure from constitutionally entrenched rights. The burden of justifying any departure from the rights protected by the Bill of Rights is on the Government, and the justification has to be cogent and persuasive. While the interests of the individual have to be balanced against the interests of society generally, there is a bias towards the interests of the individual. However, in attempting to strike the right balance between the individual and society as a whole, rigid and inflexible standards should not be imposed on the Government's attempts to resolve the problems with which it is faced. *R v Sin Yau Ming* (1991) 1 HKPLR 88, [1992] 1 HKCLR 127; *A-G of Hong Kong v Lee Kwong Kut* (1993) 3 HKPLR 72, [1993] AC 95 followed (at 517I-518G).

(9) Article 21(c) requires only general terms of equality of treatment. Any difference in treatment must be as limited as possible; it must not merely be rational, but rationally connected to the need which justifies it; and it must be no more extensive than is necessary to achieve the objective which made some difference in treatment necessary (at 518G-I).

Permanent residents

(10) The term 'permanent resident' in art 21(c) of the Bill of Rights refers to

A a person who has a right of abode in Hong Kong. The term was selected deliberately to replace the term 'citizen' in art 25 of the ICCPR (at 519D-F, 521B-C).

(11) The ICCPR itself imported nationality into the rights protected by art 25 by granting those rights to 'citizens'. Since it is permissible to include racial or nationality criteria in order to determine who is a citizen of a country for the purpose of art 25 of the ICCPR, it is equally permissible to include them in the criteria for the corresponding exercise for determining who is a permanent resident of Hong Kong within the meaning of art 21 of the Bill of Rights (at 523C-F).

(12) In construing a legislative provision, no weight could be attached to what is purported to be an authoritative statement of legislative intent if it is not possible to ascertain the meaning of that statement. While it was permissible to consider the statement made by the Chief Secretary when moving the Bill of Rights Ordinance, the statement was ambiguous as to the intention of the legislature and did not elucidate the matter (at 524B-H).

(13) The common law meaning of 'permanent resident' should not be adopted for art 21(c) of the Bill of Rights because (a) the common law test does not converge with five classes of persons defined in art 24 of the Basic Law who will be the permanent residents of the Hong Kong SAR; (b) the common law test is inconsistent with the use of the phrase 'right of abode' elsewhere in the Bill of Rights; and (c) the common law test, which looks to future intention, is difficult to operate in practice (at 525F-526E).

(14) It is also inappropriate to adopt the definition of permanent resident in art 24 of the Basic Law as the meaning of the words 'permanent resident' in art 21 of the Bill of Rights. Although it is desirable for the laws of Hong Kong to converge with the laws of the SAR when the transfer of sovereignty occurs, that does not mean that convergence should take place before the transfer of sovereignty (at 526E-G).

The Original and Modified Transfer Schemes

Deadline for transfer

(15) The complaints made against the deadlines for applying to transfer to local terms of service were unfounded. A restriction on the right to transfer of officers who had not yet acquired a right of abode in Hong Kong could not have been an infringement of art 21(c) of the Bill of Rights, because those officers would not have acquired any rights under art 21 until they had acquired the right of abode in Hong Kong (at 529C-531D).

Untaken leave

(16) The disparity in treatment between transferring officers and local officers on the restrictions on untaken casual and vacation leave was minimal, especially when transferring officers were not required to give up their accrued rights: they were merely being required to exercise their accrued rights in a way in which they were already required to exercise them (at 531E-533G).

Outward passage back to Hong Kong

(17) Civil Service Regulation 1320(2), which entitles an overseas officer on agreement terms 'returning to duty' on the expiry of his leave to an outward passage back to Hong Kong, applies to transferring officers as they are returning to duty, albeit to duty on different conditions of service. However, since local

A officers on agreement terms did not enjoy the right to an outward passage, the loss of that right by transferring officers merely equalised their position with their local counterparts and could not be an infringement of art 21(c) of the Bill of Rights (at 533G-534I).

School passages and overseas education allowances

B (18) The decision that transferring officers would only continue to receive those benefits for their dependent children attending full-time education in the United Kingdom violated art 21(c) of the Bill of Rights because: (a) it indirectly discriminated against local officers (including transferring officers) whose national or social origins were not in the United Kingdom, as fewer of them would derive any benefit from that right; and (b) the rationale of strengthening the colonial ties between the United Kingdom and Hong Kong by exposing their children to life in the United Kingdom could hardly be appropriate in the twilight of British sovereignty over Hong Kong (at 535A-536F).

Transfer to the permanent establishment

D (19) The decision prohibiting overseas officers on agreement terms from transferring to the permanent establishment for the duration of their agreements modelled on local conditions of service was not irrational. As an interim measure pending the introduction of a uniform set of conditions of service for all officers, it was open to the Government to conclude that the Chinese Government should be consulted and that transferring officers should not be allowed to bypass the proposed requirements in the uniform set of conditions for transfer to the permanent establishment pending discussions with the Chinese Government. However, the decision was discriminatory and inconsistent with art 21(c) of the Bill of Rights as those objectives could be equally achieved by refusing, for the time being, local officers on agreement terms from transferring to the permanent establishment (at 536G-539F).

Proficiency in the Chinese language

G (20) The decision to take into account the ability of the officer seeking a transfer to communicate in Cantonese if there was any post in his rank which might become available and in which communication in Chinese would be required, was not irrational. This was so because (a) exceptions for specialist skills were provided for; (b) it was open to the Secretary for Civil Service reasonably to conclude that an officer should be able to stand in for his colleagues from time to time in other posts in the same rank for which a proficiency in Chinese was required; (c) allocation of resources to the provision of courses in Cantonese for officers who wished to transfer to local conditions of service was a matter of political judgment and not a matter for the court; and (d) proficiency in English, though an official language, was no substitute for proficiency in Chinese if proficiency in Chinese was required to enable an officer to carry out his duties or to stand in for his colleagues (at 539G-542B).

I (21) Nor was the decision inconsistent with art 21(c) of the Bill of Rights. It was a justifiable assumption that most of the local officers on agreement terms are already proficient in Chinese. The difference in treatment between overseas and local officers on agreement terms, if any, was entirely rational, and rationally connected to and proportionate to the need which justified it, bearing in mind that proficiency in Chinese was only a factor to be taken into account in appropriate

cases, and that a language requirement was rationally connected to the performance of the job in hand in view of the need for officers in the same rank to deputise for their colleagues when necessary (at 542C-543D).

Eligibility for transfer for those officers whose agreements had expired by 30 July 1993:

(22) The decision that overseas officers whose agreements had expired by 30 July 1993 without being renewed would not be eligible to apply for transfer to local conditions of service, even if they continued to be paid after that date, was lawful. 'Transfer' connotes the idea of an officer still serving in the Civil Service. Officers whose agreements expired on a particular date could not properly be regarded as continuing to serve in the Civil Service after that date simply because they continued to receive leave payments (at 543F-545C).

Selection exercise and demotion under the modified transfer scheme:

(23) The decision requiring transferring officers to be demoted by one rank if there was a qualified and suitable local replacement for the officer constituted a prima facie infringement of art 21(c) of the Bill of Rights, as the restriction was based on their national or social origins which, as a result of Civil Service Regulation 115(1), had caused them to be classified as overseas officers in the first place. However, the difference in treatment was proportionate to the need which justified it, in view of limited scope and duration of the restriction and that the transferring officers were not financially worse off. In the context of the need for the Government to maintain good industrial relations with local officers, the form which the difference in treatment took was also rational (at 545D-549F).

Restriction on promotion before transfer:

(24) The decision excluding transferring officers from being eligible for promotion prior to their transfer if their current agreements had less than 12 months to run was lawful, as it was obvious that officers should not be promoted if they were only going to spend a short time at the new rank. Furthermore, the maintenance of good industrial relations with local officers warranted taking into account what they might have seen as the cynical manipulation of the modified transfer scheme (at 549G-550F).

Restriction on promotion after transfer:

(25) The decision excluding transferring officers from being eligible for promotion during the terms of their new agreements was a proportionate response to the need which justified it, as it was only a short term measure, and was rational in the context of the Government's need to maintain good industrial relations with local officers (at 550G-552A).

Reduction in the length of the new agreements:

(26) The decision that any extensions granted to a transferring officer's previous agreement for the completion of naturalisation procedures and/or as a result of the legislative freeze on the original transfer scheme would be deducted from the length of the new agreement was lawful, for otherwise the transferring officer would have received the windfall of the period of the extension, during which

A period the transferring officers continued to enjoy the fringe benefits which local officers did not enjoy (at 552B-G).

The limit on the length of the new agreements

(27) The decision not to offer to transferring officers agreements that would last beyond 30 June 1997 constituted an infringement of art 21(c), as the restriction was attributable to the national or social origins of transferring officers which had caused them to be classified as overseas officers in the first place. It satisfied the test of rationality, but the objectives which the Government wished to achieve could have been achieved without departing from art 21(c), namely, by applying the same cap to the length of any new agreement offered to local officers (at 552H-555D).

The Opening-up Scheme

(28) The prohibition on transferring officers from applying to transfer to the permanent establishment in the context of the Opening-up Scheme was unlawful for the same reasons given in the context of the original and modified transfer schemes. Besides, the difference in treatment between local officers on agreement terms and transferring officers on agreement terms had a much more far-reaching impact that it enabled only local officers to avoid the Opening-up Scheme by transferring to the permanent establishment (at 557C-G).

(29) The requirement of proficiency in Chinese in the context of the Opening-up Scheme was lawful for the same reasons given in the context of the original and modified transfer schemes (at 557H-558F).

(30) The decision that all transferring officers be required to undergo Chinese language training was unlawful because no rational connection had been shown that this requirement would improve effectiveness and efficiency of job performance if the discharge of their own duties and those duties of other officers in the same rank whom they might be required to deputise did not require the need to speak colloquial Chinese. There was no evidence that the requirement to undergo Chinese language training was confined to officers who have to speak colloquial Chinese to perform their duties (at 558G-560C).

The Principal Official Posts and the Succession Posts Scheme

(31) None of the applicants had been able to identify a member in the Administrative Service who would be adversely affected by the decision to limit the number of overseas officers at a certain rank below that of Secretary and hence none of them had standing to challenge this aspect of the decision (at 560D-561A).

(32) The decision to implement the Succession Posts Scheme in the Attorney General's Chambers was lawful. It was rational in that sensible manpower planning required the creation of a pool of talent from which senior officers would be drawn in the future. Given that only few, if any, of the officers currently in line for the Principal Official posts were Chinese citizens, it was necessary to include in the pool officers whose eligibility to be Principal Officials was only potential. In addition, it was also rational to exclude overseas officers because only local officers, who are overwhelmingly likely to be ethnic Chinese, had the real potential to be eligible for the Principal Official posts. Therefore, the Succession Posts Scheme was not inconsistent with art 21(c) of the Bill of Rights (at 563I-565B).

The Uniform Terms Scheme

(33) Mere proposals should not be susceptible to judicial review — even if the proposals are likely to be put into effect because (a) there is always the possibility that they might not be put into effect and hence the proceedings would have served no useful purpose; and (b) no one has the standing to challenge mere proposals as no one is affected by them until they are implemented. Even if it can be said that a 'decision' is not a necessary prerequisite for an application for judicial review, there must have been a concluded stance on whatever it is sought to challenge. *R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1994] 2 WLR 409 considered (at 565G-566E).

(34) The Government's proposals for a uniform set of conditions of service were provisional and a further consultation exercise was to take place. Accordingly, these proposals were not amenable to judicial review, and it would be wrong for the court to give an advisory opinion merely because the parties wished the court to do so (at 566E-G).

[*Editorial note:* The applicants have lodged an appeal against the decision of Keith J.]

Cases referred to

A-G of Hong Kong v Lee Kwong Kut (1993) 3 HKPLR 72, [1993] AC 95
Caswell v Dairy Produce Quota Tribunal for England and Wales [1990] 2 AC 738

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374
Gape, Re [1952] 1 Ch 743

Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd [1982] AC 617

R v Man Wai Keung (No 2) (1992) 2 HKPLR 164, [1992] 2 HKCLR 207

R v Town Planning Board, ex p Kwan Kong Co Ltd (1995) 5 HKPLR 261

R v Sin Yau Ming (1991) 1 HKPLR 88, [1992] 1 HKCLR 127

R v Secretary of State for Employment, ex p Equal Opportunities Commission [1994] 2 WLR 409

Cases referred to in argument

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223

Central Okanagan School District No 23 v Renaud (1992) 95 DLR (4th) 577

Enderby v Frenchay Health Authority (ECJ) [1994] ICR 112

Fletcher Challenge Canada v BC (Council for Human Rights) (1992) 97 DLR (4th) 550

Groener v Ministry of Education [1990] 1 CMLR 401

James v Eastleigh Borough Council [1990] 2 AC 751

Kelso v The Queen (1981) 120 DLR (3d) 1

Lam Yuk Ming v AG [1980] HKLR 815

Mandla v Dowell Lee [1983] 2 AC 548

McClaren v Home Office [1990] ICR 824

Mercury Ltd v Electricity Corp [1994] 1 WLR 521

Ministry of Defence v Jeremiah [1980] QB 87

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A *Ontario Human Rights Commission v Borough of Etobicoke* (1982) 132 DLR (3d) 14

Padfield v Minister of Agriculture, Fisheries and Food [1968] AC 997

Parklane Private Hospital Ltd v City of Vancouver (1972) 25 DLR (3d) 731

Pepper v Hart [1993] AC 593

B *R v Chief Adjudication Officer, ex parte Bland and ors, The Times*, 6 February 1985

R v Commission for Racial Equality, ex p Westminster County Council [1984] ICR 770 (DC), [1985] ICR 827 (CA)

R v Employment Secretary, ex p Equal Opportunity Commission [1994] 2 WLR 409

C *R v Inland Revenue Commission, ex p Preston* [1985] AC 835

R v Legal Aid Board, ex p Bateman [1992] 1 WLR 711

R v Secretary of State for Home Department, ex p Ruddock [1987] 1 WLR 1482

R v Stratford-on-Avon DC, ex p Jackson [1985] 1 WLR 1319

R v Horsham Justices, ex p Farquharson [1982] 2 WLR 430

D *R v Derbyshire County Council, ex p Noble* [1990] ICR 808

R v Tower Hamlets LBC, ex p Chetnik Ltd [1988] AC 873

Rainey v Greater Glasgow Health Authority [1987] 1 All ER 65

Re Athlumney, ex p Wilson [1898] 2 QB 547

Williams Construction Ltd v Blackman [1995] 1 WLR 102

Legislation referred to

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China 1990 arts 9, 61, 24, 26, 61, 100, 101

Civil Aviation Ordinance (Cap 448) s 2(1)

F Electoral Provisions Ordinance (Cap 367) ss 6(1), 7-11, 18, 19

Hong Kong Bill of Rights Ordinance (Cap 383) s 2(3)

Hong Kong Bill of Rights arts 1, 8(4), 9, 21(c)

Immigration Ordinance (Cap 115) ss 2A, 59A, Sch 1

Official Languages Ordinance (Cap 5)

Rules of the Supreme Court (Cap 4 sub leg) O 53, 4 3(7), r 4(1)

G Supreme Court Ordinance (Cap 4) ss 21K(3), 21K(6)

Hong Kong Letters Patent 1994 (LN 406 of 1994)

Legislative Council (Date of General Election) Notice 1995 (LN 350 of 1995)

Citizenship Act 1955 [India] s 9

Citizenship Act (Cap 349) [Sri Lanka] s 20

British Nationality Act 1981 [UK] s 18, Sch 1

H Supreme Court Act 1981 [UK] s 31(6)

Legislation referred to in argument

Colonial Regulations

Disability Discrimination Ordinance (86 of 1995)

I Electoral Provisions (Miscellaneous Amendments) Ordinance (60 of 1995) ss 8, 16

Employees Retraining Ordinance (Cap 423) s 2

Interpretation and General Clauses Ordinance (Cap 1)

ASSOCIATION OF EXPATRIATE CIVIL SERVANTS OF HONG KONG v CHIEF EXECUTIVE OF THE HKSAR A

COURT OF FIRST INSTANCE
ADMINISTRATIVE LAW LIST NO 90 OF 1997
KEITH J
24, 25 FEBRUARY, 3 APRIL 1998

Constitutional Law – Basic Law – Executive orders providing for appointment and removal of holders of public office – Whether procedures for recruitment and discipline of public officers before 1 July 1997 required approval of legislature – Appointment and removal to be ‘in accordance with legal procedure’ – Whether ‘in accordance with legal procedure’ meant requiring approval of Legislative Council – Whether retrospective operation of procedures unlawful – Basic Law arts 48(7), 103 C

Human Rights – Freedom of movement – Whether prohibition of public officer under interdiction from leaving Hong Kong without permission violated right to freedom of movement – Whether restriction was ‘provided by law’ – Hong Kong Bill of Rights Ordinance (Cap 383) art 8(2), (3) – Public Service (Administration) Order 1997 s 17 D

Human Rights – Right of access to public service – Whether prohibition of public officer from being legally represented at disciplinary hearing constituted restriction of right of access to public service on general terms of equality – Hong Kong Bill of Rights Ordinance (Cap 383) art 21(c) E

Administrative Law – Standing – Human Rights – Whether a representative body had sufficient standing to bring challenge under Bill of Rights F

Words and Phrases – ‘In accordance with legal procedure’ – Basic Law art 48(7) – ‘Provided by law’ – Hong Kong Bill of Rights Ordinance (Cap 383) arts 8(3) – ‘General terms of equality’ – Hong Kong Bill of Rights Ordinance (Cap 383) art 21(c) G

憲法 – 基本法 – 有關任免公職人員之行政命令 – 1997年7月1日前有關公職人員之招聘及紀律程序是否須要立法機關批准 – 「依照法定程序」是否指須要立法會批准 – 追溯實施該條程序是否不合法 – 《基本法》第48(7), 103條 H

人權 – 遷徙往來的自由 – 禁止被停職之公職人員在未經批准下離開香港是否違反遷徙往來自由的權利 – 限制是否「法律所規定」 – 《香港人權法案條例》(第383章)第8(2), (3)條 – Public Service (Administration) Order 1997 s 17 I

人權 – 服公職之權利 – 禁止公職人員在紀律聆訊中有法律代表會否構成限制以一般平等之條件服公職之權利 – 《香港人權法案條例》(第383章)第21(c)條

A 行政法 – 起訴權 – 人權法 – 一個代表團體有否充份起訴權提出根據人權法案之質疑

B 詞彙 – 「依照法定程序」 – 《基本法》第48(7)條 – 「法律所規定」 – 《香港人權法案條例》(第383章)第8(3)條 – 「一般平等之條件」 – 《香港人權法案條例》(第383章)第21(c)條

C The applicant, the Association of Expatriate Civil Servants of Hong Kong (the AECS), applied for judicial review of the decision of the Chief Executive to promulgate two instruments, namely the Public Service (Administration) Order 1997 (the Order) and the Public Service (Disciplinary) Regulation (the Regulation) on the ground that they provided for the appointment and removal of holders of public office contrary to the provisions of the Basic Law, and that they were retrospective in operation. The AECS argued that procedures for the appointment and dismissal of public servants had to be established either by legislation or with legislative approval. Since the Order and the Regulation which established these procedures were by Executive Order only, they were inconsistent with arts 48(7) and 103 of the Basic Law. Art 103 provided that ‘Hong Kong’s previous system of recruitment [and] ... discipline ... for the public service ... shall be maintained’, and art 48(7) empowered the Chief Executive to appoint or remove holders of public office in accordance with ‘legal’ procedures. The AECS further challenged s 17 of the Order (which prohibited a public officer under interdiction from leaving Hong Kong without permission) on the ground that it was inconsistent with the right to freedom of movement guaranteed under art 8(2) of the Bill of Rights. It further argued that reg 8(3)(a) of the Regulation (which prohibited a public officer from being legally represented at a disciplinary hearing unless the Chief Executive permitted) was inconsistent with the right of access to civil service on general terms of equality protected by art 21(c) of the Bill of Rights.

Held (declaring s 17 of the Order to be inconsistent with the Bill of Rights and dismissing the rest of the application):

G (1) There was no violation of art 103 of the Basic Law as ‘Hong Kong’s previous system of recruitment [and] ... discipline ... for the public service’ did not require the relevant procedures to be established by the legislature or with legislative approval. The previous procedures were established by the Crown under the Letters Patent and the Colonial Regulations in the exercise of its prerogative, and by the Governor in the exercise of powers expressly conferred upon him by the Colonial Regulations. Accordingly, the maintenance of the previous system did not require the current system to have the approval of the legislature (at 144E-145C).

H (2) Article 48(7) must be construed together with art 103. In the light of art 103 and the fact that art 48(7) did not use the phrase ‘prescribed by law’ which appeared in a number of other provisions, the phrase ‘in accordance with legal procedures’ in art 48(7) meant ‘in accordance with such procedures as are lawfully established to maintain Hong Kong’s previous system of recruitment and discipline for the public service.’ Since the procedures laid down by the Chief Executive in the Order and the Regulation maintained Hong Kong’s previous system of recruitment and discipline in the public service and were therefore lawfully established, it followed that those procedures fell within the phrase ‘legal

procedures' in art 48(7). They did not have to be sanctioned by legislation (at 146A, B/C-F).

(3) The Chief Executive's power in art 56 to dispense with consulting the Executive Council related to decisions of the Chief Executive to appoint and remove particular public servants. The procedures by which such decisions should be taken could only be established once the Executive Council had been consulted (provided that their establishment could properly be characterised as an important policy decision) (at 146H-I).

(4) There was no legal principle which prevented subordinate legislation or administrative action from being valid merely because of its retrospectivity. There was nothing in the Basic Law or the Reunification Ordinance (110 of 1997) which even impliedly prevented the Chief Executive's executive orders from taking effect retrospectively. Indeed, the Chief Executive had little alternative but to make them retrospective in the circumstances in order to prevent the occurrence of an undesirable lacuna in the management of the public service due to the lapsing of the colonial instruments (at 147B-G).

(5) The right protected by art 8(2) of the Bill of Rights was a right to leave Hong Kong without suffering any disadvantage as a result of exercising that right. If an officer under interdiction exercised his right to leave Hong Kong without having first obtained permission to leave, the disadvantage he suffered was the possibility of having to face disciplinary action as a result of the disciplinary offence he had committed and the prospect of forfeiting all his claims to any pension or gratuity if he was found guilty and dismissed. Therefore, s 17 of the Order constituted a restriction on an officer's right to leave Hong Kong. However, since in individual cases circumstances might justify a departure from the right guaranteed by art 8(2), it was inappropriate to mount a blanket challenge to s 17 (at 148I-149B, 149H-150A).

(6) The requirement in art 8(3) that any limitation be provided by law meant that any restriction must be set down by the legislature itself or by an equivalent unwritten norm of common law, which must be accessible to all those subject to the law. Mere administrative provisions were insufficient. Section 17 of the Order was no more than an administrative provision, and there was no principle of common law equivalent to it. Therefore the restriction of an officer's right to leave Hong Kong was not 'provided by law' as required by art 8(3) of the Bill of Rights. Article 103 of the Basic Law did not provide the legal basis; it merely maintained Hong Kong's previous system of discipline for the public service, and could not be taken to contemplate the maintenance of a system which contravened the Bill of Rights (at 150A/B-G).

(7) The right of access to public service under art 21(c) of the Bill of Rights protected the right of access to the terms and conditions of service enjoyed by other officers. It was reasonably open to the Chief Executive to conclude that there were valid and rational grounds for treating police officers and judicial officers differently from other public servants in relation to the right to be legally represented at a disciplinary hearing. The mere fact that there might be other groups of officers who should be given similar preferential treatment did not make the restriction on legal representation imposed by the Regulation unreasonable. In any event, the preferential treatment accorded to judicial officers and police officers was such that sensible and fair-minded people would recognise a genuine need for the preferential treatment, that the preferential treatment was

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A both rational and rationally connected to the need which justified it, and that the preferential treatment was proportionate to that need, and was no more extensive than was necessary to achieve the objective which made the preferential treatment necessary (at 152B-H, 153E-H).

B (8) As the AECS represented a class of officers, at least one of whom might possibly be affected by the decisions under challenge, and since it was possible that at least one of them wished the AECS to challenge the relevant decision on his behalf, the AECS had the standing to challenge the legality of s 17 of the Order (at 154E/F-G).

C **Cases referred to**
Lam Yuk Ming & Ors v Attorney General [1980] HKLR 815
R v Secretary for the Civil Service & Anor, ex p Association of Expatriate Civil Servants of Hong Kong & Ors (1995) 5 HKPLR 490 (HC), (1996) 6 HKPLR 333 (CA)

D **Legislation referred to**
Basic Law of the Hong Kong Special Administrative Region arts 8, 30, 39, 48(4), 48(6), 48(7), 56, 73, 74, 83, 98, 99, 103, 110, 111
Hong Kong Bill of Rights Ordinance (Cap 383) arts 8(2), 8(3), 21(c)
Hong Kong Reunification Ordinance (110 of 1997) s 23(3)

E **Other sources referred to**
Civil Service (Disciplinary) Regulations
Colonial Regulations
Disciplinary Proceedings (Colonial Regulations) Regulations
International Covenant on Civil and Political Rights art 12(3)
F Letters Patent arts XIV, XVI
Nowak, M *United Nations Covenant on Civil and Political Rights: CCPR Commentary* (Kehl, Strasbourg, Arlington: N P Engel, 1993) pp 208-209
Public Service (Administration) Order 1997 (EO No 1 of 1997) ss 17, 21(1)
Public Service (Disciplinary) Regulation regs 8(3)(a), 8(5), paras 3(b)(i) in
G Parts A and B of the Schedule

Application
This was an application for judicial review of the decision of the Chief Executive of the HKSAR to promulgate two instruments, namely the Public Service (Administration) Order 1997 and the Public Service (Disciplinary) Regulation and the constitutionality of some provisions in those instruments. The facts appear sufficiently in the following judgment.

Michael Scott (Vice-President of the AECS) for the applicant.
Joseph Fok (Wilkinson & Grist) for the respondent.

I **Keith J: INTRODUCTION**

This is an application by the Association of Expatriate Civil Servants of Hong Kong (the AECS) for judicial review of (a) the decision of the Chief

LEE MIU LING & ANOR v ATTORNEY GENERAL

COURT OF APPEAL – CIVIL APPEAL NO 145 OF 1995
LITTON VP, BOKHARY AND GODFREY JJA
21, 24 NOVEMBER 1995

Elections – Inequality of voting power – Functional constituencies – Whether contrary to Bill of Rights that some people could vote in functional as well as geographical constituencies – Whether disparity in numbers of voters in functional constituencies contrary to Bill of Rights – Legislative Council (Electoral Provisions) Ordinance (Cap 381) – Hong Kong Bill of Rights (Cap 383) art 21

Human Rights – Inequality of voting power – Functional constituencies – Whether contrary to Bill of Rights that some people could vote in functional as well as geographical constituency – Whether disparity in numbers of voters in functional constituencies contrary to Bill of Rights – Tests applicable – Locus standi of non-voters in functional constituencies – Whether challenged by way of judicial review or originating summons – Hong Kong Bill of Rights (Cap 383) art 21 – Legislative Council (Electoral Provisions) Ordinance (Cap 381) – Letters Patent art VII(3)

The appellants challenged provisions in the Legislative Council (Electoral Provisions) Ordinance (Cap 381) relating to functional constituencies. They complained that the law which provided that some people could vote in both a geographical constituency and a functional constituency while others got only one vote was contrary to art 21 of the Hong Kong Bill of Rights (Cap 383) which guaranteed universal and equal suffrage. They further submitted that the sizes of functional constituencies varied so greatly that a votes in a constituency with few votes were worth more than a vote in a large functional constituency and thus were also repealed by the Bill of Rights.

Held, dismissing the appeal:

(1) As the statutory provisions being challenged were enacted after the Hong Kong Bill of Rights Ordinance came into effect, the challenge was not whether they were repealed but whether they were unconstitutional. *R v Chan Chak Fan* [1994] 3 HKC 145 approved (at 127D-E).

(2) Although the challenge was only to objectionable features of functional constituencies, the challenge was necessarily to the whole of the legislation relating to functional constituencies. The court could only decide if this legislation was constitutional or not. If it were not, the 30 people elected to represent the functional constituencies would not be Legislative Councillors and there would be no Legislative Council (at 127H-I).

(3) The argument that Hong Kong's electoral system was at an embryonic stage and so should be judged sympathetically was irrelevant to the challenge (at 129I).

(4) The large differences in size of the functional constituencies, ranging from 39 voters to 487,000 voters was a departure from identical treatment. Any departure from identical treatment must be justified, ie it must be shown that sensible and

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A fair-minded people would recognize a genuine need for some difference of treatment, the difference was rational and the departure was proportionate to the need. If the departure from identical treatment was justified, the legislation would survive the challenge. *R v Man Wai Keung (No 2)* [1992] HKCLR 207 followed (at 130E-G).

(5) In this case, sensible and fair-minded people would recognize the need for some difference of treatment. By their nature, functional constituencies were bound to vary in size. Sensible and fair-minded people would not condemn the arrangement as irrational or disproportionate (at 130I-131B).

(6) The fact that 2.9 million people had two votes and 1 million had only one also disclosed a departure from identical treatment. Whether such departure was justified was not answered by applying the general test in *R v Man Wai Keung (No 2)* but by reference to art VII (3) of the Letters Patent, which permitted people of a particular description to be given a voting entitlement in addition to a geographical constituency vote. Functional constituencies came within art VII (3) (at 132F-H, 133C-E).

per Litton VP:
(7) The challenge should have been brought under O 53 as an application for judicial review. If the appellants had done so, they would have had to show sufficient interest to bring the case at the ex parte leave stage and it was difficult to see how they could have fulfilled this requirement with regard to the complaint over the disparity in sizes of the functional constituencies, as they were not even members of a functional constituency. Further, by seeking declaratory relief and commencing proceedings by originating summons, the court's power was limited under O 15 r 16 of the Rules of the Supreme Court to making binding declarations of right. As the appellants were not electors in any functional constituency, they had no rights which could be violated by the inequality of voting power (at 135E-1, 136A-C).

(8) The appellants sought a declaration to impeach the whole of the Legislative Council (Electoral Provisions) Ordinance which they acknowledged was too wide. The judge should have had before him the precise form of relief the plaintiffs said they were entitled to (at 136C-E).

Chinese summary:

選舉 – 不平等投票權 – 功能組別 – 部分選民可同時在功能組別和地區選舉中投票是否有違人權法 – 各功能組別選民人數不等是否有違人權法 – 《立法局(選舉規定)條例》(第 381 章) – 《香港人權法案》(第 383 章) 第 21 條

人權 – 不平等投票權 – 功能組別 – 部分選民可同時在功能組別和地區選舉中投票是否有違人權法 – 各功能組別選民人數不等是否有違人權法 – 適用測試 – 不屬任何功能組別的選民有否出庭權 – 應以司法覆核還是原訴傳票方法對選舉方法提出質疑 – 《香港人權法案》(第 383 章) 第 21 條 – 《立法局(選舉規定)條例》(第 381 章) – 《英皇制誥》第 VII (3) 條

本案的上訴人對《立法局(選舉規定)條例》(第 381 章) 中有關功能組別的條文提出質疑。他們投訴該條例容許有些人可以同時在地區選舉和

功能組別中投票，而其他人士則只能投一票，是違反了《香港人權法案》(第383章)第21條有關普及、平等選舉權的保證。他們更指稱由於各功能組別的選民人數相差甚遠，致使小組別中的一票可以相當於大組別中的多票，因此亦應基於人權法而廢除。

裁決 — 上訴駁回：

(1) 由於被質疑的法例是在《香港人權法案條例》通過後才開始施行，所以質疑的問題不是它應否被廢除，而是它是否違憲。雖然上訴人只是質疑有關功能組別的某些規定，但實質上是對整個功能組別選舉的質疑。法院只能決定這法例是否符合憲法。如果不符合，則獲選代表各功能組別的三十名立法局議員便不可成為立法局議員，而立法局亦不能成立。

(2) 各功能組別的選民人數參差，可以說是違同等對待的原則。但如果合理理由解釋為何要違反此原則，能證明一般明理的人都認為有作此不同對待的需要，而對待的相異是合理並與實際需要相稱的話，則該條例便不能受到質疑。一般明白事理的人都會知道，由於功能組別性質，它們必定大小不一，明理人都不會認為此安排是不合理和與實際需要不相稱的。

(3) 香港有二百九十萬人擁有兩票，而有一百萬人只有一票，這安排亦是脫離了同等對待的原則，但根據《英皇制誥》第VII(3)條，是容許符合某些條件的人，除了地區選舉中可以投票外，亦有權多投一票的。功能組別在第VII(3)條的範圍之內。

(4) 上訴人應根據《高等法院規則》第53令申請司法覆核有關條例。但即使他們以此方式提出訴訟，亦難就功能組別選民人數參差這問題上充分證明與他們的利益有關，因為他們並不屬於任何功能組別。另外，他們如以原訴傳票的方式要求法院作出聲明，根據《高等法院規則》第15令16條，法院的權力只限於就申請人所有權利而作出有效的聲明。由於上訴人不是任何功能組別的選民，他們沒有因為不平等投票權而致權利遭侵犯。

Cases referred to

Communication No 172/1984, SWM Broeks v The Netherlands (9 April 1987, United Nations Human Rights Committee, unreported)
Dixon v British Columbia (Attorney General) (1986) 31 DLR (4th) 546
Electoral Boundaries Commission Act, Re (1991) 81 DLR (4th) 16
R v Chan Chak Fan [1994] 3 HKC 145
R v Man Wai Keung (No 2) [1992] 2 HKCLR 207

Legislation referred to

Legislative Council (Amendment) Ordinance 1994
 Legislative Council (Electoral Provisions) Ordinance (Cap 381)
 Letters Patent arts VI(1), VII(1), (3), (5)
 Hong Kong Bill of Rights Ordinance (Cap 383) s 3(2), Pt II arts 1(1), 21, 22
 Rules of the Supreme Court O 15 r 16, O 53 rr 1(2), 3(2), (7)

Other sources referred to

International Covenant on Civil and Political Rights

Appeal

This was an appeal from Keiths J's refusal to grant a declaration that functional constituencies as provided for by the Legislative Council (Electoral Provisions) Ordinance (Cap 381) were repealed by the Hong Kong Bill of Rights Ordinance

A (Cap 383) and art VII (5) of the Letters Patent (see (1995) 5 HKPLR 191). The facts appear sufficiently in the following judgment.

Gladys Li QC and Nigel Kat (Robertson, Double & Lee) for the appellants.
Geoffrey Ma QC and Paul Shieh (Crown Solicitor) for the respondent.

B Bokhary JA: Introduction

What the plaintiffs challenge are those provisions in the Legislative Council (Electoral Provisions) Ordinance (Cap 381), which relate to functional constituencies. They commenced these proceedings to seek a declaration that those provisions have been repealed by art VII(5) of the Letters Patent and s 3(2) of the Hong Kong Bill of Rights Ordinance (Cap 383). Having lost before Keith J in the High Court (see (1995) 5 HKPLR 191), they now appeal to this court.

D Whether unconstitutional

In the court below, everyone including the judge took the question to be whether the provisions under challenge had been repealed. In truth, however, since those provisions were enacted after the Bill of Rights had come into effect, the question raised by the challenge to them must be whether they are unconstitutional. As we said in *R v Chan Chak Fan* [1994] 3 HKC 145 at 153:

The Letters Patent entrench the Bill of Rights by prohibiting any legislative inroad into the International Covenant on Civil and Political Rights as applied to Hong Kong. The Bill is the embodiment of the covenant as applied here. Any legislative inroad into the Bill is therefore unconstitutional, and will be struck down by the courts as the guardians of the constitution. And the test of constitutionality is the same as the test of Bill consistency.

G Consequences of unconstitutionality

Keith J said that the plaintiffs 'only seek the elimination of those features of the functional constituencies which make them objectionable'. That may be what the plaintiffs desire. But we cannot rewrite the legislation under challenge. Our task is to decide whether such legislation is constitutional or unconstitutional. If we decide that it is constitutional, we uphold it. But if we decide that it is unconstitutional, then, simply by saying so, we strike it down.

Since we cannot rewrite the legislation which the plaintiffs challenge, their challenge is necessarily to the whole of the legislation relating to functional constituencies. No half-way course is open. So, if the plaintiffs' challenge is correct in law, then (whether or not they desire or even realize it) the legal consequences would be these.

First, the 30 persons returned to the Legislative Council in respect of functional constituencies would not be Legislative Councillors after all.

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26 October 2002

Mr. Stephen Lam
Assistant Legal Adviser
Legislative Council Secretariat
Legal Service Division
Legislative Council
8 Jackson Road
Central
Hong Kong

Dear Mr. Lam,

Village Representative Election Bill

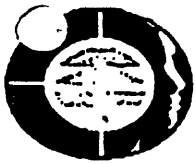
I refer to your letter of 18 October 2002 and my reply of 22 October 2002.

The Equal Opportunities Commission has advised that, as far as it can anticipate matters, the provisions of the Village Representative Election Bill are consistent with the Sex Discrimination Ordinance (Cap 480). A copy of the Commission's letter dated 25 October 2002 is attached for your information.

Yours sincerely,

(Stephen Fisher)
for Secretary for Home Affairs

c.c. DHA (Attn.: Miss Monica Chen)
D of J (Attn.: Mr. Lawrence Peng
Mr. James O'Neil)



平 等 機 會 委 員 會

香港灣仔港灣道一號會議廣場辦公大樓20樓2002室

EQUAL OPPORTUNITIES COMMISSION

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25 October 2002

By Fax: 2572 6546 and By Post

Mr. Stephen Fisher, JP
for Secretary for Home Affairs
Home Affairs Bureau
31st Floor, Southorn Centre
130 Hennessy Road
Wan Chai
Hong Kong

Dear Mr. Fisher,

Re : Village Representative Election Bill

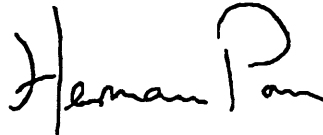
I refer to my letter dated 23 October 2002.

Please be advised that, as far as the Commission can anticipate matters, the provisions of the Village Representative Election Bill are consistent with the Sex Discrimination Ordinance Cap. 480 ("SDO").

However, consistency with the SDO does not necessarily mean the Bill is also compliant with other legislation and instrument, such as the Hong Kong Bill of Rights. You will appreciate that the Commission is not charged with the function of ensuring compliance with the Hong Kong Bill of Rights and it would not be appropriate for us to offer any comment thereon.

The above is the view of the Commission at this stage. Should there be any new development, we will inform you as soon as possible.

Yours faithfully,

A handwritten signature in black ink, appearing to read "Herman Poon". The signature is written in a cursive style with a large, prominent initial "H" and "P".

Herman L.H. Poon
Legal Adviser (Ag).

節錄自1959年11月25日立法局會議過程正式紀錄
Extract from Official Record of Proceedings of
Council sitting on 25 November 1959

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HEUNG YEE KUK BILL, 1959.

THE COLONIAL SECRETARY moved the First reading of a Bill intitled "An Ordinance to provide for the Establishment and Functions of an Advisory and Consultative Body for the New Territories and for purposes connected therewith."

He said: Sir, although the Heung Yee Kuk has not until now been a statutory body, it has existed, as honourable Members are no doubt aware, for more than thirty years. During that period it has, until recently, enjoyed a respected position in the eyes not only of the people of the New Territories but also of the officials charged with the administration of the New Territories and of the Government and the community as a whole. The present Bill seeks to set up the Kuk as a statutory advisory body on New Territories affairs and to establish and consolidate and indeed to broaden its representative position, and to ensure that it may retain and enhance in the future the honoured status and prestige which have been won for it in the past by those New Territories elders who have accepted the responsibility of office therein and who in that capacity have made so substantial a contribution towards the good administration of that part of the Colony.

The immediate occasion for the introduction of this Bill arises from a dispute, or conflict, which has virtually prevented the Kuk from functioning at all during the last two years. This unhappy state of affairs began as a dispute between two factions within the Kuk which led in late 1957 to the withdrawal by the Government of recognition of the representative status of the Kuk. Matters finally developed into a dispute between one of these two factions on the one hand and the Government on the other. The point at issue was a very simple one: those who had by then assumed control of the Kuk maintained that the Government ought to treat that body as being authoritatively representative of New Territories opinion but should at the same time in no way concern itself with the question how the Kuk officials were elected—that is to say, with the Kuk's constitution—or with the question whether the Kuk was truly representative.

Such a proposition cannot logically command any support, although I suppose that if Government attached no importance to New Territories opinion, then the existence and constitution of the Heung Yee Kuk might be similarly dismissed as unimportant. This is not, however, the case, as honourable Members are well aware, and indeed since the war the Government has gone to considerable lengths to ascertain and give heed to rural opinion. Much time and care has been spent upon this, and the result has been the establishment of the twenty-five Rural Committees which now exist for the representation of local opinion in almost every area of the New Territories.

Some Members may be interested to learn, Sir, of the arrangements that are made to ensure as far as possible that these Rural Committees truly reflect rural opinion. At the bottom of the representative system is the ordinary village family. The heads of the families in each village choose one or more representatives, depending on the size of the village. The choice is reported to the District Officer who, if he is satisfied that the nomination genuinely commands the support of the majority of the

village and that the man is of good character, will extend formal recognition to the Village Representative. In the Rural Committee areas the Village Representatives sometimes together with one or two other well-known men, form the full Rural Committee and they in their turn elect the officials of the Rural Committee. Elections for Village Representatives are not often contested and in many cases a formal election is not necessary. In the Rural Committees there is usually greater competition and elections are supervised by the District Officers who ensure that the ballot is secret.

The Bill before Council not only gives statutory recognition for the first time to the Village Representative and the Rural Committee; it also establishes the Heung Yee Kuk as the apex in the representative pyramid which I have just described. The leading office-bearers of these twenty-five Rural Committees, reinforced by some twenty elders of their own choosing, will compose the Full Council of the Heung Yee Kuk and will elect the Kuk's office-bearers from amongst their own number.

All this is in line with the Government's policy, over the last ten years or more, towards the representation of rural opinion. Honourable Members will readily see that there is a need for some organization to carry out the Heung Yee Kuk's traditional functions, that is to say to co-ordinate purely localized opinion and to present, in relation to matters that affect the New Territories at large, as opposed to matters that are of only local significance, a consolidated and truly representative statement of responsible New Territories opinion. The object of the Bill at present before Council is to set up the Kuk for this purpose as a statutory body.

I should perhaps emphasize here that the Heung Yee Kuk and the Rural Committees on which it will be based are purely advisory and consultative bodies, and the main purpose of this Bill is simply to re-establish and confirm the Heung Yee Kuk in the position which it has already held for a long time, under less formal arrangements until the unhappy events of the past two years. I am confident that the future Kuk, functioning within its new statutory framework, will more than uphold the very worthy traditions which it inherits, and will again make a substantial contribution towards the good government of the New Territories. It will certainly be the policy of the Government to assist it to do so.

Finally, Sir, before closing I feel that, in order to prevent any possible misapprehension that might otherwise arise, I should mention that the proposals in this Bill are quite separate and distinct from the issue raised in an action, of which honourable Members may be aware, instituted before the Supreme Court just over a year ago by certain officers of the Kuk and which is still pending. Government, of course, respects the accepted general principle that the law should not be

changed to prejudice the existing rights of a litigant which he is seeking to assert in the Courts. The proposals in this Bill do not offend this principle. The litigation to which I have referred concerns solely the position under the Societies Ordinance of the present Heung Yee Kuk, an issue not affected by this Bill if it becomes law. While it is true to say that this Bill if enacted will make the issue before the Courts an academic one, it is equally true to say that whether or not the present Heung Yee Kuk should be held to be subject to the Societies Ordinance Government would still need to introduce this legislation in order to establish a truly representative body.

THE ATTORNEY GENERAL seconded.

The question was put and agreed to.

The Bill was read a First time.

Objects and Reasons.

The "Objects and Reasons" for the Bill were stated as follows:—

The reasons for this legislation are set out in the preamble. In creating a statutory body it is not intended to alter the general advisory functions of the Heung Yee Kuk which are defined in clause 9.

2. In providing for the constitution of the Full Council clause 3 accords statutory recognition of Rural Committees, whose Chairmen and Vice-Chairmen are *Ex Officio* Councillors and vote for the Special Councillors.

3. Clause 14 provides that the statutory body shall have the exclusive use of the name and style Heung Yee Kuk, while clause 13 entitles the corporation (to be established under clause 12) to call for a lease of the property in Tai Po which has long been associated with the activities of the Heung Yee Kuk.

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