

Leung Chun Ying
and
Ho Chun Yan Albert

Ma CJ, Chan, Ribeiro and Tang PJJ and Gleeson NPJ
Final Appeal Nos 24, 25 and 27 of 2012 (Civil), 1 of 2013 (Civil)
10–11 June, 11 July 2013

Elections — Chief Executive election — persons eligible under s.33 may challenge election result on grounds in s.32 only by election petitions — persons not covered under s.33 entitled to challenge election result by way of judicial review but locus standi would depend on normal judicial review considerations — Chief Executive Election Ordinance (Cap.569) ss.32, 33, 34, 39

Constitutional law — Basic Law — right of access to courts — seven-day time limit for commencing election petition proceedings — limit not disproportionate — Basic Law art.35

L was elected Chief Executive (CE) in an election held in March 2012. H, an unsuccessful candidate, challenged L's election by way of election petition under s.32 of the Chief Executive Election Ordinance (Cap.569) (the Ordinance) and judicial review, alleging that L engaged in illegal conduct contrary to the Elections (Corrupt and Illegal Conduct) Ordinance (Cap.554). K, a non-candidate, also applied to challenge L's election by way of judicial review on substantially the same grounds. Section 32 of the Ordinance provides "(1) An election may be questioned only by an election petition on the ground that – (a) the person declared ... as elected was not duly elected because (i) he was not eligible ... (ii) he was disqualified ... (iv) he engaged in corrupt conduct or illegal conduct at the election ... (vii) material irregularity occurred ...". Section 33 identifies the category of persons able to lodge an election petition. It is not restricted to candidates in the election and includes persons who were not nominated, whose nominations were not accepted by the returning officer or who were disqualified. Section 34 provides for a non-extendable period of seven working days for the lodging of an election petition from the day the relevant election result is declared. Section 39 provides that for any application for judicial review in relation to the election of a person as CE, there was a time limit of 30 days, unless extended by the court. The Judge of the Court of First Instance refused leave for judicial review to H on the basis that it was an abuse for H to have commenced both judicial review and election petition proceedings and, in the case of

H and K, that the grounds set out in s.32(1)(a) were not available in judicial review proceedings. He also held that the seven-day period in s.34 was unconstitutional as breaching the right of access to the courts under art.35 of the Basic Law. The Appeal Committee's conclusion (see (2012) 15 HKCFAR 686) that the factual allegations raised were unarguable was sufficient to dispose of the challenges made by H and K, and rendered the appeal academic, but the Appeal Committee granted leave to appeal on two questions of law given the sufficiently great public interest, namely: (a) the relation between challenges to a CE election by way of election petition in s.32 and the judicial review procedure envisaged under s.39; and (b) whether the seven-day time limit in s.34 infringed the right of access to court under art.35 of the Basic Law.

Held, allowing the appeal by L and the Secretary for Justice and dismissing the appeal by H, that:

Issue (a)

- (1) An election petition was not the only means of challenging an election. The wording of s.39 of the Ordinance presupposed the availability of judicial review and other proceedings. Sections 29 and 38 expressly envisaged the situation in which challenges could be made as to whether a person was “duly elected” in proceedings other than election petition proceedings. Further, s.32(1)(a) and (b) set out the grounds to question an election under the election petition proceedings. Nothing was said about the grounds which might be available in judicial review or other proceedings envisaged under s.39. (See para.20.)
- (2) However, the word “only” in s.32(1) made clear that where an election was questioned by persons eligible under s.33 (s.33 Persons) on the grounds set out in s.32(1)(a) or (b), this could only be done by an election petition. The election petition procedure was a unique procedure open only to s.33 Persons who were the most likely persons to take action to question an election. They had the considerable benefit of being able to lodge an election petition as of right, without the need to seek leave as in judicial review proceedings. Judicial review or other proceedings were not open to H or other s.33 Persons if the same grounds as set out in s.32(1)(a) were used. It made pointless the elaborate and speedy procedure for election petitions carefully and extensively set out in the Ordinance if they could do so. However, s.33 Persons could bring judicial review proceedings if non-s.32(1)(a) or (b) grounds were relied on. (See paras.22, 29.)
- (3) As for non-s.33 Persons, like K, nothing in the Ordinance excluded the right of non-s.33 Persons from relying on the

grounds set out in s.32(1)(a) or (b). The availability of judicial review as a fallback procedure to deal with those situations where, for whatever reason, election petition proceedings were not instituted, constituted an additional guarantee to enable CE elections to have integrity and to be genuine, open, honest and fair. Whether or not a person would be able actually to rely on one or more of the grounds set out s.32(1)(a) and (b), or had the necessary *locus standi*, to found a claim for judicial review would depend on normal judicial review considerations. (See paras.26–27.)

Issue (b)

- (4) While the seven-day limit in s.34 could be regarded as placing restrictions on the right of access to courts, it was not disproportionate. Although a tight one, as s.33 Persons were those who could be expected to have been intimately involved in an election from the start and who could therefore be expected to pay close attention to the activities of their opponents, the limit was not unduly short. It was in line with the limits imposed for similar proceedings in other jurisdictions. Further, a due margin of appreciation should be accorded. Elections involved political and policy considerations and it was in these areas where the legislature was involved. A stated time limit of seven days was one that did involve considerations other than legal ones (*Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, *Miller v Bull* [2010] 1 WLR 1861, *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 applied; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471, *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265, *Rudolph v Lightfoot* (1999) 197 CLR 500, *Hocine v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 269 distinguished). (See paras.36–45.)

選舉 — 行政長官選舉 — 符合第33條所訂資格的人士如欲根據第32條所列的理由質疑選舉結果，只可藉選舉呈請提出質疑 — 不受第33條涵蓋的人士有權提出司法覆核以質疑選舉結果，但他的是否具有起訴地位，須按照適用於一般司法覆核的考慮因素來決定 — 《行政長官選舉條例》（第569章）第32、33、34、39條

憲法 — 《基本法》 — 向法院提起訴訟的權利 — 展開選舉呈請法律程序的七日時限 — 時限並非不相稱 — 《基本法》第35條

L於2012年3月舉行的選舉中獲選為香港特別行政區行政長官。其中一名落敗的候選人（下稱H）提出《行政長官選舉條例》（第569章）第32條所訂明的選舉呈請以及司法覆核，對L的當選提出質疑，指稱L曾作出非法行為，違反《選舉（舞弊及非法行為）條例》（第554章）。另一名並非候選人的人士（下稱K）亦基於大

致相同的理由提出司法覆核，對L的當選提出質疑。《行政長官選舉條例》第32條規定：「(1)選舉只可藉提出選舉呈請而受質疑，而提出選舉呈請的理由，須是 — (a) ... 宣布當選的人因以下理由而非妥為當選 — (i)該人 ... 沒有資格 ... ; (ii)該人 ... 喪失 ... 資格; (iv)該人在有關的選舉中作出舞弊行為或非法行為; ... (vii)有 ... 具關鍵性的欠妥之處 ...」。第33條指明選舉呈請可由何等類別的人士提出，規定除了候選人外，不獲提名的、提名不獲選舉主任接納的或喪失當選資格的人士亦可提出選舉呈請。第34條規定，選舉呈請須在宣布相關選舉的結果之日後七個工作日內提出，而該時限不可延展。第39條規定，關於一名人士當選為行政長官的司法覆核申請，提出的時限為30日，但如時限獲法庭延展，則作別論。原訟法庭法官拒絕給予H許可申請司法覆核，理由為H同時展開司法覆核和選舉呈請程序乃屬濫用程序；至於H和K的個案，法官亦拒絕給予許可申請司法覆核，理由為第32(1)(a)條所臚列的理由不適用於司法覆核程序。法官又裁定，第34條下的七日期限因侵犯《基本法》第35條下向法院提起訴訟的權利而違憲。上訴委員會斷定（詳見(2012) 15 HKCFAR 686）所提出的事實指控無法辯證成立，而這已足以處置H和K所提出的質疑，以及使上訴流於學術性。然而，考慮到所涉的重大公眾利益，上訴委員會就以下兩個法律問題批予上訴許可：(a)根據第32條提出選舉呈請以質疑行政長官選舉與第39條所預視的司法覆核程序之間的關係；及(b)第34條下的七日時限是否侵犯《基本法》第35條下向法院提起訴訟的權利。

裁決—L及律政司司長的上訴得直，並駁回H的上訴：

議題(a)

- (1) 選舉呈請並非質疑選舉的唯一方法。《行政長官選舉條例》第39條的用字已預先假定司法覆核及其他法律程序可供使用。第29及38條明確預視可以在選舉呈請以外的法律程序中對某人是否「妥為當選」提出質疑。此外，第32(1)(a)和(b)條列出在選舉呈請程序中質疑選舉的理由，但第39條卻無提及在其所預視的司法覆核或其他法律程序中可依賴何等理由。（見第20段）
- (2) 不過，第32(1)條下的「只」字表明，當符合第33條所訂資格的人士（下稱「第33條人士」）如欲根據第32(1)(a)或(b)條列出的理由質疑選舉，只能提出選舉呈請。選舉呈請程序是只供第33條人士採用的獨特程序，他們是最有可能採取行動質疑選舉的人士。他們能夠以當然權利提出選舉呈請，毋須如司法覆核程序般申請許可，這對他們有莫大益處。假如所依賴的理由與第32(1)(a)條所臚列者相同，則H或第33條人士不能提起司法覆核或其他法律程序；否則，《行政長官選舉條例》小心和廣泛地訂立和詳細規定的簡便選舉呈請程序便會失去其意義。然而，假如所依賴的理由並非第32(1)(a)或(b)條所臚列者，則第33條人士可提起司法覆核程序。（見第22、29段）

- (3) 例如K的一類非第33條人士，《行政長官選舉條例》並無任何條文剝奪他們依賴第32(1)(a)或(b)條所臚列的理由的權利。在無人提出選舉呈請程序（不論原因為何）的情況下容許人們提出司法覆核以作後着，乃構成額外保證，以確保行政長官選舉持正、真實、公開、誠實和公平。至於某人是否確能依賴第32(1)(a)及(b)條所臚列的一項或多項理由或是否具有提出司法覆核所需的起訴地位，則須按照適用於一般司法覆核的考慮因素來決定。（見第26至27段）

議題(b)

- (4) 雖然第34條下的七日時限可被視為向法院提起訴訟的權利施加限制，但這種限制並非不相稱。雖然時限緊迫，但由於可預期第33條人士是從一開始已密切地牽涉在選舉中的人士，從而可被預期一直密切留意着競選對手的活動，因此上述時限並非不合理地短。它與其他司法管轄區對類似訴訟施加的時限一致。再者，應當妥為給予自由判斷餘地。選舉涉及政治與政策考慮，而立法機關牽涉的正是這些領域。條例指明的七日時限，確實涉及法律以外的考慮因素（引用 *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* (2006) 9 HKCFAR 234, *Miller v Bull* [2010] 1 WLR 1861, *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409; *Australian Iron & Steel Ltd v Hoogland* (1962) 108 CLR 471, *David Grant & Co Pty Ltd v Westpac Banking Corp* (1995) 184 CLR 265, *Rudolph v Lightfoot* (1999) 197 CLR 500, *Hocine v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 269 予以區別）。（見第36至45段）

Mr Johnny Mok SC and Mr Abraham Chan, instructed by Sit Fung, Kwong & Shum, for the appellant in FACV 24, 25/2012 and the 1st respondent in FACV 1/2013.

Mr Michael Thomas SC, Mr Stewart Wong SC and Mr Jin Pao, instructed by the Department of Justice, for the appellant in FACV 27/2012.

Mr Martin Lee SC, Mr Hectar Pun, Mr Jeffrey Tam and Mr Carter Chim, instructed by Lam and Lai, for the respondent in FACV 24, 25 and 27/2012 and the appellant in FACV 1/2013.

Legislation mentioned in the judgment

Basic Law of the Hong Kong Special Administrative Region arts.35, 37, 43, 44, 45, 47, 47(1), 48(1), 73(9), Annex I

Chief Executive Election Ordinance (Cap.569) ss.13(c), 22(1AB), 22(1AB)(d), 23, 26A, 28, 28(1), 28(2), 29, 31, 32, 32(1), 32(1)(a), 32(1)(a)(iv), 32(1)(a)(vi), 32(1)(b), 32(2), 33, 34, 34(1), 35, 36, 37, 38, 39, 39(1), 39(1)(c), 39(1)(d), 39(2), Parts 5, 6

Commonwealth of Australia Constitution Act [Australia] ss.75(v), 76, 77, 77(i)

Elections (Corrupt and Illegal Conduct) Ordinance (Cap.554)
ss.24(1), 37(2)(a)(ii)(A)
High Court Ordinance (Cap.4) s.21K
Hong Kong Court of Final Appeal Ordinance (Cap.484) s.22(1)(c)
Interpretation and General Clauses Ordinance (Cap.1) s.18(3)
Legislative Council Ordinance (Cap.542) s.73
Rules of the High Court (Cap.4A, Sub.Leg.) O.53 r.4(1)

Cases cited in the judgment

Abebe v Commonwealth (1999) 197 CLR 510
Ashingdane v United Kingdom (1985) 7 EHRR 528
Australian Iron & Steel Ltd v Hoogland (1962) 108 CLR 471
Chit Fai Motors Co Ltd v Commissioner for Transport [2004] 1
HKC 465
David Grant & Co Pty Ltd v Westpac Banking Corp (1995) 184
CLR 265
Fok Chun Wa v Hospital Authority (2012) 15 HKCFAR 409, [2012]
2 HKC 413
Fully Profit (Asia) Ltd v Secretary for Justice (2013) 16 HKCFAR
351, [2013] 6 HKC 374
HKSAR v Lam Kwong Wai (2006) 9 HKCFAR 574, [2006] 3
HKLRD 808
Hocine v Minister for Immigration and Multicultural Affairs (2000)
99 FCR 269
Miller v Bull [2009] EWHC 2640 (QB), [2010] 1 WLR 1861,
[2010] PTSR 1737
Mok Charles Peter v Tam Wai Ho (2010) 13 HKCFAR 762, [2011]
2 HKC 119
Mok Charles Peter v Tam Wai Ho (2012) 15 HKCFAR 489, [2012]
3 HKC 398
Ng Yat Chi v Max Share Ltd (2005) 8 HKCFAR 1, [2005] 1
HKLRD 473
Po Fun Chan v Winnie Cheung (2007) 10 HKCFAR 676, [2008]
1 HKLRD 319, [2007] 5 HKC 145
Polskiego v Poland (2005) 41 EHRR 21
Rudolphy v Lightfoot (1999) 197 CLR 500
Secretary for Security v Sakthevel Prabakar (2003) 6 HKCFAR 397,
[2004] 1 HKLRD 568
Sky Wide Development Ltd v Building Authority [2011] 5 HKLRD
202
Stock Exchange of Hong Kong Ltd v New World Development
Co Ltd (2006) 9 HKCFAR 234, [2006] 2 HKLRD 518, [2006]
2 HKC 533
Tolstoy Miloslavsky v United Kingdom [1996] EMLR 152, (1995)
20 EHRR 442

- Vallejos v Commissioner of Registration (2013) 16 HKCFAR 45, [2013] 2 HKLRD 533, [2013] 4 HKC 239
- W v Registrar of Marriages (2013) 16 HKCFAR 112, [2013] 3 HKLRD 90, [2013] 3 HKC 375
- Yeung Chun Pong v Secretary for Justice (unrep., FAMC 101/2005, [2006] HKEC 404)

Cases in the List of Authorities not cited in the judgment

- A v Secretary of State for the Home Department [2004] UKHL 56, [2005] 2 AC 68, [2005] 2 WLR 87, [2005] 3 All ER 169, [2005] HRLR 1
- AEI Rediffusion Music Ltd v Phonographic Performance Ltd [1999] 1 WLR 1507, [1999] 2 All ER 299, [1999] CPLR 551, [1999] EMLR 335
- Abidin v Minister for Immigration (2002) 116 FCR 237
- Ahmed v Kennedy [2002] EWCA Civ 1793, [2003] 1 WLR 1820, [2003] 2 All ER 440, [2003] BLGR 161
- Allen v Wright (No 2) (1960) 2 WIR 102
- Allina Pty Ltd v Federal Commissioner of Taxation (1991) 28 FCR 203
- Almeda v Attorney-General of Gibraltar [2003] UKPC 81
- Au Kwok Hung, Re [2001] 1 HKLRD 169, [2000] 4 HKC 659
- Barnardiston v Soame (1674) 6 St Tr 1063, 89 ER 283
- Baudinet v Tavioni [2012] UKPC 35
- Belfast City Council v Miss Behavin' Ltd [2007] UKHL 19, [2007] 1 WLR 1420, [2007] 3 All ER 1007, [2007] NI 89
- Brandy v Human Rights & Equal Opportunity Commission (1995) 183 CLR 245
- Brümmer v Minister for Social Development [2009] ZACC 21
- Carver v Duncan (Inspector of Taxes) [1985] AC 1082, [1985] 2 WLR 1010, [1985] 2 All ER 645, [1985] STC 356
- Chan Koon Nam v Ng Man Sum (unrep., CACV 281/2011, [2013] HKEC 299)
- Chan Noi Heung v Chief Executive in Council [2009] 3 HKLRD 362
- Chan Pun Chung v HKSAR (2000) 3 HKCFAR 392, [2000] 3 HKLRD 498, [2000] 4 HKC 283
- Chan Tin Shi v Li Tin Sung (2006) 9 HKCFAR 29, [2006] 1 HKLRD 185
- China Field Ltd v Appeal Tribunal (Buildings) (No 2) (2009) 12 HKCFAR 342, [2009] 5 HKLRD 662, [2009] 5 HKC 231
- Chow Wing Kan v Returning Officer, Chan Ming Kui [1997] HKLRD 449
- Chu Hoi Dick v Secretary for Home Affairs [2007] 4 HKC 428
- Commissioner of Inland Revenue v Carlingford Life and General Assurance Co Ltd [1990] 1 HKLR 463

Council of Civil Service Unions v Minister for the Civil Service
[1985] AC 374, [1984] 3 WLR 1174, [1984] 3 All ER 935,
[1985] ICR 14

De Silva v A-G of Ceylon (1949) 93 SJ 432

Devan Nair v Yong Kuan Teik [1967] 2 AC 31, [1967] 2 WLR
846, [1967] 2 All ER 34

Director of Lands v Yin Shuen Enterprises Ltd (2003) 6 HKCFAR
1, [2003] 2 HKLRD 399, [2003] 2 HKC 490

Dunsmuir v New Brunswick [2008] 1 SCR 190

Effort Shipping Co Ltd v Linden Management SA [1998] AC 605,
[1998] 2 WLR 206, [1998] 1 All ER 495, [1998] 1 Lloyd's Rep
337

Elgindata Ltd (No 2), Re [1992] 1 WLR 1207, [1993] 1 All ER
232, [1993] BCLC 119

Flanagan v Murdoch Community Services Inc (2010) 188 FCR 300
Fok Chun Wa v Hospital Authority (unrep., CACV 30/2009, [2010]
HKEC 713)

Golder v United Kingdom (1979–80) 1 EHRR 524

HKSAR v Cheung Kwun Yin (2009) 12 HKCFAR 568, [2009] 6
HKC 22

Hashimi Habib Halim v Director of Immigration (unrep., HCAL
139/2007, [2010] HKEC 1729)

Hirst v United Kingdom (No 2) (2006) 42 EHRR 41

Holmes v Angwin (1906) 4 CLR 297

Hume Steel Ltd v Attorney-General (Vic) (1927) 39 CLR 455

Ignatane v Latvia (2002) 9 IHRR 5

Inco Europe Ltd v First Choice Distribution [2000] 1 WLR 586,
[2000] 2 All ER 109, [2000] 1 Lloyd's Rep 467

Interasia Bag Manufacturers Ltd v Commissioner of Inland Revenue
[2004] 3 HKLRD 881

J & PM Dockeray v Secretary of State for the Environment, Food
& Rural Affairs [2002] EWHC 420 (Admin), [2002] HRLR 27,
[2002] UKHRR 836, [2002] NPC 45

John Pfeiffer Pty Ltd v Rogerson (2000) 203 CLR 503

Kidston v Empire Marine Insurance Co Ltd (1865–66) LR 1 CP
535

Kinco Investment Holding Ltd, Re (unrep., HCAL 91/2009, [2010]
HKEC 1459)

Kwong Kwok Hay v Medical Council of Hong Kong [2007] 4 HKC
446

Lam Wo Lun v Director of Social Welfare (unrep., HCAL
133/2010, [2012] HKEC 670)

Lau Hon Ying, Re [2004] 2 HKC 252

Lau Kwok Fai v Secretary for Justice [2004] 3 HKLRD 570

Lau San Ching v Appollonia Liu [1994] 3 HKC 122

- Leach, Re [2001] EWHC Admin 455, [2001] CP Rep 97, [2001] 4 PLR 28
- Lee Miu Ling v Attorney-General [1996] 1 HKC 124, (1995) 5 HKPLR 585
- Leung Kwok Hung v HKSAR (2005) 8 HKCFAR 229, [2005] 3 HKLRD 164
- Leung Kwok Hung v President of the Legislative Council [2013] 2 HKC 580
- Leung Kwok Hung, Re (unrep., HCAL 64/2012, [2012] HKEC 1006)
- Libman v Quebec (Attorney-General) [1997] 3 SCR 569
- Lim v Gregson [1989] WAR 1
- Lister Assets Ltd v Chief Executive in Council (unrep., CACV 172/2012, [2013] HKEC 605)
- Luk Ka Cheung v Market Misconduct Tribunal [2009] 1 HKLRD 114, [2009] 1 HKC 1
- ML v YJ (2010) 13 HKCFAR 794, [2011] 1 HKC 447
- MacManaway, Re [1951] AC 161, 66 TLR (Pt 2) 808
- Mathews v Diaz 426 US 67 (1976)
- Matthews v Ministry of Defence [2003] UKHL 4, [2003] 1 AC 1163, [2003] 2 WLR 435, [2003] 1 All ER 689, [2003] ICR 247
- Medical Council of Hong Kong v Chow Siu Shek (2000) 3 HKCFAR 144, [2000] 2 HKLRD 674, [2000] 2 HKC 428
- Mellacher v Austria (1990) 12 EHRR 391
- Oguzhan v Minister for Immigration and Multicultural Affairs (2000) 99 FCR 285
- PCCW-HKT Telephone Ltd v Telecommunications Authority (2005) 8 HKCFAR 337, [2005] 3 HKLRD 235
- Pennycook v Shaws (EAL) Ltd [2004] EWCA Civ 100, [2004] Ch 296, [2004] 2 WLR 1331, [2004] 2 All ER 665, [2004] L & TR 34
- Powell v United Kingdom (1990) 12 EHRR 355
- Pérez de Rada Cavanilles v Spain (2000) 29 EHRR 109
- R (Animal Defenders International) v Secretary of State for Culture, Media and Sport [2008] UKHL 15, [2008] 1 AC 1312, [2008] 2 WLR 781, [2008] 3 All ER 193, [2008] EMLR 8
- R (Carson) v Secretary of State for Work and Pensions [2005] UKHL 37, [2006] 1 AC 173, [2005] 2 WLR 1369, [2005] 4 All ER 545, [2005] HRLR 23
- R (Cart) v Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663, [2011] 3 WLR 107, [2011] 4 All ER 127, [2011] PTSR 1053
- R (Harrison) v Secretary of State for Health [2009] EWHC 574 (Admin), (2009) 12 CCL Rep 355, [2009] LS Law Medical 246
- R (Mount Cook Land Ltd) v Westminster City Council [2003] EWCA Civ 1346, [2004] CP Rep 12, [2004] 2 Costs LR 211, [2004] 2 P & CR 22

- R (SB) v Governors of Denbigh High School [2006] UKHL 15, [2007] 1 AC 100, [2006] 2 WLR 719, [2006] 2 All ER 487, [2006] 1 FCR 613
- R (Woolas) v Parliamentary Election Court [2010] EWHC 3169 (Admin), [2012] QB 1, [2011] 2 WLR 1362
- R v Honourable Society of the Middle Temple, ex p Bullock [1996] ELR 349
- R v Lang (Stephen Howard) [2005] EWCA Crim 2864, [2006] 1 WLR 2509, [2006] 2 All ER 410, [2006] 2 Cr App R (S) 3
- RJR-MacDonald Inc v Canada (Attorney General) [1995] 3 SCR 199
- Rahman v Minister for Immigration and Multicultural Affairs (2002) 118 FCR 448
- Richardson Greenshields of Canada (Pacific) Ltd v Paul Chow [1989] 1 HKC 261
- Right to Inherent Dignity Movement Association v HKSAR Government (unrep., HCAL 74/2008, [2008] HKEC 1412)
- Scoppola v Italy (No 3) (2013) 56 EHRR 19
- Secretary for Justice v Tang Bun [1999] 3 HKC 647
- Secretary for Justice v Yau Yuk Lung (2007) 10 HKCFAR 335, [2007] 3 HKLRD 903, [2007] 3 HKC 545
- Sieders v R (2008) 72 NSWLR 417
- Sitaropoulos v Greece (2013) 56 EHRR 9
- Sky Wide Development Ltd v Building Authority [2009] 1 HKC 450
- Solicitor v Law Society of Hong Kong (2003) 6 HKCFAR 570, [2004] 1 HKLRD 214
- Solomon v Scotland [2009] CILR 403
- Stubbings v United Kingdom [1997] 1 FLR 105, [1997] 3 FCR 157, (1997) 23 EHRR 213, [1997] Fam Law 241
- Théberge v Laudry (1876) 2 App Cas 102
- Tipperary County Election, Re (1985) 3 O'M & H 19
- Wang Din Shin v Nina Kung (unrep., CACV 460/2002, 67/2003, [2005] HKEC 568)
- Waterside Workers' Federation of Australia v JW Alexander Ltd (1918) 25 CLR 434
- Wellington Central Election Petition, Re [1973] 2 NZLR 470
- Williams v Mayor of Tenby (1879) 5 CPD 135
- Wilson v First County Trust Ltd (No 2) [2003] UKHL 40, [2004] 1 AC 816, [2003] 3 WLR 568, [2003] 4 All ER 97, [2003] 2 All ER (Comm) 491
- Wong Hin Wai v Secretary for Justice [2012] 4 HKLRD 70
- X v Sweden (1982) 31 DR 223
- Yumak v Turkey (2009) 48 EHRR 4
- Ždanoka v Latvia (2007) 45 EHRR 17

Other material mentioned in the judgment

Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, art.6

Ma CJ**A. Introduction**

1. The present appeals involve principally the determination of two important issues regarding challenges in elections for the Chief Executive under the Chief Executive Election Ordinance (Cap.569) (CEEO): first, the scope of election petitions under Part 6 of that Ordinance and their relationship to judicial review and other proceedings; secondly, the constitutionality of the absolute seven-day time limit for lodging election petitions contained in s.34(1) of the CEEO. The first issue is predominately an exercise in statutory interpretation, the second is a constitutional issue involving the right of access to the courts under art.35 of the Basic Law. This appeal also concerns an order for costs made in the course of the present proceedings and I shall identify that issue in due course.

A.1 The procedural history

2. In the elections¹ for the Chief Executive held on 25 March 2012, Mr Leung Chun Ying (Mr Leung) was the returned candidate and he was publicly declared and gazetted² as such by the Returning Officer on 25 March 2012. The other candidates in the elections were Mr Ho Chun Yan Albert (Mr Ho) and Mr Henry Tang.

3. Following the election of Mr Leung, on 4 July 2012 Mr Ho lodged an election petition, followed the next day by a notice of application for leave to apply for judicial review,³ putting in issue whether Mr Leung was duly elected. The factual basis for both proceedings was the same, namely it was alleged that Mr Leung had made false or misleading statements in the course of the elections, this amounting to illegal conduct within the meaning of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap.554) (ECICO)⁴ and also that this conduct amounted to his not being a

¹ Under the CEEO, the Chief Executive is elected by an Election Committee, the constitution of which is set out in Part 3 of the Ordinance. Voting by members of the Election Committee is governed under Part 5.

² Pursuant to s.28(2) of the CEEO.

³ Mr CY Leung was named as the 1st Respondent in both proceedings. The 2nd Respondent was the Returning Officer for the relevant election. It was the declaration made on 25 March 2012 that was the relevant decision challenged in both proceedings. The Returning Officer is a required party in election petitions: s.35 of the CEEO. The Returning Officer has effectively taken no part in the proceedings to date and did not participate in the present appeals.

⁴ Such conduct is a ground by which an election of the Chief Executive may be questioned: s.32(1)(a)(iv) and (2) of the CEEO.

“person of integrity, dedicated to his or her duties” for the purposes of art.47(1) of the Basic Law. For reasons which will become apparent presently, it is unnecessary to elaborate on these factual aspects; it is sufficient merely to say that the allegations concerned certain unauthorized building works at the home of Mr Leung.

4. It should also be noted that on 5 July 2012, a notice of application for leave to apply for judicial review was also issued by Mr Leung Kwok Hung⁵ challenging Mr Leung’s election as Chief Executive on substantially the same grounds as Mr Ho’s challenge.

A.2 The judgments of Lam JA

5. The election petition and the applications for judicial review were all dealt with by Lam JA, and it is from the first three judgments that the present appeals before us emanate (but there is also a fourth judgment dated 5 October 2012, the relevance of which will become apparent below):

- (1) By a judgment handed down on 30 July 2012 in the applications for leave to apply for judicial review (of Mr Ho and Mr Leung Kwok Hung),⁶ Lam J⁷ refused leave on the following grounds:
 - (a) As far as Mr Ho was concerned, it was regarded as an abuse for him to have commenced judicial review proceedings while at the same time pursuing election petition proceedings.
 - (b) In any event, the grounds set out in s.32(1)(a) of the CEEO enabling an election to be questioned, were not available to an applicant in judicial review proceedings which sought to question the election of a candidate in Chief Executive elections. This applied to both Mr Ho and Mr Leung Kwok Hung’s challenges.
 - (c) The challenge based on art.47 of the Basic Law was unsustainable.⁸

⁵ Mr Leung Kwok Hung is a member of the Legislative Council and was a member of the Election Committee for 2012 Chief Executive Elections. Though participating in the hearings in the court below, for reasons that will presently appear, he took no part in the appeals before us.

⁶ Although such applications for leave are usually dealt with on an *ex parte* basis, the judge heard submissions made on behalf of Mr Leung and also from the Secretary for Justice who had intervened in the proceedings.

⁷ As he then was.

⁸ This issue is no longer before the Court.

- (2) By a judgment handed down on 12 September 2012, Lam JA⁹ considered the election petition¹⁰ in the context of a strike-out application brought by Mr Leung on the basis that the election petition was time-barred¹¹ and also that in any event, on the merits, the election petition was bound to fail. On the issue of the merits, Lam JA held at that stage that Mr Ho's case on the facts was arguable and so declined to strike-out on this basis. On the time bar, although the election petition was admittedly lodged out of time, Mr Ho contended that the seven-day time limit prescribed under s.34(1) was unconstitutional as denying him access to the courts, a protected right under art.35 of Basic Law. On this issue, the Judge agreed with Mr Ho and held that the seven-day time limit contained in s.34(1) of the CEEQ, if it was an absolute one, was unconstitutional. He was persuaded, however, that the correct remedy was, rather than to strike down the provision, instead to effect a remedial interpretation¹² whereby the provision was subject to the court's discretion to extend time.¹³
- (3) On 28 September 2012, a third judgment was handed down dealing with the question of the costs of the hearing relating to the application for leave to institute judicial review proceedings.¹⁴ The Judge held that there were exceptional circumstances to depart from the usual order for costs in such hearings, where the putative respondent has appeared to resist leave being granted;¹⁵ accordingly, Mr Ho and Mr Leung Kwok Hung were ordered each to pay half of the costs of Mr Leung. No order was made regarding the costs of the Secretary for Justice (who was an intervener).¹⁶ This order made as to costs forms the subject matter of the third issue before this court.
- (4) On 25 September 2012, Lam JA dealt with the application (which was made by Mr Ho) for an extension of time to lodge

⁹ As he had become.

¹⁰ The Secretary for Justice had also intervened in these proceedings in view of the importance of the legal issues raised.

¹¹ Under s.34(1) of the CEEQ, an election petition questioning an election has to be lodged within seven working days after the day on which the result of an election is declared under s.22(1AB) or s.28. Mr Ho had lodged the election petition only on 4 July 2012, well after the seven-day limit.

¹² See *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574, 608D–611E [67]–[69].

¹³ Accordingly, on this basis, the Judge indicated that Mr Albert Ho should be given an opportunity to apply for an extension of time to lodge the election petition.

¹⁴ See sub-para.(1) above.

¹⁵ The rule appears to be that usually no order as to costs is made even where a putative respondent (in the present case Mr CY Leung) successfully resists leave being granted, unless there are good reasons or unusual circumstances to suggest the contrary: see *Sky Wide Development Ltd v Building Authority* [2011] 5 HKLRD 202.

¹⁶ The Secretary for Justice had undertaken when he intervened that he would at no stage be seeking costs orders.

the election petition. By a judgment dated 5 October 2012, this was refused on the basis that the complaints made by him against Mr Leung did not have any real prospect of success.

6. Leave to appeal to the Court of Final Appeal was sought by all parties who were unsuccessful in the various applications I have referred to.¹⁷ The applications for leave to appeal made by Mr Ho, Mr Leung Kwok Hung, Mr Leung and the Secretary for Justice (eight in all) were dealt with by the Appeal Committee¹⁸ on 9 November 2012. In the Determination dated 13 November 2012, the Appeal Committee considered the question whether at the end of the day, even if the various jurisdictional issues raised in the applications were resolved in favour of Mr Ho and Mr Leung Kwok Hung, the allegations of false and misleading statements made by Mr Leung in relation to the unauthorized building works at his home were sufficiently arguable. The Appeal Committee concluded that no reasonably arguable grounds existed for appealing Lam JA's decision dated 5 October 2012.¹⁹

7. The conclusion that the factual allegations raised were unarguable was sufficient to dispose of the challenges made by Mr Ho and Mr Leung Kwok Hung and thus rendered academic the other issues for which leave to appeal was sought. However, given the importance of some of the issues that were raised, the Appeal Committee decided that a sufficiently great public interest existed to grant leave even though the issues were, strictly speaking, academic.²⁰ Leave was accordingly granted on the following two issues:

- (1) Under the CEEQ, how do challenges to a CE election pursuant to the election petition procedure in s.32 relate to challenges pursuant to the judicial review procedure in s.39?
- (2) Does the seven-day time limit laid down by CEEQ s.34 involve any infringement of the right of access to a court guaranteed by art.35 of the Basic Law, and if so, is such time limit unconstitutional?

Leave to appeal was also given on the “or otherwise” ground to Mr Ho and Mr Leung Kwok Hung in relation to the costs order made by Lam JA on 28 September 2012.²¹ This would seem to

¹⁷ Under s.22(1)(c) of the Hong Kong Court of Final Appeal Ordinance (Cap.484).

¹⁸ The Chief Justice, Ribeiro and Tang PJJ.

¹⁹ [5(4)] above.

²⁰ See *Secretary for Security v Sakthivel Prabakar* (2003) 6 HKCFAR 397, *Yeung Chun Pong v Secretary for Justice* (unrep., FAMC 101/2005, [2006] HKEC 404) and *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465.

²¹ [5(3)] above.

follow if leave to appeal was given in relation to the two main issues.

A.3 The parties before the court

8. It was indicated at the resolution of the applications for leave that given the academic nature of the appeals to this Court as concerned them, it was open to Mr Ho and Mr Leung Kwok Hung to choose not to appear at the hearing of the present appeals. In the event, Mr Ho,²² Mr Leung²³ and the Secretary for Justice²⁴ are before us. Mr Leung Kwok Hung does not appear, not having proceeded with his appeal. We are grateful to all counsel for their assistance.

9. Before dealing with the three issues before us, I should first set out the relevant statutory provisions.

B. The Relevant Provisions in the CEEO

10. The two main issues in these appeals involve the construction of relevant provisions in the CEEO. It is convenient to set out the following provisions in full (I will of course be referring to other provisions as well in the course of this judgment):

(1) Under Part 5 (headed “Elections and Polling”), s.29 states:

A person declared under section 28 as elected at an election is presumed to be duly elected until he is ruled by the Court or the Court of Final Appeal pursuant to the determination of an election petition or otherwise as not duly elected.

(2) Under Part 6 (headed “Election Petitions”), ss.32, 33, 34, 38 and 39 are of particular relevance:

32. Election may be questioned only by election petition made on specified grounds

(1) An election may be questioned only by an election petition on the ground that:

(a) the person declared by the Returning Officer under section 28 as elected was not duly elected because:

²² Represented by Mr Martin Lee SC, Mr Hector Pun, Mr Jeffrey Tam and Mr Carter Chim.

²³ Represented by Mr Johnny Mok SC and Mr Abraham Chan.

²⁴ Represented by Mr Michael Thomas SC, Mr Stewart Wong SC and Mr Jin Pao.

- (i) he was not eligible to be nominated as a candidate under section 13;
 - (ii) he was disqualified under section 14 from being nominated as a candidate;
 - (iii) he should have been disqualified under section 20(1) from being elected but was not so disqualified;
 - (iv) he engaged in corrupt conduct or illegal conduct at the election;
 - (v) another person engaged in corrupt conduct or illegal conduct in respect of him at the election in connection with his candidature;
 - (vi) corrupt conduct or illegal conduct was generally prevalent at the election; or
 - (vii) material irregularity occurred in relation to:
 - (A) the election;
 - (B) the poll at the election; or
 - (C) the counting of votes in respect of the election; or
- (b) the candidate declared by the Returning Officer under section 22(1AB)(c) as not returned at the election is not returned because material irregularity occurred in relation to:
- (i) the election;
 - (ii) the poll at the election; or
 - (iii) the counting of votes in respect of the election.

(2) In this section

corrupt conduct (舞弊行為) means corrupt conduct within the meaning of Part 2 of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap.554);

election (選舉) includes nomination proceedings and the decisions of the Returning Officer or any Assistant Returning Officer;

illegal conduct (非法行為) means illegal conduct within the meaning of Part 3 of the Elections (Corrupt and Illegal Conduct) Ordinance (Cap.554).

33. Who may lodge election petition

(1) An election petition:

- (a) may be lodged by any candidate in the election;
or
- (b) may be lodged by:
 - (i) a person who was determined under section 17 to be not validly nominated;
 - (ii) a person the nomination of whom was not accepted by the Returning Officer; or
 - (iii) a person who was disqualified under section 20(1) from being elected,

provided that the election petition is, subject to subsection (4), subscribed to by not less than 10 members of the Election Committee in the manner specified in subsection (2).

34. Period within which election petition and appeal must be lodged

- (1) An election petition questioning an election must be lodged within 7 working days after the day on which the result of the election is declared under section 22(1AB) or 28.

...
38. Acts of person not invalid if ruled not to be elected

A:

- (a) determination of the Court under section 37(1);
or

- (b) ruling by the Court or the Court of Final Appeal,

that a person who was originally declared as elected at an election was not duly elected does not invalidate acts purporting to have been done by the person as the Chief Executive before the determination or ruling, as the case may be.

39. Time limit for legal challenges

- (1) Notwithstanding any provision in the High Court Ordinance (Cap.4), no:

- (a) application for leave to apply for judicial review under section 21K of that Ordinance; or
- (b) other proceedings;

which put in issue:

- (c) whether a candidate is duly determined to be not returned at an election under section 26A(4); or
- (d) whether the candidate declared under section 28 as elected at an election can lawfully assume the office of the Chief Executive,

shall be made or commenced more than 30 days after the publication of the declaration under section 22(1AB)(d) or the publication of the result of the election under section 28 unless the leave of the Court has been obtained.

- (2) The Court may upon application grant the leave to make an application for leave to apply for judicial review or commence proceedings after the expiry of the 30 days referred to in subsection (1) if it is satisfied that:

- (a) the person making the first-mentioned application has used his best endeavours to make the second-mentioned application or commence the proceedings within the 30 days; and
- (b) granting the leave applied for is in the interest of justice.

C. First Issue: Challenges in a Chief Executive Election Made by Election Petition and in Judicial Review Proceedings

11. The issue as framed by the Appeal Committee²⁵ invite, first, a consideration of the election petition procedure and its ambit; and secondly, a consideration of the relationship between that procedure and the judicial review procedure envisaged under s.39 of the Ordinance.²⁶ It will be recalled that in the 30 July 2012 judgment,²⁷ Lam J concluded that if any of the grounds set out in s.32(1)(a) of the CEEO was employed to challenge the election of someone as Chief Executive, this was available only in election petition proceedings and therefore unavailable as a ground of challenge in judicial review proceedings. For the reasons that follow, I am of the view that the Judge erred in this conclusion. In dealing with the First Issue, I recognize that it involves an exercise in statutory construction, the relevant provisions being those set out in Section B above.

C.1 The Court's approach to statutory interpretation: context and purpose

12. As has been reiterated recently by this Court,²⁸ the proper starting point in statutory interpretation, as well as constitutional and contractual interpretation, is to look at the relevant words or provisions having regard to their context and purpose.

13. In the present case, the context and purpose of the relevant provisions earlier set out are principally these:

- (1) We are concerned with elections, specifically with elections for the most important official post in Hong Kong, namely, that of the Chief Executive. Article 45 of the Basic Law states that the Chief Executive shall be selected by election in Hong Kong and that he or she shall be appointed by the Central People's Government. Annex I to the Basic Law sets out the "Method for the Selection of the Chief Executive", making reference to the election of the Chief Executive by an Election Committee comprising 1,200 members,²⁹ intended to be broadly representative of Hong Kong people. Although the election of the Chief Executive is not by universal suffrage,

²⁵ [7(1)] above.

²⁶ Section 39 of the CEEO refers to both judicial review and "other proceedings" but no party in the present appeals has addressed the Court on any type of proceedings other than judicial review.

²⁷ [5(1)] above.

²⁸ See *Vállejos v Commissioner of Registration* (2013) 16 HKCFAR 45, [76] and [77]; *Fully Profit (Asia) Ltd v Secretary for Justice* (2013) 16 HKCFAR 351, [15] and [16].

²⁹ Annex I to the Basic Law originally made reference to the Election Committee comprising 800 members. By an Amendment to Annex I approved by the Standing Committee of the National People's Congress on 28 August 2010, the number of members was increased to 1,200 persons.

his or her election is obviously of great importance and interest to Hong Kong people.

- (2) It follows from this that the election for the post of Chief Executive is of considerable importance in Hong Kong, thus emphasizing the need for such elections to be genuine, open, honest and fair; in short, such elections must, as far as Hong Kong residents are concerned, have integrity so as to ensure that those elected are truly representative of those whom he or she represents.³⁰ The existence of a satisfactory mechanism to question election results comes within this rubric.
- (3) Given the obvious importance of the post of Chief Executive, who fulfils the role of being the head of the HKSAR, represents the Region³¹ and leads the Hong Kong Government,³² it goes without saying that there is a necessity to have certainty in the elections for the post of Chief Executive. In the context of the present appeals, where any doubts exist as to whether a person has been duly elected as Chief Executive, the sooner such doubts are resolved, the better. This Court has, in the context of elections to the Legislative Council, emphasized the need to have matters speedily determined: see *Mok Charles Peter v Tam Wai Ho*.³³

C.2 The Scheme of Election Petitions and Judicial Review Proceedings under the CEEO

14. With this approach in mind, I now deal with the relevant provisions in the CEEO.

15. It is notable first that the provisions in the Ordinance regarding election petitions are very detailed:³⁴

- (1) Seven specific grounds are enumerated to enable challenges to be made where there have been contested elections. Where a single candidate election takes place,³⁵ the ground stipulated in s.32(1)(b) allowing a challenge to be made against a declaration by the Returning Officer that a single candidate is not returned, is material irregularity. These grounds are presumably the most likely and serious grounds for an election result to be challenged.

³⁰ In the context of elections to the Legislative Council making this point, see *Mok Charles Peter v Tam Wai Ho* (2012) 15 HKCFAR 489, [17] and [18]. I shall refer to this decision as *Charles Mok 2*.

³¹ Article 43 of the Basic Law.

³² Article 48(1) of the Basic Law.

³³ (2010) 13 HKCFAR 762, 786 [51(2)]. I shall refer to this case as *Charles Mok 1*.

³⁴ Part 5 of the CEEO is headed “Election Petitions” although other proceedings are also referred to.

³⁵ See ss.22(1AB), 23, 26A and 28(1) of the Ordinance.

- (2) Section 33 identifies the category of persons able to lodge an election petition. This is not restricted to candidates in the election and include persons who were not nominated, whose nomination was not accepted by the Returning Officer or who were disqualified. I shall for convenience refer to those persons identified in s.33 as the “s.33 persons”.
- (3) Section 34 sets out a rigorous time limit for the lodging of an election petition questioning an election result: seven days after the declaration of an election result under s.22(1AB)³⁶ or s.28³⁷ of the CEEA. The constitutionality of the seven-day limit is of course the subject matter of the second of the two main issues before this Court.
- (4) Sections 35–37 of the Ordinance also contain detailed provisions regarding who should be the respondent in election petitions, the jurisdiction of the court to determine election petitions and how the court is to determine here such petitions.

16. Given this elaborate structure in relation to election petitions, the intention must have been for this procedure to be the primary and most speedy means of enabling challenges to be made questioning Chief Executive elections:

- (1) Primary because the s.33 persons will likely be that class of persons most affected by an adverse election result and therefore those most likely to take action questioning an election result.
- (2) That speed was of the essence can be seen from the very limited time allowed for election petitions to be lodged under s.34(1) of the Ordinance.

17. Thus far, there is perhaps little controversy but the two important questions that remain to be answered involve a discussion of, first, how exclusive the election petition procedure is and secondly, its relationship with other proceedings relevant to the questioning of elections (here the discussion will center on the judicial review procedure). As will be seen, these questions are connected.

18. On the aspect of exclusivity, although it is not in dispute between the parties that only s.33 persons may lodge election petitions (to the exclusion of all other persons), three facets need to be considered:

- (1) Can an election be questioned only by an election petition to the exclusion of any other type of proceedings?

³⁶ Where a single candidate is not returned at an election.

³⁷ Where, in the case of multiple candidate elections, the winning candidate is returned.

- (2) Can an election be questioned only on those grounds set out in s.32(1)(a) and (b) of the Ordinance?
- (3) Are the s.33 persons restricted only to the election petition procedure in questioning a Chief Executive election result such that, for instance, the judicial review proceedings envisaged under s.39 of the Ordinance are not open to this class?

19. Common to the consideration of these three facets is the need to construe the effect of the word “only” contained in s.32(1) of the CEEO.³⁸ The word “只” also appears in the Chinese text of that provision.

20. If one looked in isolation at the language of s.32 of the Ordinance without considering context and purpose or the other provisions in the CEEO, there might be some justification to conclude that an election petition was the only means by which an election could be questioned or³⁹ that the only grounds to challenge an election were those set out in s.32(1)(a) and (b). However, in my view, this is clearly not the position. My conclusion on the first two facets is that: (i) the election petition is not the *only* means of challenging an election and (ii) the grounds set out in s.32(1)(a) and (b) are not the *only* grounds based on which a challenge can be made to Chief Executive elections:

- (1) As to the first facet, the wording of s.39 of the Ordinance pre-supposes the availability of judicial review and other proceedings putting in issue whether a candidate who is declared to be elected “can lawfully assume the office of the Chief Executive.” It was argued on behalf of Mr Leung and the Secretary for Justice that this wording was apt only to cover post-election matters.⁴⁰ I disagree that these words should be so restricted. Nothing in the Ordinance militates towards this construction. Quite the contrary: ss.29 and 38⁴¹ expressly envisage the situation in which challenges can be made as to whether a person was “duly elected” in proceedings other than election petition proceedings. The challenge to whether a person “can lawfully assume the office of the Chief Executive” can obviously include grounds other than the question of whether a person has been duly elected, but must

³⁸ The word “only” is also used in the heading to s.32 but headings have no legislative effect: s.18(3) of the Interpretation and General Clauses Ordinance (Cap.1).

³⁹ As Lam J held in the 30 July 2012 judgment.

⁴⁰ Such as a failure publicly to declare that he or she is not a member of a political party and to give an appropriate undertaking to this effect (s.31 of the Ordinance). Or, subsequent to the election, he or she acquires a right of abode in a foreign country (s.13(c) of the CEEO; art.44 of the Basic Law).

⁴¹ Set out in [10(1)] and [10(2)] above.

in my view include that ground as well. A person who is not duly elected within the meaning of the Ordinance cannot surely be a person who can lawfully assume the office of Chief Executive.

- (2) As to the second facet, s.32(1)(a) and (b) set out the grounds to question an election under the election petition procedure. These grounds relate only to election petition proceedings. Nothing is said about the grounds which may be available in judicial review or other proceedings envisaged under s.39 of the Ordinance to question whether a candidate can lawfully assume the office of Chief Executive (this as we have just seen including the right to question whether a person has been duly elected). Even in the case of the single candidate, while he or she may contest the declaration of non-return on the ground of material irregularity in an election petition,⁴² in the other proceedings envisaged under s.39, this non-return may be challenged by other people and this is not necessarily restricted to challenges based on material irregularity.⁴³

21. Given the conclusion reached above on the first two facets, what of the remaining question whether the s.33 persons are confined to the election petition procedure in challenging elections? Mr Ho's position is simply put: s.33 persons like Mr Ho have available to them in questioning an election both the election petition procedure as well as the benefit of other procedures (such as those envisaged under s.39); and further, that the grounds set out in s.32(1)(a) and (b) are also available to be utilized whether under the election petition procedure or in judicial review proceedings. In answer to the obvious objection as to why there should be available to s.33 persons both the unique and elaborate election petition procedure as well as judicial review (and other) proceedings based on the same grounds, Mr Lee SC pointed out that the two types of proceedings were different: if judicial review proceedings were sought to be instituted, leave was required and in obtaining leave, an intended applicant would have to demonstrate to the court why the election petition procedure was not utilized. Lam J had been of the view that judicial review and other proceedings based on the s.32(1)(a) grounds⁴⁴ would be unavailable to persons like Mr Ho (in other words, the s.33 persons) with the consequence that Mr Ho's application for leave to institute judicial review was dismissed.

22. In my view, the Judge was right in his conclusion that judicial review (or other proceedings) were not open to Mr Ho —

⁴² Under s.32(1)(b).

⁴³ Section 39 is silent on the available grounds.

⁴⁴ The s.32(1)(b) ground was obviously unavailable since the 2012 election was a multi-candidate election.

and therefore also unavailable to all s.33 persons — if the same grounds as set out in s.32(1)(a) were used. This would also be the consequence in relation to single candidate elections in relation to the grounds set out in s.32(1)(b). The effect of ss.32 and 33 may be stated as follows:

- (1) These two sections, which deal with election petitions, must be read together in order to ascertain just who can lodge election petitions and on what grounds.
- (2) Section 32(1) begins by stating that an election may be “questioned”. But questioned by whom? Section 33 provides the answer by identifying the s.33 persons.
- (3) The word “only” in s.32(1) is important and effect must be given to it. In my view, it makes clear that where an election is “questioned” by someone within the class of s.33 persons on the grounds set out in s.32(1)(a) or (b), this can only be done by election petition.
- (4) Apart from the above being the proper construction of these two provisions, it also makes good sense. The election petition procedure is a unique procedure⁴⁵ open only to s.33 persons. This class of persons is, as stated earlier, that class seen to be most likely to take action to question an election. This class, although bound by a strict time limit in the institution of proceedings,⁴⁶ has the considerable benefit of being able to lodge an election petition as of right, without the need to seek leave. This is not the position in judicial review proceedings where leave to apply for judicial review is required.⁴⁷ In return for this right to institute election petition proceedings as of right, the s.33 persons are, as I have said, bound by a strict time limit and also must be left with this form of proceedings as the only means of questioning an election if any of the grounds set out in ss.32(1)(a) and (b) are relied on. It makes no sense for the judicial review procedure also to be available to s.33 persons on the same grounds. It makes pointless the elaborate procedure for election petitions carefully and extensively set out in the Ordinance. The object and purpose of these provisions relating to election petitions, being the need for matters to be resolved quickly,⁴⁸ would be defeated.
- (5) In the course of his submissions, Mr Lee SC referred the Court to extrinsic materials (mainly in the form of debates when the

⁴⁵ Although it has similarities to the election petition procedure under the Legislative Council Ordinance (Cap.542), the District Council Ordinance (Cap.547) and the Village Representative Election Ordinance (Cap.576).

⁴⁶ Section 34(1) of the CEEO.

⁴⁷ And the threshold for obtaining leave is by no means an easy threshold to overcome since there has to be a reasonably arguable claim which enjoys a realistic prospect of success: *Po Fui Chan v Winnie Cheung* (2007) 10 HKCFAR 676.

⁴⁸ See [13(3)] above.

draft bill which became the CEEO dealing with election challenges was discussed in the Legislative Council) which refer to the availability of judicial review. I have not found these materials useful. Apart from anything else, they do not deal with the issues and facets which this Court has to consider.

23. The above analysis disposes of the first two facets set out in [18] above, but leaves open the question of the relationship of election petition proceedings to other proceedings in relation to the questioning of elections. This is the second main question under the First Issue, to which I now turn.

24. As stated earlier,⁴⁹ in considering the ambit of the other proceedings referred to in s.39 of the CEEO, the parties have focused on the position of the judicial review proceedings rather than any other proceedings. I shall likewise deal with only the position of judicial review. The reference to judicial review in s.39 assumes that such proceedings can exist where they put in issue the matters specified in s.39(1)(c) and (d).⁵⁰ As the parties accepted, s.39 does not found the jurisdiction to institute these other types of proceedings; it merely assumes their existence. For judicial review proceedings, the foundation of the jurisdiction is s.21K of the High Court Ordinance (Cap.4). Section 39 merely states that the usual three-month time limit for judicial review proceedings⁵¹ is reduced to 30 days after the date of the publication of the declaration of the election result under s.22(1AB)(d) or s.28 of the CEEO.

25. It would be neither desirable nor appropriate to embark on a general discussion of the ambit of judicial review in the context of challenges made to election results. Relevant to the present case, however, is an analysis of the relationship between judicial review and election petition proceedings. The Judge held (as far as Mr Ho was concerned) that judicial review was unavailable to him to make a challenge based on the grounds specified in s.32(1)(a).⁵² He also held (in the case of Mr Leung Kwok Hung) that judicial review proceedings were unavailable if a s.32(1)(a) ground was relied on. Lam J's view was that where s.32(1)(a) grounds were relied on, the only proceedings where this could take place were election petition proceedings. Judicial review was therefore excluded if a s.32(1)(a) ground was relied on.

26. For my part, I would respectfully disagree with the Judge's views on the relationship between election petition proceedings and judicial review proceedings. I have concluded earlier that the effect

⁴⁹ [11] footnote 26 above.

⁵⁰ Section 39(1) is set out in [10(2)] above.

⁵¹ See Rules of the High Court (Cap.4A, Sub.Leg.) O.53 r.4(1).

⁵² It will be recalled that Mr Albert Ho's challenge was based on s.32(1)(a)(iv) of the CEEO: see [3] footnote 4 above.

of ss.32 and 33 of the CEEO is that where s.33 persons wish to question an election on any of the grounds set out in s.32(1)(a) or (b), they can only do so by an election petition and no other proceedings are available to them if such grounds are relied on.⁵³ It does not follow from this construction of those two provisions, however, that persons other than s.33 persons are somehow automatically excluded from claiming that an elected person should not be permitted lawfully to assume the office of Chief Executive on the basis that he or she was not properly elected by reason of one or more of the grounds set out in s.32(1)(a) or (b). Nothing in the CEEO automatically excludes the right of non-s.33 persons from so relying on the grounds set out in s.32(1)(a) or (b). I refer back to the earlier discussion regarding the first and second facets. It seems odd automatically to exclude a non-s.33 person from relying on a s.32(1)(a) or (b) ground. For example (as pointed out in argument by Mr Justice Gleeson NPJ), where corrupt conduct or illegal conduct was prevalent at an election⁵⁴ in circumstances where s.33 persons would obviously be reluctant to raise the issue, it seemed unsatisfactory if no one could then raise the point in judicial review proceedings.

27. Of course, whether or not a person will be able actually to rely on one or more of the grounds set at in s.32(1)(a) and (b), or have the necessary *locus standi*, to found a claim for judicial review will depend on normal judicial review considerations.

28. In reaching this conclusion, I have not ignored the argument to the effect that to allow the judicial review procedure to be made available to non-s.33 persons in this way might undermine the election petition procedure set out in the CEEO and thus potentially result in duplication and prolonging of proceedings concerning elections. After all, apart from anything else, it may be said that the time limit for instituting proceedings under s.39 is 30 days⁵⁵ (in contrast to the seven-day limit for election petitions), and this may be extended as well.⁵⁶ In my view, it is important to highlight the following points in this context:

- (1) It should be borne in mind that the primary and most speedy form of proceedings to question an election is the election petition.⁵⁷ This is likely in practice to be the most usual form of proceedings to challenge an election result.
- (2) However, the election petition procedure cannot be the only form of proceedings available to question an election. The content of those provisions in the Ordinance discussed earlier

⁵³ See [22] above.

⁵⁴ Section 32(1)(a)(vi) of the CEEO.

⁵⁵ Section 39(1) of the CEEO.

⁵⁶ Section 39(2) of the Ordinance.

⁵⁷ See [16] above.

- make this point. Judicial review is available, although the time for instituting such proceedings is reduced to 30 days from the usual three months.
- (3) The availability of judicial review as a fallback procedure to deal with those situations where, for whatever reason, election petition proceedings are not instituted, constitutes an additional guarantee to enable elections for the Chief Executive to have integrity and to be genuine, open, honest and fair. The availability of judicial review should not be cut down unless this is clearly stated and justified.
 - (4) It does not follow judicial review proceedings will necessarily prolong the challenges that may be made regarding elections. While the time limited for the lodging of election petitions may be shorter, those proceedings can be instituted and pursued as of right (subject of course to any striking out applications). Judicial review proceedings, on the other hand, require leave before they can be properly instituted.

29. In respect of the ability of s.33 persons to institute judicial review proceedings (the third facet referred to in [18] above), it does not follow from the conclusion that they cannot institute judicial review proceedings on a s.32(1)(a) or (b) ground that they cannot under any other circumstances institute judicial review proceedings at all putting in issue whether a person elected in an election can lawfully assume the office of Chief Executive. In my view, they are able to institute such judicial review proceedings, as long as the ground relied on is not one of the grounds set out in s.32(1)(a) and (b) and provided they satisfy the usual requirements in judicial review proceedings. This conclusion also follows from the view I have earlier reached in relation to the second facet.⁵⁸

C.3 Conclusion on the First Issue

30. The views I have reached under the First Issue differ from the learned Judge. They are, however, based on the true construction of the relevant provisions of the CEEA set out in [10] above, bearing in mind the context and purpose of those provisions. Nevertheless, in terms of the actual result, the Judge was right to refuse leave to Mr Ho to commence judicial review proceedings. However, as regards Mr Leung Kwok Hung (although he has not pursued his appeal), the learned judge ought not to have, at that stage, refused leave to institute judicial review proceedings on the basis that Mr Leung Kwok Hung was not entitled to rely on a s.32(1)(a) ground to found his application for judicial review. However, as the Appeal Committee held in its Determination dated

⁵⁸ [20(2)] above.

13 November 2012, the factual assertions made by Mr Leung were unsustainable as a matter of law.⁵⁹

31. I now turn to the constitutional issue.

D. Second Issue: Constitutionality of s.34(1) of the CEEO

32. The relevant provision here is s.34(1) of the CEEO.⁶⁰ The seven-day limit for the lodging of election petitions is an absolute one. There is no provision allowing the seven-day limit to be extended. This is to be contrasted with the 30-day limit contained in s.39 of the Ordinance, which can be extended by the Court.⁶¹ Mr Ho has consistently contended that this provision, if it is absolute in nature, is unconstitutional in denying the constitutional right of access to the courts. He relies on art.35 of the Basic Law (under Chapter III: Fundamental Rights and Duties of the Residents) which states that “Hong Kong residents shall have the right to ... access to the courts ... for timely protection of their lawful rights and interests ... and to judicial remedies.” As seen above,⁶² Lam JA agreed with Mr Ho’s position, but instead of striking down the provision (which would have had the effect of eliminating any time limit for the lodging of election petitions), he applied a remedial interpretation to s.34(1) so as to subject the seven-day limit to the Court’s discretion to extend time.

33. In this part of the appeals, the appellants are Mr Leung and the Secretary for Justice.

D.1 Is art.35 of the Basic Law engaged?

34. At one stage in his submissions, Mr Thomas SC (for the Secretary for Justice) seemed to suggest that art.35 gave no right of access to the courts at all, but this is plainly not the case, whether upon a simple reading of that article — it actually states there is “the right to ... access to the courts” — or as a matter of substance. In *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd*,⁶³ Ribeiro PJ stated this to be the essence of art.35 of Basic Law:

[49] What is of prime relevance to this appeal is the second dimension of art.35. As appears from its language, art.35 is also concerned with entrenching the individual’s rights in relation to “the courts”: individuals are to have the right of “access to the courts”, the right of “choice of

⁵⁹ [6] above.

⁶⁰ This provision is set out in [10(2)] above.

⁶¹ See s.39(2) of the CEEO.

⁶² [5(2)] above.

⁶³ (2006) 9 HKCFAR 234, 255G–256B [49]–[50].

lawyers ... for representation in the courts”, the right “to judicial remedies” and “the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel”.

- [50] This is a crucial additional feature of the constitutional architecture of the Basic Law in relation to the judicial system of the Region. Article 35 ensures that the fundamental rights conferred by the Basic Law as well as the legal rights and obligations previously in force and carried through to apply in the HKSAR are enforceable by individuals and justiciable in the courts. It gives life and practical effect to the provisions which establish the courts as the institutions charged with exercising the independent judicial power in the Region. This dimension of art.35 is therefore concerned with ensuring access to the courts for such purposes, buttressed by provisions aimed at making such access effective.

In the context of elections, I have already remarked that an effective means of making challenges enables elections to have integrity and to be genuine, open, honest and fair.⁶⁴ This is buttressed by art.35 of Basic Law which “gives life and practical effect” to these aspects.

35. Next, it was argued both by Mr Thomas SC and Mr Mok SC that art.35 is simply not engaged in the present case. As I understand the argument, it proceeded along these lines: the right to question Chief Executive elections by election petition proceedings was introduced by those provisions contained in Part 5 of the CEEO, which included s.34(1); that provision was one of the provisions which merely defined the jurisdiction of the election petition procedure. Accordingly, seen in this light, this definition of the jurisdictional limits of the election petition procedure could not and did not engage any right of access to the courts, any more than say a definition of rights introduced by legislation. So the argument ran, the s.34(1) restriction had only to do with jurisdictional limits.

36. I must say that I have found it difficult to follow this argument. True it is that s.34(1) can be said in a way to define the jurisdiction of the right to institute election petition proceedings, but without doubt that provision also involves the question of access to the courts. In fact, it may be said that the provision is dealing precisely with the enforcement by persons of legal rights in the courts (the right to challenge elections by election petition). This, as the passage from *Stock Exchange of Hong Kong Ltd v New World Development Co Ltd* makes clear, is what art.35 of the Basic Law ensures.

⁶⁴ [28(3)] above.

37. In support of their submissions, reliance was placed by Mr Leung and the Secretary for Justice on a number of authorities from Australia in which the courts have discussed time provisions,⁶⁵ using language to suggest that such provisions only defined the limits of jurisdiction. It is unnecessary to refer to all these authorities; it suffices just to refer to the following:

- (1) In *Australian Iron & Steel Ltd v Hoogland*,⁶⁶ Windeyer J referred to such limitation provisions as merely imposing a condition “which is of the essence of a new right”.
- (2) In *David Grant & Co Pty Ltd v Westpac Banking Corp*,⁶⁷ Gummow J (in dealing with the time constraints regarding when an application could be made to set aside a statutory demand) said that the time condition was “an essential condition of the new right conferred by s.459G”.
- (3) In *Rudolph v Lightfoot*,⁶⁸ the High Court of Australia dealt with an election petition which had been lodged with the Court of Disputed Returns beyond the time that was permitted under statute (40 days). The Court viewed this time limitation as a condition which was part of the essence of the right (given to dispute elections).⁶⁹
- (4) In *Hocine v Minister for Immigration and Multicultural Affairs*,⁷⁰ French J (then in the Federal Court) had to consider whether the time limit for filing appeals to review the decision of the Refugee Review Tribunal was in excess of legislative power. An argument was raised along the lines that the time limit went against the concept that the courts should have the ability to exercise judicial power and that this power should be real and not illusory.⁷¹ French J, after reviewing the three cases referred to above, concluded that the time limitation was a part of the definition of the right to seek a review⁷² and that such a definition of the jurisdiction did not involve any direction to the court about the manner and conduct of its exercise of the jurisdiction.⁷³

38. In the course of argument, it was pointed out by Mr Justice Gleeson NPJ, who it must be noted was the former Chief Justice

⁶⁵ Such as s.34(1) where time limits were prescribed for the institution of proceedings or for some other court process to be commenced.

⁶⁶ (1962) 108 CLR 471, 488.

⁶⁷ (1995) 184 CLR 265, 277.

⁶⁸ (1999) 197 CLR 500.

⁶⁹ At [11]. Reference was made to that passage in *Australian Iron & Steel Ltd v Hoogland* referred to in sub-para.(1) above.

⁷⁰ (2000) 99 FCR 269.

⁷¹ At [43(3)].

⁷² At [45].

⁷³ At [46].

of the High Court of Australia, that those cases were not concerned with any consideration of a constitutionally declared right of access to the courts. There is no equivalent in the Australian Constitution⁷⁴ to art.35 of the Basic Law although s.75(v),⁷⁵ which directly confers on the High Court original jurisdiction to issue constitutional writs against an officer of the Commonwealth, is a mainstay of the capacity of the judicial arm of government to enforce the rule of law. Those cases were more to do with the power vested in the Australian Parliament to make laws conferring jurisdiction on the courts.⁷⁶ In *Abebe v Commonwealth*,⁷⁷ where the High Court of Australia had to consider the lawfulness of statutory provisions which limited the ability of the court to examine the legality of decisions (of, again, the Refugee Review Tribunal), the principal issue, as stated in the joint judgment of Gleeson CJ and McHugh J was whether Parliament had the constitutional power to do so.⁷⁸ This required a consideration of s.77(i) of the Australian Constitution. In *Hocine*, the court was faced with an argument that bore some resemblance to the concept of access to the courts but, as I have said, there is no such constitutional right expressed in the Australian Constitution.

39. This is the distinguishing feature in the Australian cases to which we have been referred and it is in my view a critical distinction. In Hong Kong, where art.35 of the Basic Law articulates this right, the approach of the court will be different. Here, the approach of the court will find more similarity in the way the question of time limits was dealt with in *Miller v Bull*⁷⁹ where

⁷⁴ This is a reference to the Commonwealth of Australia Constitution Act 1900.

⁷⁵ Section 75(v) states:

75. Original jurisdiction of High Court

In all matters:

...

(v) in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth;

the High Court shall have original jurisdiction.

⁷⁶ This power vested in Parliament is referred to in ss.76 and 77 of the Constitution, which states:

76. Additional original jurisdiction

The Parliament may make laws conferring original jurisdiction on the High Court in any matter:

(i) arising under this Constitution, or involving its interpretation;

(ii) arising under any laws made by the Parliament;

(iii) of Admiralty and maritime jurisdiction;

(iv) relating to the same subject-matter claimed under the laws of different States.

77. Power to define jurisdiction

With respect to any of the matters mentioned in the last two sections the Parliament may make laws:

(i) defining the jurisdiction of any federal court other than the High Court;

(ii) defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States;

(iii) investing any court of a State with federal jurisdiction.

⁷⁷ (1999) 197 CLR 510.

⁷⁸ At [1].

⁷⁹ [2010] 1 WLR 1861.

Tugendhat J tested the time provision in that case⁸⁰ against art.6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the right to a fair trial).

40. In my view, the right of access to the courts is engaged in the present case. But has it been infringed in the case of s.34(1) of the CEEO?

D.2 Is art.35 of the Basic Law infringed?

41. I have earlier referred to the essence of the right of access to the courts contained in art.35 and the buttress it provides to the integrity of elections.⁸¹ There is no doubt that s.34 of the CEEO can be regarded as placing restrictions on that right. But whether such restrictions amount to an infringement of that constitutional right depends on whether on analysis the essence of the right has been impaired. In the context of the right of access to court, the European Court of Human Rights has said that the right is not an absolute one and any restrictions placed on it must be examined to see whether the essence of the right has been impaired.⁸² This analysis has been applied in Hong Kong in relation to the right to marry contained in art.37 of the Basic Law.⁸³

42. The question of whether s.34(1), if absolute in preventing an election petition being lodged beyond the seven-day limit, impairs the essence of the right of access to the courts, must be seen in context. The context of that provision is that it is but part of a whole scheme regarding election petitions. This scheme is an elaborate one as we have seen,⁸⁴ restricting the class of persons entitled to use that procedure to the s.33 persons⁸⁵ but it has the important feature of allowing election petitions to be lodged as of right without the need for leave to be obtained.

43. I have also earlier mentioned the need for any proceedings questioning an election to be dealt with speedily. This is obviously the purpose of s.34(1) and on this basis, in the context of the scheme as a whole, it does not seem to me disproportionate to impose a seven-day limit. Although a tight one, given that the class of persons entitled to lodge election petitions proceedings are those who can be expected to have been intimately involved in an election right from the start and who can therefore be expected to pay close

⁸⁰ The time to serve a notice of the amount a nature of the security given in relation to an election petition.

⁸¹ [34] above.

⁸² *Polskiego v Poland* (2005) 41 EHRR 21, [29]. See also *Ashingdane v United Kingdom* (1985) 7 EHRR 528, [57]; *Tolstoy Miloslavsky v United Kingdom* (1995) 20 EHRR 442, [59] (both these cases were referred to for this purpose in *Ng Yat Chi v Max Share Ltd* (2005) 8 HKCFAR 1, [75]).

⁸³ *W v Registrar of Marriages* (2013) 16 HKCFAR 112, [68], [69] and [108].

⁸⁴ [15] and [16] above.

⁸⁵ Being the class of persons most likely to be affected by an adverse election result and therefore most likely to take action: [16(1)] above.

attention not only to their own election activities but also the activities of their opponents, the limit is not unduly short. Certainly, Lam JA was of the view that the seven-day limit was not “so short that it would not be possible to comply with [it].”⁸⁶ I would also add that it is more or less in line with the limits imposed for similar proceedings in other jurisdictions. In his judgment, Lam JA described the position in other jurisdictions:⁸⁷

- [84] Based on that survey, for all countries where the head of state is a popularly elected office, the permissible time limits for legal challenge are specifically regulated. The shortest time limit is Poland where the time available for challenge by a protest lodged with the Supreme Court is 3 days from the date of announcement of the election result. In Ireland, leave application has to be made and the time limit is 7 days. After leave is granted, a petitioner has 3 days to lodge his petition. The position in the United States of America depends on the states or region in question: for District of Columbia the time is 7 days; for Florida it is 10 days. In France, the time limit is 10 days. No information about time limit can be found in respect of the election of the President of Germany and the mechanism for challenge appears to be quite different. In India, the time limit is 30 days. In Singapore, the primary time limit is 21 days. However, in respect of challenge based on allegations of corrupt practice or illegal practice involving payment of money, it is 28 days after the payment. In respect of challenge based on other allegations of illegal practice, the time limit is 14 days. The system in Russia also appears to be different. The first level of challenge is by way of complaints to the Election Commission and the Commission must establish the result within 10 days. After that, there is a time frame of one year for challenges to be made to the Supreme Court though the court’s decision would not automatically remove the president from office. None of these countries has any statutory provisions for extension of time for such challenges.

44. The last sentence of that passage is of note in that it is by no means unusual for time limits for the institution of proceedings questioning an election to be non-extendable, just as in the case of s.34(1). For the same reasons as indicated earlier, I do not regard as objectionable this feature of s.34(1).

⁸⁶ The 12 September 2012 judgment at [109].

⁸⁷ In [84] of the judgment.

45. There is also the consideration of the margin of appreciation which can be accorded by the court to the legislature. This aspect has been considered by the courts in a number of cases. In *Fok Chun Wa v Hospital Authority*, this Court emphasized the point that the concept of margin of appreciation reflected the different constitutional roles of the judiciary on the one hand, and the executive and legislature on the other.⁸⁸ In the context of election law, this difference in roles must be borne in mind. I have earlier discussed the role of the judiciary when dealing with the engagement of art.35 of the Basic Law⁸⁹ in the present case. Elections, however, also involve political and policy considerations and it is in these areas where the legislature is involved. The determination that seven days is the appropriate limit for the lodging of election petitions is one that does involve considerations other than legal ones. A due margin of appreciation should be accorded in the present case. Mr Lee SC relied on those passages in *Fok Chun Wa* in which this Court made references to core values and fundamental concepts,⁹⁰ but the right of access to the courts is not an unlimited one, particularly in the present context.

46. The main reason for the Judge making a finding that s.34(1) infringed art.35 of the Basic Law was basically that he could not reconcile the seven-day non-extendable time limit in that provision with the more generous time limit in s.39 (30 days which could be extended). He regarded this as a fundamental flaw in the legislation. Reference was made to *Charles Mok 1* where, in the context of the Legislative Council election under the Legislative Council Ordinance,⁹¹ the Court remarked on the incongruity of the unavailability of an appeal mechanism for election petitions under that Ordinance contrasted with the availability of appeals in other proceedings under that Ordinance⁹² to challenge the qualification of the members of the Legislative Council.⁹³ Given this fundamental flaw, according to the Judge, any margin of appreciation that might otherwise have been accorded was of no significance.

47. I am, with respect, unable to agree with the Judge's reasoning:

- (1) It is important to have regard to the difference between election petition and judicial review proceedings under the CEEO. As explained above, they are quite different, although admittedly overlaps do exist. The election petition procedure can be regarded as the primary and most speedy means of

⁸⁸ (2012) 15 HKCFAR 409, [64].

⁸⁹ [36] above.

⁹⁰ *Fok Chun Wa*, [77]–[79].

⁹¹ (Cap.542).

⁹² Namely s.73 of the Legislative Council Ordinance.

⁹³ [68] of the judgment in *Charles Mok 1*.

resolving questions regarding elections. The judicial review procedure enables the question of whether an elected person can lawfully assume the office of Chief Executive to be raised. It can be regarded as a residual means of challenge. The fundamental difference between the two procedures is that one that has already been noted: election petition proceedings can be instituted as of right whereas the judicial review procedure requires leave to be obtained.

- (2) Devising the scheme of challenges to elections in the way that exists in the CEEO, with different time limits for different proceedings, represents an attempt by the legislature to balance on the one hand the need to resolve any questions about the legality of elected persons to become the Chief Executive as speedily as possible and due respect for the integrity of elections on the other.⁹⁴ A tight time limit governs the election petition procedure, which is for the benefit of those persons who have been intimately involved with the relevant election. For those who have not been so intimately involved, the time limit is more relaxed for the residual means of challenge (judicial review), even though the time limit is actually considerably less than the usual three months.
- (3) No useful guidance can be obtained from *Charles Mok 1*. In that case, the court was faced with a total absence of any appeal in election petition proceedings and this was contrasted with the availability of avenues of appeal in comparable proceedings. This is not the same situation in the present case where a comparison had to be made between time limits.

48. Mr Lee SC also made a submission to the effect that the inflexible time limit in s.34(1) had the potential of causing injustice where (and he used the present case as an illustration), the facts supporting one or more of the grounds in s.32(1)(a) of the CEEO, were not discovered until after the seven-day time limit had expired. He gave as an example the ground set out in s.32(1)(a)(iv), being illegal conduct based on election expenses.⁹⁵ Since returns for election expenses in Chief Executive elections do not have to be lodged until 30 days after the publication of the election result,⁹⁶ it may be well past the seven-day deadline before any such illegal conduct could be discovered.

49. Admittedly, it is possible for these situations to arise but in my view it does not follow from this that the seven-day limit becomes then objectionable from a constitutional point of view. First, where a line is drawn, it is inevitable that there may be hard

⁹⁴ In this latter respect, see [28(3)] above.

⁹⁵ Contrary to s.24(1) of the ECICO.

⁹⁶ Under s.37(2)(a)(ii)(A) of the ECICO.

cases that would arise when persons fall within the wrong side of the line.⁹⁷ Secondly, it must be borne in mind in the present context that if a situation were to arise where one or more of the grounds in s.32(1)(a) or (b) only came to light after the seven-day period, the election petition procedure does not provide the only means of redress. The existence of judicial review proceedings (although not open to s.33 persons on the s.32(1)(a) or (b) grounds); the possibility of criminal proceedings under, say, ECICO; proceedings under art.73(9) of the Basic Law; or simple political realities, are all relevant to be considered in this context.

D.3 Conclusion on the Second Issue

50. The appeals by Mr Leung and the Secretary for Justice must accordingly be allowed. The election petition proceedings instituted by Mr Ho ought to have been struck-out on the basis that they were barred by s.34(1) of the CEEO.

E. Third Issue: The Costs Order of 28 September 2012

51. Both the main protagonists in relation to this part of the case, Mr Ho and Mr Leung, were agreed that the principles to be applied were those contained in *Sky Wide Development Ltd.*⁹⁸ Although Mr Thomas SC for the Secretary for Justice in his written Case questioned whether the applicable principles regarding costs in contested applications for leave to institute judicial review proceedings were those as stated in *Sky Wide Development Ltd*, I do not regard the present case as an appropriate occasion to go into this question. Apart from the agreed position of Mr Ho and Mr Leung, I am in some doubt as to whether the Secretary for Justice has *locus standi* to argue in this appeal at all, he having all along taken a neutral view on costs.

52. This appeal can be quickly disposed of. We have differed from the reasoning of the learned judge in the 30 July 2012 judgment. Although the effect is the same in that it was correct that leave to institute judicial review proceedings should not have been given to Mr Ho, I have not fully accepted the submissions made by Mr Leung or the Secretary for Justice. In the circumstances, the correct order for costs should be that no order for costs be made.

F. Conclusions on the Appeals

53. The appeals giving rise to the two main issues are, as stated earlier, academic but leave to appeal was given on them by the Appeal Committee in view of their importance. It followed from

⁹⁷ See *Fok Chun Wa*, [71].

⁹⁸ See [5(3)] footnote 15 above.

the giving of leave to appeal on the two main issues that leave to appeal should also be given in relation to the Third Issue.

54. The formal orders following the resolution of the three issues should be as follows:

- (1) The appeals of Mr Leung in FACV 24 and 25/2012⁹⁹ are allowed. Paragraphs 1–3 of the Order of Lam JA dated 5 October 2012 are set aside.
- (2) The appeal of the Secretary for Justice in FACV 27/2012¹⁰⁰ is allowed. Paragraphs 1–3 of the Order of Lam JA dated 5 October 2012 are set aside.
- (3) The appeal of Mr Ho in FACV 1/2013¹⁰¹ is dismissed insofar as the Order of Lam J dated 30 July 2012 is concerned. The appeal is allowed insofar as the Order for costs made by Lam JA dated 28 September 2012 is concerned, and there is to be substituted in its place no order as to costs.

55. As for the costs of these appeals, both Mr Leung and Mr Ho have to an extent succeeded but also failed in relation both to outcome as well as in their submissions on various issues. The Secretary for Justice maintained a neutral position in relation to costs in these appeals. In the circumstances, I would make an order *nisi* that there be no order as to costs in these appeals. If any party wishes to have a different order for costs, written submissions should be served on the other parties and lodged with the court within 14 days of the handing down of this judgment, with liberty on the other parties to lodge written submissions within 14 days thereafter. In the absence of such written submissions, the order *nisi* will stand absolute at the expiry of the time limited for such submissions.

Chan PJ

56. I agree with the judgment of the Chief Justice.

Ribeiro PJ

57. I agree with the judgment of the Chief Justice.

Tang PJ

58. I respectfully agree with the judgment of the Chief Justice.

⁹⁹ Relating to the Second Issue.

¹⁰⁰ Relating to the Second Issue.

¹⁰¹ Relating to the First and Third Issues.

Gleeson NPJ

59. I agree with the judgment of the Chief Justice.

Reported by Ken TC Lee