

Kwok Cheuk Kin
and
President of Legislative Council

[2021] HKCA 169
(Court of Appeal)
(Civil Appeal No 320 of 2019)

Poon CJHC, Lam V-P and Au JA
22 December 2020, 11 February 2021

Administrative law — Legislative Council — resolution amending Rules of Procedure reducing quorum of meeting of committee of whole Council (COWC) — standing of applicant to bring judicial review — art.75 did not govern quorum of COWC — Basic Law art.75

Constitutional law — Legislative Council — meeting of committee of whole Council — quorum not governed by art.75 — Basic Law art.75

Administrative law — judicial review — locus standi — considerations — reasonable arguability — additional requirement of sufficient interest

[Basic Law of the Hong Kong Special Administrative Region art.75]

行政法 — 立法會 — 修改議事規則以減少立法會全體委員會(COWC)會議的法定人數的決議 — 提出司法覆核的申請人的資格 — 第75條不管轄COWC的法定人數 — 《基本法》第75條

憲法 — 立法會 — 立法會全體委員會會議 — 法定人數不受第75條管轄 — 《基本法》第75條

行政法 — 司法覆核 — 訴訟資格 — 考慮因素 — 合理的可爭辯性 — 充份利益的附加要求

[《香港特別行政區基本法》 第75條]

The Legislative Council passed a resolution amending r.17 of the Rules of Procedure of the Legislative Council with the effect of reducing the quorum for a meeting of a committee of the whole Council (the COWC) from not less than half of all the members of the Council (including the chairman), to 20 members (including the chairman) (the Resolution). This took effect on 22 December 2017. The amendment however did not affect the quorum for a

meeting of the Council which remained one half of all the members including the President. X, a Hong Kong permanent resident who was not a member of the Council, sought to challenge the Resolution arguing that it contravened art.75 of the Basic Law (BL 75) (the BL) which provides that “[T]he quorum for the meeting of the Legislative Council ... shall be not less than one half of all its members”. X argued that the “meeting of the Legislative Council” embraced a meeting of the COWC and the Resolution therefore contravened BL 75. X’s application for judicial review was dismissed in the Court of First Instance. X appealed.

Held, dismissing the appeal, that:

- (1) Context in the assessment of standing was important. Bearing in mind that the essential function in judicial review was to safeguard the rule of law, the courts should be informed by the over-arching question, in the particular context, of whether the preservation of the rule of law required standing be given to an applicant to ventilate the issues raised in the application in light of his interest (*AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 applied; *Re Wong Chi Kin* (CACV 80/2014, [2014] HKEC 1590), *Kwok Cheuk Kin v Commissioner of Police* [2017] 6 HKC 93, 郭卓堅 v 立法會主席梁君彥 [2018] HKCA 672, [2018] HKEC 2914 considered). (See paras.27–28.)
- (2) In many cases, the courts could only form a view on whether the contention of an applicant was reasonably arguable at the leave stage. Reasonable arguability *per se* was not sufficient to satisfy the requirement of standing in every case. The requirement of sufficient interest under s.21K(3) High Court Ordinance (Cap.4) was an additional requirement to the merit assessment (*AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868 applied). (See para.39.)
- (3) X had no standing to bring this application. (See paras.32, 40.)
 - (i) Not being a member of the Council, X had no right to participate at the meetings in the legislative process, including the COWC. The Committee stage was only an interim stage in the legislative process and ultimately a bill had to go through the Third Reading, where a decision would be made by the Council with a quorum complying with BL 75. (See paras.19, 33.)
 - (ii) It could not be said that X would be directly affected. The change of quorum requirement only affected the internal working of the COWC and did not have a

- direct impact on the general public. (See paras.35, 37, 40.)
- (iii) The amendment to the quorum for COWC would not diminish public support of a piece of legislation because: (a) the members of the Council had as much opportunity to debate as before in the Council; and (b) every member of COWC remained a member of the COWC. (See para.36.)
- (4) BL 75 did not govern the quorum of COWC. COWC's quorum was governed by the Standing Order of the Legislative Council whereas the quorum of the Council itself was governed by Royal Instructions. The changes in the quorum of the COWC had always been effected by the amendments to the Standing Orders adopted by the Council, not the Royal Instructions emanating from the British Government. Different changes of quorum were effected for the COWC and the Council prior to 1971, which highlighted that the Council was not regarded as the same entity as the COWC. Therefore, from the angle of continuity and given that the functions and works of the COWC remained substantially the same after 1997, the construction of BL 75 contended for by X had no merit. (See paras.45–48, 50, 54, 56.)

Appeal

This was an appeal against the dismissal of an application for judicial review of a resolution passed by the Legislative Council amending r.17 of the Rules of Procedure of the Legislative Council by Anderson Chow J in the Court of First Instance (see [2019] HKEC 1815).

Mr Jeffrey Tam and Mr Ernest CY Ng, instructed by Ho Tse Wai & Partners, for the applicant.

Mr Benjamin Yu SC, Mr Abraham Chan SC and Mr Danny Tang, instructed by PC Woo & Co, for the putative respondent.

Mr Wong Yan Lung SC and Mr Anthony Chan, instructed by the Department of Justice, for the intervener.

Legislation mentioned in the judgment

Basic Law of the Hong Kong Special Administrative Region arts.66, 73, 73(1), 75, 75(1), (2)

High Court Ordinance (Cap.4) s.21K(3)

Legislative Council (Powers and Privileges) Ordinance (Cap.382) s.19

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

Cases cited in the judgment

AXA General Insurance Ltd v HM Advocate [2011] UKSC 46, [2012] 1 AC 868, [2011] 3 WLR 871, 2012 SC (UKSC) 122
Kwok Cheuk Kin v Commissioner of Police [2017] 6 HKC 93
R (Cart) v Upper Tribunal [2011] UKSC 28, [2012] 1 AC 663, [2011] 3 WLR 107, [2011] 4 All ER 127, [2011] PTSR 1053
Wong Chi Kin, Re (CACV 80/2014, [2014] HKEC 1590)
郭卓堅 v 立法會主席梁君彥 [2018] HKCA 672, [2018] HKEC 2914

Other material mentioned in the judgment

Legislative Council (HKSAR), Rules of Procedure, rr.17, 59

REASONS FOR JUDGMENT

Lam V-P (giving the reasons for judgment of the Court)

1. On 22 December 2020, we dismissed the appeal brought by the applicant, Mr Kwok Cheuk Kin, against the judgment of Chow J dated 12 June 2019 with costs. We now hand down the reasons for our judgment.

Background facts

2. On 15 December 2017, the Legislative Council (the Council) passed a resolution (the Resolution) amending r.17 of the Rules of Procedure of the Legislative Council (the RoP) with the effect that the quorum for a meeting of a committee of the whole Council (COWC) is reduced from not less than half of all the members of the Council (including the chairman) to 20 members (including the chairman). The Resolution was published in the *Gazette* on 22 December 2017 and took effect upon such publication.

3. Though the membership of a meeting of the COWC is the same as that of a meeting of the Council, the amendment did not alter the quorum for the latter (which remains at one half of all the members including the President).

4. The legislative authority in Hong Kong was conferred on the Council by the Basic Law (BL), see BLs 66 and 73(1). Though there are provisions in the BL governing composition, powers and functions of the Council and voting procedure, subject to BL 75(1) on quorum of the meeting of the Council, BL 75(2) leaves it to the Council to make its own rules of procedure provided that such rules cannot contravene the BL.

5. The deliberation of bills in the three-reading legislative process is set out in the RoP. In this respect, Anderson Chow J summarised the process at [14]–[20] in the judgment of 12 June 2019 (which we gratefully adopted for the purpose of this judgment):

[14] Notice of Presentation of Bills: the legislative process starts with a notice given by a Member of the Council or a designated public officer of his intention to present a bill sent to the office of the Clerk to the Council (**the Clerk**) (Rule 51(1)).

[15] Presentation and Publication of Bills: the Clerk shall, after receipt of a bill for presentation to the Council:

- (1) cause the text of the bill and its explanatory memorandum to be published in the Gazette unless (a) the President directs that the bill shall not be published in the Gazette before it has been read the first time, or (b) the bill has already been published in the Gazette in accordance with Rule 51(6) in the case of a 'private bill' (Rule 52(1)); and
- (2) cause a copy of the bill and its explanatory memorandum to be sent to every Member, whereupon the bill shall be deemed to have been presented to the Council (Rule 52(2)).

[16] First Reading of Bills:

- (1) The short title of a bill presented to the Council in accordance with Rule 52(2) shall be placed on the Agenda of the Council for first reading at such meeting as may be specified to the Clerk by the Member in charge of the bill (Rule 53(1)).
- (2) No debate is allowed upon the first reading of a bill; and the bill is deemed to have been read the first time upon the Clerk reading the short title (Rule 53(2)).
- (3) When a bill has been read the first time, the Council is deemed to have ordered the bill to be set down for second reading (Rule 53(3)).

[17] Second Reading of Bills:

- (1) The Council proceeds to the second reading of a bill on a motion that the bill be now read the second time; and on this motion a debate may arise covering the general merits and principles of the bill (Rule 54(3)).
- (2) Except in relation to Appropriation Bills, when the Member in charge of a bill has spoken on a motion that the bill be now read the second time, the

debate is adjourned and the bill is referred to the House Committee unless the Council, on a motion which, with the consent of the President, may be moved without notice by any Member, otherwise orders (Rule 54(4)).

- (3) The House Committee to whom a bill has been referred may allocate it to a Bills Committee for consideration, or may cause it to be considered in such other manner as the House Committee thinks fit (Rule 75(4)). In most cases, a Bills Committee would be formed if there is no dissenting voice. The House Committee may also provide guidelines relating to the procedures of a Bills Committee (Rule 75(8)).
- (4) The procedures of a Bills Committee are set out in Rule 76. Rule 76(7) provides that a Bills Committee shall consider the general merits and principles, and the detailed provisions, of the bill allocated to it; and may also consider any amendments relevant to the bill. As soon as a Bills Committee has completed consideration of the bill allocated to it, it notifies the House Committee and advises it in writing of the Bills Committee's deliberations and where appropriate, the majority and minority views, and whether or not the Bills Committee supports the bill. After discussion at the House Committee on its deliberations, the Bills Committee shall submit a report to the Council and arrange for it to be presented at the same Council meeting at which the resumption of the second reading debate on the bill takes place. The discussion at the House Committee upon the completion of the work of a Bills Committee is on whether the bill is ready for resumption of further proceedings in the Council. The decision of the House Committee is not on whether the bill is to be supported, but rather on whether there is support for the second reading debate on the bill to be resumed at a Council meeting as requested by the Member or public officer in charge of the bill.
- (5) The resumed second reading debate on the bill is on the general merits and principles of the bill. After all Members who wish to speak have spoken, the President will then put the question 'That the bill be read the second time' to vote.

- (6) When a motion for the second reading of a bill has been negated no further proceedings shall be taken on that bill (Rule 54(8)).

[18] Committal of Bills/Committee Stage: when a motion for the second reading of a bill has been agreed to, the bill shall stand committed to a committee of the whole Council, unless —

- (1) the Council, on a motion which, with the consent of the President, may be moved without notice by any Member immediately after the bill has been read the second time, commit the bill to a select committee; or
- (2) the President is of the opinion that the bill would specially benefit or otherwise specially affect some particular person or association or corporate body, in which case he may direct that the bill be committed to a select committee (Rule 55(1)).

[19] I am given to understand that the procedure of committing a bill to a select committee has fallen into disuse in recent times. Apparently, the last time when a bill was referred to a select committee was in 1968. Nevertheless, as emphasised by Mr Benjamin Yu, SC (for the President) and Mr Wong Yan Lung, SC (for the Secretary for Justice), the power of the Council or President under Rule 55(1) to refer a bill to a select committee still exists ...

[20] Third Reading of Bills:

- (1) After a bill has navigated through the Committee Stage, the Council proceeds to the third reading of a bill on a motion that the bill be read the third time and do pass. Debate on that motion is confined to the contents of the bill and no amendment may be moved to the motion (Rule 63(1)).
- (2) Amendments for the correction of errors or oversights may, with the President's permission, be made to the bill before the question for the third reading of the bill is put by the President, but no amendments of a material character shall be proposed (Rule 63(2)).
- (3) When a motion for the third reading of a bill has been agreed to, the Clerk shall read the short title

of the bill and shall write at the end of the bill the words ‘Passed by the Legislative Council of the Hong Kong Special Administrative Region this day’ giving the date (Rule 63(3)).

- (4) When a motion for the third reading of a bill has been negatived no further proceedings shall be taken on that bill (Rule 63(4)).

6. As can be seen from this summary, a bill has to be steered through various committees before it is finally voted upon by the Council at the Third Reading.

7. At the Second Reading, a bill would be referred to the House Committee, which in turn will decide if the bill should be referred to a Bills Committee. When the Bills Committee has completed its deliberations, after consultation with the House Committee, the debate on the Second Reading in the Council would be resumed. After such debate in the Council and if the motion is not negatived, the bill will be committed to either the COWC or a Select Committee.

8. At this stage (what is called the Committee Stage), the COWC will consider the details (rather than the fundamental direction or underlying principles) of a bill and amendments can be made to a bill.

9. All the committees (including the House Committee, the Bills Committee, the COWC and Select Committee) are creatures of the RoP with their respective composition, function, power and procedures being provided for in the RoP.

10. After the Committee Stage, the Council’s debate of the motion in the Second Reading will resume. The amendments to the RoP also altered the procedure in this regard. Such changes were described by the Secretary General in his 1st affirmation filed in HCAL 1120/2017 (which was adopted as evidence in the present case) at paras.37 and 38:

37. Prior to 22 December 2017, after a bill had been considered by the CoWC with or without CSAs, the Council would resume with the public officer or Member in charge of the bill reporting it to the Council, whereupon the Council would be deemed to have ordered the bill to be set down for Third Reading (RoP 59). There was no requirement for the Council to vote on a motion to adopt the report from CoWC before proceeding to Third Reading.
38. After 22 December 2017, upon completion of the CoWC’s proceedings on a bill (including making any amendments thereto), CoWC must report to the Council and a motion

must then be moved and voted on by the Council to adopt CoWC's report on the bill. If the motion to adopt CoWC's report was agreed to, the Council would be deemed to have ordered the bill to be set down for Third Reading. If, however, the motion was negatived, no further proceedings would be taken on the bill.

11. The amended version of r.59 reads:

59. **Procedure on Reporting of Bill from Committee of the Whole Council**

- (1) When a bill has been reported from a committee of the whole Council, the Member or the public officer in charge of the bill shall move a motion that the report that was made under Rule 58(12) (Procedure in Committee of the Whole Council on a Bill) be adopted.
- (2) The motion moved under subrule (1) shall be voted on forthwith without amendment or debate. If the motion is agreed to, the Council shall be deemed to have ordered the bill to be set down for third reading and the order of the Council shall be so recorded in the minutes of proceedings, and notice of motion for third reading shall not be required to be given by the Member or public officer in charge of the bill. If the motion is negatived, no further proceedings shall be taken on the bill.

12. Thus, the Council has to vote on the motion to adopt the report before the bill can be set down for third reading. At that meeting (which must satisfy the quorum of the meeting of the Council as opposed to the quorum of COWC), the Council has an opportunity to negative the motion. If the motion is negatived (irrespective of the opinion expressed in the report of the COWC), the bill cannot be taken forward.

13. Further, at the Third Reading, there would be debate on the bill in the Council and it is the voting on the motion for the Third Reading which is the ultimate decision of the Council on the bill. Hence, a bill cannot be passed into law without a Council (with a quorum of one half of all the members including the President) voting in favour of it irrespective of the deliberation and report of the COWC.

Mr Kwok's contention

14. The applicant Mr Kwok, who was not (and is not) a member of the Council, sought to challenge the Resolution on the ground that it contravened BL 75(1) which prescribed the quorum for the meeting of the Council. BL 75(1) reads:

The quorum for the meeting of the Legislative Council of the Hong Kong Special Administrative Region shall be not less than one half of all its members.

15. Mr Kwok's contention was that "meeting of the Legislative Council" in that article also embraced a meeting of the COWC. As RoP is only valid insofar as its provision does not contravene the BL, the quorum of COWC cannot be less than one half of all its members. His contention was rejected by Chow J. The learned Judge also held that Mr Kwok did not have the standing to bring the application. The application for judicial review was accordingly dismissed.

Mr Kwok did not have sufficient interest

16. We first deal with Mr Kwok's lack of standing.

17. Section 21K sub-s.(3) of the High Court Ordinance (Cap.4) provides:

No application for judicial review shall be made unless the leave of the Court of First Instance has been obtained in accordance with rules of court; and the court shall not grant leave to make such an application unless it considers that the applicant has a sufficient interest in the matter to which the application relates.

18. Thus, the court has to assess whether an applicant has a sufficient interest in the matter before granting leave to apply for judicial review.

19. The subject matter in the present case is the quorum for COWC. Not being a member of the Council, Mr Kwok has no right to participate at the meetings in the legislative process, including the COWC. It may be said that as a member of the public, he has an interest in having statutes affecting him to be passed by the Council with a proper quorum. However, as we have seen, the Committee Stage is only an interim stage in the legislative process and ultimately a bill has to go through the Third Reading at which the decision would be made by the Council with a quorum complying with BL 75(1).

20. As the learned Judge observed, the Members of the Council who opposed the decision to amend r.17 and had a direct interest in the matter were better placed to bring the challenge. Whilst it

is a fact that no such member deemed it fit to advance such challenge, the Judge also held that such fact could not confer standing on Mr Kwok.

21. The question of standing must be examined against the above background.

22. In *Re Wong Chi Kin* (CACV 80/2014, [2014] HKEC 1590, 26 September 2014), [11]–[18]. At [11], this Court (Lam V-P, Cheung and Yuen JJA) had this to say on standing:

... Though the requirement of standing in public law is a liberal one, an applicant must still have some interest in the matter to warrant leave being granted to him to challenge a public decision. Leave would not be granted to a meddlesome busybody, see *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763 at p.773. The relevant principles about standing in bringing an application for judicial review were considered by Rose LJ in *R v Secretary of State for Foreign and Commonwealth Affairs, ex p World Development Movement* [1995] 1 WLR 386. Standing goes to jurisdiction and it has to be considered in the legal and factual context of the whole case. Merits are important. But there are other factors as well: the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, the nature of the breach of duty against which relief is sought.

23. This Court (Lam V-P, Chu and Poon JJA) applied these principles in *郭卓堅 v 立法會主席梁君彥* [2018] HKCA 672, [2018] HKEC 2914 in the context of Mr Kwok's application for an injunction to restrain Government officers' monitoring of members in the Legislative Council. He contended that such activities were in contravention of BL 62(6) and s.19 of the Legislative Council (Powers and Privileges) Ordinance (Cap.382). The Court rejected the contention of Mr Kwok in that appeal that he had standing because the legislator elected by him was impeded. It was held that Mr Kwok's interest was not directly affected and he did not have standing to bring the judicial review.

24. In *Kwok Cheuk Kin v Commissioner of Police* [2017] 6 HKC 93, Anderson Chow J had to consider the standing of Mr Kwok in yet another unsuccessful judicial review application. At [31]–[34], the learned Judge reviewed the law on standing. He summarised the legal principles at [34] as follows:

- (1) Where the decision affects the applicant's personal right or interest over and above that of the general public or a section of the public, the applicant should have little difficulty in showing a sufficient interest in the matter to which the application relates.

- (2) Where, however, the decision does not have such effect and the applicant is effectively pursuing the application as a representative of the public interest, the court adopts a holistic approach by taking into account a host of relevant considerations including the merits of the application, the importance of vindicating the rule of law, the importance of the issue raised, the existence and absence of any other challengers who have a greater interest in the matter, and the nature of the breach of duty against which relief is sought.
- (3) In such a situation, the applicant is not to be regarded as having a sufficient interest merely because the issue raised by him is of public interest. As observed by Dyson LJ (as he then was) in *R (Feakins) v Secretary of State for Environment, Food and Rural Affairs* [2004] 1 WLR 1761, at paragraph 23, ‘if a claimant has no sufficient private interest to support a claim to standing, then he should not be accorded standing *merely* because he raises an issue in which there is, objectively speaking, a public interest’.
- (4) Equally, the applicant should not be regarded as having a sufficient interest merely because of the strong merits of the proposed challenge. As pointed out by Lord Reed in his judgment in *AXA General Insurance Ltd v HM Advocate* quoted above, ‘the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted’.
- (5) Although there has undoubtedly been a trend to liberalise the requirement of standing in judicial review, the need to show a sufficient interest in the matter to which the application relates remains, in my view, an important filter to keep judicial review within its proper bounds and to prevent abuse of the court’s process, particularly having regard to the explosive increase in the number of applications for judicial review and, more importantly, the complexities of the applications seen in recent years in Hong Kong.
- (6) Where the applicant does not have a personal right or interest in the subject matter of the judicial review but claims to make the application in a representative capacity, the court ought to be vigilant in examining whether he is a genuinely advancing a public interest in making the application or is motivated by other reasons. In *R (Feakins) v Secretary of State for Environment, Food and Rural Affairs*, Dyson LJ stated, immediately following the sentence quoted above, the following —

“As Sedley J said in *R v Somerset County Council, Ex p Dixon* [1997] JPL 1030, when considering the issue of standing, the court had to ensure that the claimant was not prompted by an ill motive, and was not a mere busybody or a trouble-maker. Thus, if a claimant seeks to challenge a decision in which he has no private law interest, it is difficult to conceive of circumstances in which the court will accord him standing, even where there is a public interest in testing the lawfulness of the decision, if the claimant is acting out of ill-will or for some other improper purpose. It is an abuse of process to permit a claimant to bring a claim in such circumstances. If the real reason why a claimant wishes to challenge a decision in which, objectively, there is a public interest is not that he has a genuine concern about the decision, but some other reason, then that is material to the question whether he should be accorded standing.”

25. We respectfully endorse the Judge’s summary which he applied in the present case at [70] of the judgment below in concluding that Mr Kwok also lacked standing in the present case.

26. We would also respectfully adopt Lord Reed’s observations in *AXA General Insurance Ltd v HM Advocate* [2012] 1 AC 868, [170]:

For the reasons I have explained, such an approach cannot be based upon the concept of rights, and must instead be based upon the concept of interests. A requirement that the applicant demonstrate an interest in the matter complained of will not however operate satisfactorily if it is applied in the same way in all contexts. In some contexts, it is appropriate to require an applicant for judicial review to demonstrate that he has a particular interest in the matter complained of: the type of interest which is relevant, and therefore required in order to have standing, will depend upon the particular context. In other situations, such as where the excess or misuse of power affects the public generally, insistence upon a particular interest could prevent the matter being brought before the court, and that in turn might disable the court from performing its function to protect the rule of law. I say ‘might’, because the protection of the rule of law does not require that every allegation of unlawful conduct by a public authority must be examined by a court, any more than it requires that every allegation of criminal conduct must be prosecuted. Even in a context of that kind, there must be considerations which lead the court to treat the applicant

as having an interest which is sufficient to justify his bringing the application before the court. What is to be regarded as sufficient interest to justify a particular applicant's bringing a particular application before the court, and thus as conferring standing, depends therefore upon the context, and in particular upon what will best serve the purposes of judicial review in that context.

27. These observations highlight the importance of context in the assessment of standing and the need to be guided by the object of the courts' exercise of supervisory jurisdiction in judicial review. In the earlier parts of his judgment at [159] to [169], Lord Reed discussed the distinction between the private law actions to vindicate on rights and public law process to supervise public authority to preserve the rule of law.

28. Bearing in mind that the essential function in judicial review is to safeguard the rule of law (see also *R (Cart) v Upper Tribunal* [2012] 1 AC 663, [37], *per* Baroness Hale), in the holistic assessment on standing for making the judicial review application as summarised by Chow J, the courts should be informed by this over-arching question: in the particular context whether the preservation of the rule of law requires standing be given to this applicant to ventilate the issues raised in the application in light of the interest he has.

29. In the Amended Form 86, Mr Kwok relied on the following matters to support his standing in the application:

- (a) As a Hong Kong permanent resident, he would be directly affected because legislation passed by the Legislative Council with less than one half of members in the COWC would bind him;
- (b) He was genuinely concerned that the amendment of the RoP would affect the general public in that the legislation passed would not have the support of public;
- (c) The existence of other challengers with a greater interest should not operate to deny him standing; and
- (d) He was not a busybody nor a purveyor of a trivial misguided complaint.

30. He also contended that at the leave stage, the court should only make a *prima facie* assessment.

31. At the hearing, Mr Tam further submitted that the merit of the challenge is a factor and in view of the importance of the issue, the safeguard of the rule of law requires that Mr Kwok should have standing as the challenge is a constitutional one based on BL 75 and the COWC played an essential part in the legislative process. Counsel also referred to the historical fact that since 1971 quorum of the COWC was the same as the Council.

32. With respect, it is plain to us that Mr Kwok did not have standing to bring this application for judicial review.

33. In our judgment, the matters set out in the Amended Form 86 to support standing did not analyse the effect of the change of quorum properly. As we have seen, the Committee Stage is only an interim process and the Council itself (with a quorum requirement satisfying BL75) has to vote in favour of (i) the motion to adopt the report after the Committee Stage; and (ii) the Third Reading motion after debate in the Council before the bill would become law which binds all the people in Hong Kong. Mr Kwok completely omitted any consideration to such later involvement by the Council. Viewed thus, Mr Kwok's interest in the COWC process is no more than his interest in other interim steps in the works of the Council.

34. In this respect, reference was made in the Amended Form 86 to the judgment of Lord Hope in *AXA General Insurance Ltd v HM Advocate*, [63]. In that paragraph, Lord Hope opined that the words "directly affected" in the Scottish rules (which is equivalent to our O.53 r.1A of the Rules of the High Court (Cap.4A, Sub.Leg.) in the definition for "interested party") captured the essence of what to look for to constitute standing. His Lordship continued to say:

One must, of course, distinguish between the mere busybody, to whom Lord Fraser of Tullybelton referred in *R v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617, 646, and the interest of the person affected by or having a reasonable concern in the matter to which the application related. The inclusion of the word 'directly' provides the necessary qualification to the word 'affected' to enable the court to draw that distinction. A personal interest need not be shown if the individual is acting in the public interest and can genuinely say that the issue directly affects the section of the public that he seeks to represent.

35. We cannot see how it can be suggested that Mr Kwok would be directly affected by the quorum requirement in the COWC when the quorum for the Council remains the same.

36. Nor can we see any merit in the suggestion that the public support for a piece of legislation would be diminished as a result of the amendment to the quorum for COWC. Firstly, as the quorum of Council is not affected, the members of the Council have as much opportunity to debate as they previously had in the Council. Secondly, the opportunity for concerned Members to debate in the COWC is not affected because every member of the Council remains as member of COWC notwithstanding the change in the quorum requirement.

37. In the present circumstances, we do not accept that Mr Kwok has standing simply because his challenge was based on a provision in the Basic Law and he was genuinely concerned about the same. In light of our analysis as to the effect of the amendments to r.17 of the RoP, the change of quorum requirement only affected the internal working of the COWC and it did not have a direct impact on the general public. Even though the BL 75 point is arguable (as accepted to be so by the Judge), it is not so strong that the rule of law demands there should be a judicial review even though none of the Members of the Council who had undergone a debate over the amendments deemed fit to take up such challenge.

38. When the Judge held that Mr Kwok had no standing, he had determined that Mr Kwok's challenge based on BL 75 had no merit in a rolled-up hearing. We shall discuss merit below and we uphold the Judge in rejecting the challenge on the merit.

39. In many cases, the courts can only form a view on whether the contention of an applicant is reasonably arguable at the leave stage. Reasonable arguability *per se* is not sufficient to satisfy the requirement of standing in every case. Much depends on the context. Whilst merit is a factor in the assessment of standing, the requirement of sufficient interest in s.21K(3) is an additional requirement to the merit assessment. As held by the Supreme Court in *AXA General Insurance Ltd v HM Advocate*, there is a co-relation between the criteria for deciding if a third party should be allowed to participate in a judicial review as "interested party" and the requirement of standing for an applicant. In both instances, the court should consider if the party in question can be said to be directly affected.

40. Since the amendment of the RoP concerns the internal working of the COWC as opposed to the general public, we agree with the Judge that this is not a case where Mr Kwok has standing to challenge the amendment when those who are directly affected (*viz* the Members of the Council) did not deem fit to do so.

BL 75 does not govern the quorum for the meeting of COWC

41. As we have explained, COWC is a committee of the Council and its role is to consider a bill at the Committee Stage before the bill is taken forward to the Third Reading.

42. There are other committees involved in the legislative process and they have different quorum requirements. Mr Tam accepted that those other committees are not subject to the quorum requirement in BL 75.

43. Mr Tam distinguished the position of the COWC from those other committees on the following grounds:

- (a) The membership of the COWC is the same as the membership of the Council;
- (b) COWC plays an integral role in the legislative process;
- (c) Historically, COWC has had the same quorum as the Council since 1971; and
- (d) Before 1997, the Council followed English parliamentary practice. COWC is equivalent to the Committee of the Whole House of the English House of Common and there are English authorities suggesting that the Committee of the Whole House is the same as the House of Common. By reason of the concept of continuity, the reference to meeting of the Council in BL 75 should be construed as including meeting of COWC.

44. With respect, none of these grounds provide support to Mr Tam's contention.

45. Starting with the concept of continuity, the quorum of COWC was governed by the Standing Order of the Legislative Council whereas the quorum of the Council itself was governed by Royal Instructions. The authority of the Legislative Council came from the Royal Instructions, which was a document of constitutional order in the colonial political regime. On the other hand, the COWC derived its authority from the Standing Orders, which were rules adopted by the Council itself. In other words, at all times prior to 1997, the quorum of the COWC had never been prescribed by a constitutional instrument.

46. Prior to 1971, the quorum requirements of the COWC and the Council were actually different. The details were set out by the Judge at [33] of the judgment:

...

- (1) Prior to 9 October 1968, the quorum of the Council under the Royal Instructions was at least five Members including the Governor or the Presiding Member. There was no express provision concerning the quorum of a committee of the whole Council in the Standing Orders.
- (2) During the period from 9 October 1968 (when the revised Standing Orders came into force) to 17 February 1969, the quorum of the Council under the Royal Instructions was at least five Members including the Governor or the Presiding Member, while the quorum of the Council and a committee of the whole Council under the Standing Orders was ten members excluding the President or Chairman.
- (3) During the period from 17 February 1969 to 1 December 1971, the quorum of the Council under the Royal Instructions was at least ten Members including the Governor or the Presiding Member, while the quorum of the Council

- and a committee of the whole Council under the Standing Orders was ten members excluding the President or Chairman.
- (4) During the period from 1 December 1971 to 1 September 1983, the quorum of the Council under the Royal Instructions was at least ten Members including the Governor or the Presiding Member, while the quorum of the Council and a committee of the whole Council under the Standing Orders was also ten members including the President or Chairman.
- (5) Lastly, as from 1 September 1983 to 30 June 1997, the quorum of the Council under the Royal Instructions was twenty Members including the Governor or the Presiding Member, while the quorum of the Council and a committee of the whole Council under the Standing Orders was also twenty member including President or Chairman.

47. Two important points flowed from these changes over the years. First, the changes in the quorum of the COWC had always been effected by the amendments to the Standing Orders adopted by the Council, not the Royal Instructions emanating from the British Government. This highlighted the fact that the Council had the authority to effect the changes. There was no need for approval by the British Government.

48. Second, since different changes of quorum were effected for the COWC and the Council prior to 1971, it also highlighted that the Council was not regarded as the same entity as the COWC. Otherwise, the requirement in the Royal Instructions applied and there was no need to have separate provision governing the quorum of COWC in the Standing Orders.

49. Bearing in mind the functions and works of the COWC as an internal committee of the Council, it is not surprising that the rule as to its quorum was governed by Standing Orders issued by the Council as opposed to being prescribed by a constitutional document such as the Royal Instructions.

50. Hence, from the angle of continuity, it is difficult to see the logic of the adoption of a construction of BL 75 governing not only the quorum of the Council but also the quorum of COWC. That would be a change from the practice in the past when the Council could amend the quorum requirement on its own. Mr Tam had not pinpointed any contextual material which can remotely suggest that the National People's Congress had the intention to make that change by the Basic Law. The functions and works of the COWC remain substantially the same after 1997 and we cannot see any reason why the drafters of the Basic Law would wish to

make provision for the quorum of an internal committee in BL 75(1) instead of leaving it to the Council to decide under BL 75(2).

51. In this connection, we agree with the Judge's analysis at [49] of the judgment:

The context and purpose of BL 75(1) as described above strongly support the view that the true legislative intent is that the quorum requirement prescribed by that article should apply only to meetings of the body tasked with the important constitutional powers and functions as enumerated in BL 73, ie the Council itself, but not that of a mere committee of the Council. The Basic Law is a constitutional instrument which sets out broad general principles for the governance of the HKSAR. A committee of the whole Council is essentially a working committee to fine tune the details of a bill after its general merits and principles have been considered by a Bills Committee and accepted by the Council at the second reading of the bill. While it can readily be understood why the Basic Law would prescribe the quorum of the Council which must be satisfied before it can validly meet and transact its business, it is difficult to see why the Basic Law would be concerned with the quorum requirement for meetings of a committee of the Council.

52. As regards the historical comparison between the COWC and the Committee of the Whole House in England, once it is appreciated that the correct analysis of the continuity argument should focus on the pre-1997 practice on the means by which the change of the rules governing quorum was achieved as opposed to other aspects of legislative practice, Mr Tam cannot gain any mileage from such historical comparison.

53. In any event, as the Judge noted at [63]–[65] of the judgment, there are significant differences between these two bodies in respect of their compositions and functions. We also agree with the Judge's comments at [66] and [67] on the unhelpfulness of transposing descriptions from English textbooks from another context (not addressing on the question of the instrument governing the quorum of the Committee of the Whole House) to the issue before this Court.

54. The other grounds relied upon by Mr Tam cannot take the matter further. Once it is concluded that the Council and COWC have all along been two different entities with their respective quorum requirements prescribed by different instruments, the fact that their membership is the same is neither here nor there. The same applies to the fact that historically there had been times when the quorums were the same. Equally, there were times when their respective quorums were different.

55. As we have seen, there are other committees (eg the House Committee, the Bills Committee, Select Committee) engaged in

the legislative process and we do not see any ground for drawing a distinction between those committees and the COWC in terms of construing BL 75 as to quorum requirement for the meeting of the Council.

56. For these reasons, the construction of BL 75 contended for by Mr Kwok has no merit.

Conclusion

57. The appeal was dismissed with costs accordingly.

Reported by Nisha Mohamed