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HCAL 79/2008

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 79 OF 2008**

BETWEEN

CHAN KIN SUM SIMON Applicant

and

SECRETARY FOR JUSTICE 1st Respondent

ELECTORAL AFFAIRS COMMISSION 2nd Respondent

AND

HCAL 82/2008

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 82 OF 2008**

BETWEEN

LEUNG KWOK HUNG

Applicant

and

SECRETARY FOR JUSTICE

1st Respondent

ELECTORAL AFFAIRS COMMISSION

2nd Respondent

AND

HCAL 83/2008

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

NO 83 OF 2008

BETWEEN

CHOI CHUEN SUN

Applicant

and

SECRETARY FOR JUSTICE

1st Respondent

ELECTORAL AFFAIRS COMMISSION

2nd Respondent

(Heard Together)

Before: Hon A Cheung J in Court

Date of Hearing: 23 February 2009

Date of Judgment: 11 March 2009

J U D G M E N T (O N R E L I E F)

Introduction

1. These applications for judicial review, which have been heard together, concern the constitutional rights of prisoners and convicted persons to be registered as electors and to vote, and that of remanded (unconvicted) persons to vote, in Legislative Council elections. In a judgment handed down on 8 December 2008, this Court concluded that the registration and voting disenfranchisement provisions contained in s 31(1)(a) and (b) and s53(5)(a) and (b) of the Legislative Council Ordinance (Cap 542), which affect prisoners and those convicted persons who have been sentenced to death or imprisonment and who have not served the sentences (or undergone any substituted punishments) or received a free pardon, contravene the right to vote constitutionally guaranteed under arts 26 and 39 of the Basic Law and art 21(b) of the Hong Kong Bill of Rights (ie art 25(b) of the International Covenant on Civil and Political Rights (ICCPR)). The Court held that arrangements should be made to enable prisoners to vote on election day.

2. The Court also took the view that the constitutional rights to vote of remanded persons are not affected by any law, and arrangements

should be made to enable them to vote on election day whilst being held in custody.

3. The Court gave leave to the respondents to file and serve evidence pertaining to the question of relief within 14 days from the date the judgment was handed down and directed that hearing on all questions relating to relief (including costs) be adjourned to a date to be fixed.

4. Evidence has since been filed on behalf of the respondents, and the Court has heard the parties on the relief to be granted, as well as an application by the respondents for a ‘temporary suspension order’ to suspend, that is to say, to postpone the coming into operation of, the declarations to be made by the Court for a period up to 31 October 2009.

5. This is the Court’s reserved judgment dealing with all these matters. The essential facts pertaining to the disputes and issues between the parties have been dealt with in some detail in the Court’s earlier judgment. Save where necessary they will not be repeated in this judgment.

Declaration on registration restrictions

6. S 31(1)(a) and (b) of the Legislative Council Ordinance containing restrictions on registration as an elector have been held to be inconsistent with the constitutional right to vote.

7. In *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4, 25G/H to J, the Chief Justice stated the position as to the

constitutional jurisdiction of the courts in the Hong Kong Special Administrative Region in the following terms:

“In exercising their judicial power conferred by the Basic Law, the courts of the Region have a duty to enforce and interpret that Law. They undoubtedly have the jurisdiction to examine whether legislation enacted by the legislature of the Region or acts of the executive authorities of the Region are consistent with the Basic Law and, if found to be inconsistent, to hold them to be invalid. The exercise of this jurisdiction is a matter of obligation, not of discretion so that if inconsistency is established, the courts are bound to hold that a law or executive act is invalid at least to the extent of the inconsistency. ... In exercising this jurisdiction, the courts perform their constitutional role under the Basic Law of acting as a constitutional check on the executive and legislative branches of government to ensure that they act in accordance with the Basic Law.”

8. The parties are agreed, quite correctly, that a declaration should be made by the Court to give effect to the Court’s holding that the above provisions¹ in the Legislative Council Ordinance are inconsistent with the right to vote guaranteed under the Basic Law and the Hong Kong Bill of Rights and are therefore unconstitutional.

9. Leaving aside the question of temporary suspension, the declaration should be in the following terms, that is to say,

“That section 31(1)(a) and (b) of the Legislative Council Ordinance (Cap 542) are inconsistent with articles 26 and 39 of the Basic Law of the Hong Kong Special Administrative Region, article 21(b) of the

¹ In their skeleton submissions, the parties focused on s 31(1)(a)(i) covering convicted persons who have not served their sentences (or undergone any substituted punishments) and s 31(1)(b) concerning prisoners. But s 31(1)(a)(i) cannot be sensibly separated from s 31(1)(a)(ii) (which deals with those who have not received a free pardon).

Hong Kong Bill of Rights contained in section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383) and article 25(b) of the International Covenant on Civil and Political Rights 1966, and are unconstitutional.”

10. The constitutionality of the above provisions has been raised, directly or indirectly, in all three sets of judicial review proceedings. A declaration in the above terms should therefore be made in each of the three applications.

Declaration on voting restrictions

11. Likewise, all three applications raise, directly or indirectly, the constitutionality of s 53(5)(a) and (b) of the Legislative Council Ordinance regarding convicted persons’ and prisoners’ rights to vote. As mentioned, the provisions have been held by the Court to be inconsistent with the constitutional right to vote and are constitutional.

12. Again, the parties are agreed, quite correctly, that a declaration should be made to give effect to the Court’s holding². To do so is a matter of obligation, not of discretion, on the part of the Court.

13. The only argument between the parties is whether in the declaration itself, it should be made clear that the provisions “are not ‘reasonable restrictions’ and to that extent” are inconsistent with the

² In their skeleton submissions, the parties focused on s 53(5)(a)(i) covering convicted persons who have not served their sentences (or undergone any substituted punishments) and s 53(5)(b) concerning prisoners. But s 53(5)(a)(i) cannot be sensibly separated from s 53(5)(a)(ii) (which deals with those who have not received a free pardon).

relevant provisions in the Basic Law, the Hong Kong Bill of Rights and the ICCPR and ‘are unconstitutional’.

14. Mr Michael Thomas SC, Mr Simon Young with him, argues for the respondents that the proposed wording makes clear that it is not *per se* inconsistent with the relevant constitutional provisions to disenfranchise convicted persons and prisoners. The provisions in the Ordinance infringe the constitutional right only because they go too far, and thus become ‘unreasonable restrictions’ on the right to vote; it is only to that extent that the infringing provisions are inconsistent with the constitutional provisions and are therefore unconstitutional. Mr Thomas apprehends that without the suggested wording, it may be ‘wrongly thought’ that there can never be any disenfranchisement of convicted persons and prisoners, regardless of how restrained, limited and reasonable the restrictions may be.

15. I fully understand Mr Thomas’ argument and his concerns. In its earlier judgment, the Court only focused on whether the blanket disenfranchisement provisions are inconsistent with the constitutional right to vote. It was not required to hold, and deliberately refrained from making any decision on, whether convicted persons’ and prisoners’ rights to vote could ever be restricted constitutionally, and if the answer be ‘yes’, how that might be done. Specifically, the Court did not decide what, if any, would or could constitute ‘reasonable restrictions’ on convicted persons’ and prisoners’ rights to vote.

16. The concerns of Mr Thomas are therefore not without foundation; however the proposed solution is not attractive. The

proposed wording, in my view, is simply not sufficient either to do justice to the Court's full reasoning in coming to the conclusion that the provisions in question are unconstitutional, or to provide the intended clarification. In other words, I am afraid there is no short cut to reading, and indeed reading carefully, the earlier judgment given by the Court.

17. Indeed, the proposed wording will create more confusion than it seeks to remove. As pointed out during argument, the words 'to that extent are inconsistent' would give rise to doubts as to whether the provisions are, to some other extent, not unconstitutional. In the passage cited from *Ng Ka Ling* above, the Chief Justice certainly spoke of the Court holding a law to be invalid 'at least to the extent of the inconsistency' identified by the Court. However, where the inconsistency is such that, in substance, there is nothing left in the offending provisions that is 'consistent' with the relevant constitutional right, it is no longer meaningful to speak of the provisions as being unconstitutional 'to the extent of the inconsistency'. I find it to be the case here. The provisions are simply unconstitutional in their entirety. There is no question of the Court inserting any words of limitation into the provisions so as to make the restrictions on the right to vote contained there constitutional. Nor can the Court 'blue-pencil' some of the words in the offending provisions so as to render the remainder constitutional.

18. For those reasons, the suggested wording is rejected. The declaration to be granted in each case in relation to the relevant provisions, leaving aside any question of suspension, shall be in the following terms:

“That section 53(5)(a) and (b) of the Legislative Council Ordinance (Cap 542) are inconsistent with articles 26 and 39 of the Basic Law of the Hong Kong Special Administrative Region and article 21(b) of the Hong Kong Bill of Rights contained in section 8 of the Hong Kong Bill of Rights Ordinance (Cap 383) and article 25(b) of the International Covenant on Civil and Political Rights 1966, and are unconstitutional.”

Declarations relating to the EAC

19. In relation to the position of the Electoral Affairs Commission (EAC), several declarations are mooted. In HCAL 82/2008, which also raises the question of a remanded person’s right to vote in law as well as in practice, Mr Martin Lee SC, leading Ms Jocelyn Leung, asks for a declaration that the EAC’s refusal to provide prisoners and remanded persons with access to polling stations and/or voting facilities on 7 September 2008 was inconsistent with arts 26 and 39 of the Basic Law, art 21 of the Hong Kong Bill of Rights and art 25 of the ICCPR and was unconstitutional.

20. In addition, Mr Lee also seeks a declaration that the EAC has a legal duty under s 4 of the Electoral Affairs Commission Ordinance (Cap 541) to provide prisoners and remanded persons with access to polling stations and/or voting facilities in all future Legislative Council elections including all Legislative Council by-elections.

21. Mr Hectar Pun, Mr Earl Deng with him, appearing for the two applicants in HCAL 79/2008 and HCAL 83/2008, asks for a similar declaration regarding the EAC's legal duty in the two applications for judicial review.

22. I will deal with the two suggested declarations in turn. The first one is a declaration of breach. It relates to the LegCo elections held on 7 September 2008. Insofar as it relates to prisoners' access to polling stations or voting facilities, in my view, the declaration should be refused because at that time, the electoral law in Hong Kong disenfranchised all prisoners from voting. The EAC was simply following the law. Whilst maybe in theory, one could say that the EAC should have foreseen that the relevant disenfranchisement provisions were unconstitutional, I do not think such an unrealistic suggestion – in fairness to all parties, it was not raised at the hearing – could justify the Court's granting a declaration of breach against the EAC in relation to prisoners' access to polling stations or voting facilities on 7 September 2008.

23. For those reasons, the debate about the first declaration has centred on whether the EAC has acted unconstitutionally in relation to remanded persons' access to polling stations or voting facilities in the last LegCo elections.

24. In my view, the two declarations asked for by Mr Lee amplify the distinction that must be clearly borne in mind. HCAL 82/2008 was not commenced by a remanded person, asking for relief in relation to his (practical) inability to vote for want of access to a polling station or voting facilities provided by the EAC. It was taken

out by Hon Leung Kwok Hung (Mr Leung), who was seeking re-election in a LegCo geographical constituency election. For reasons explained in the last judgment, the Court held that Mr Leung had the necessary standing to bring the proceedings.

25. What happened was that Mr Leung had written to the EAC on 12 June 2008 regarding prisoners' access to polling stations or voting facilities on election day, and on 13 June 2008 about similar access by remanded persons on election day. Whilst the request for access in relation to prisoners was turned down by the EAC in its letter of reply dated 18 July 2008, in its further letter dated 23 July 2008, the EAC simply indicated that the request for provision of access to polling stations to remanded persons would be replied to as soon as possible after the EAC had consulted the relevant parties. Not having received any substantive reply thereafter from the EAC, Mr Leung took out his application for leave to apply for judicial review on 12 August 2008. He regarded the EAC as having refused his request that remanded persons be provided with access to polling stations or voting facilities on election day.

26. Whilst Mr Leung claimed in his Form 86A (para 5(4)) that he had been approached by persons, including persons who had been remanded and had yet to be convicted or to face trial and who had expressed concerns over their exclusion from participation in the 2008 LegCo elections, which had prompted him to write to the EAC in the first place and to take out an application for judicial review eventually, no remanded persons or former remanded persons had ever joined in the proceedings in HCAL 82/2008. No details or particulars regarding

those remanded persons who were said to have approached Mr Leung to express their concerns were ever revealed in evidence. The Court simply does not know what has happened to them on election day, bearing in mind that obviously these people had approached Mr Leung some time before the first letter in June was written, and that the Form 86A and the supporting affirmation of Mr Leung were filed on 12 August 2008, almost a month before election day.

27. There is, in short, no concrete evidence, nor has the Court made any finding, that the EAC has ever wrongfully refused to provide any remanded persons, who were registered as electors, with access to polling stations or voting facilities on election day. There is no evidence that any such remanded persons sought such access from the EAC at the last LegCo elections.

28. As the respondents have submitted, the premise for making the first declaration, which posits an unidentified refusal by the EAC to provide an undefined class of persons with access to polling stations or voting facilities on election day, is highly doubtful.

29. The Court does not lightly make a declaration, including a declaration of breach, unless good grounds are established. Whilst I can see arguments for a declaration of breach premised on a very general case of refusal, as a matter of discretion, in my view, it should be rejected, particularly bearing in mind that the applicant (Mr Leung) was not himself a remanded person affected by any such 'generalised' refusal. I also bear in mind what I am going to do with the second declaration sought.

30. As I said, the two declarations sought illustrate a very important distinction. Mr Leung was heard in the application for judicial review because the Court took the view that he was not a person without standing, and also because the Court found that as between him and the EAC, a genuine question of general public importance had arisen which required resolution. Put another way, there was a genuine disagreement between Mr Leung and the EAC (which clearly emerged after leave was granted and the EAC filed its evidence) as to whether the EAC is under a legal duty to provide remanded persons with access to polling stations or voting facilities on election day, which was a general question not restricted to the last Legco general elections. The Court did not find the question to be an academic one, even though no remanded persons actually took part in the proceedings. In any event, the Court had a discretion to deal with academic questions on a discretionary basis in appropriate circumstances. *Leung v Secretary for Justice* [2006] 4 HKLRD 211.

31. In those circumstances, the Court dealt with the disagreement and eventually concluded in the last judgment that arrangements should be made by the EAC to enable those remanded persons who are registered as electors and who wish to vote on election day to do so whilst being held in custody.

32. In my view, this holding of the Court, which clarifies the duty of the EAC in this particular aspect, ought to find expression in the Court's order in HCAL 82/2008. The most appropriate form of relief is a declaration. Bearing in mind the importance of the law point that the Court has thus clarified, a declaration will most appropriately express the

Court's view on the point. In my view, a declaration in the following terms is appropriate:

“That the Electoral Affairs Commission has a statutory duty under sections 4(b), (d)(ii), (e) and (h), 7(1) and 9(1) and (2) of the Electoral Affairs Commission Ordinance (Cap 541) and regulations 28 and 30 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap 541D) to make all necessary arrangements that are within its powers to make to provide remanded unconvicted persons who are registered as electors and are held in custody on election day with access to polling stations and/or voting facilities on election day in a Legislative Council election, including a by-election.”

33. For substantially the same reasons, a similar declaration in relation to (convicted) prisoners who are registered as electors and are serving sentences of imprisonment on election day should be made in all three applications for judicial review.

34. It is true that the EAC cannot provide such access without the cooperation of the Correctional Services Department and other Government departments concerned. The Government is of course also under a duty by reason of the provisions in the Basic Law and the Hong Kong Bill of Rights to allow such access to be made available to prisoners and remanded persons. Although the declarations only clarify the duties of the EAC and no one has asked for a similar declaration

against the Government, yet since the Secretary for Justice representing the Government is a party to these proceedings, the Government, as a responsible government, is fully expected to respect the declarations and to do all that is necessary to enable the EAC to provide such access.

35. Mr Thomas has sought to re-open arguments relating to the EAC's duty to make arrangements to enable remanded persons to vote whilst being held in custody on election day by seeking to distinguish the South African case of *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) 2005 (3) SA 280*, which the Court relied on in reaching its conclusions on the duties of the EAC. Mr Thomas has said it is still open to the Court to modify its view on the EAC's duty relating to remanded persons since no final order has yet been made.

36. Whilst there may still be residual discretion on the part of the Court to reconsider the matter, having borne in mind the supposed distinctions raised and the stage of proceedings that the litigation has reached, I decline to exercise my discretion to re-open the matter.

Mandamus against the EAC

37. Orders of *mandamus* are also sought in the applications. But to be fair to the parties, they have not been strenuously argued for. The reason is obvious. It is plain from the evidence filed after the Court's earlier judgment that the EAC has made substantial efforts in complying with the legal duties that it has under the relevant legislation, which the Court has clarified in the judgment. Such efforts have

resulted in, the Court is most happy to learn, arrangements being put in place to enable remanded persons who are registered as electors to exercise their constitutional rights to vote in case there should be any Legislative Council by-election. In short, in case of such a by-election, there will be two polling stations set up in two remand centres to enable male and female remanded persons to cast their votes respectively. Arrangements are also being seriously considered and no doubt will be implemented by the next Legislative Council general elections to enable all, who have an unrestricted right to vote, to exercise that right.

38. There can be no doubt about the EAC's readiness, willingness and ability to fully discharge its statutory duties that have been clarified by the Court.

39. In those circumstances, there is simply no question of making any order of *mandamus* against the EAC. I decline to do so.

No damages sought

40. No claim for damages is made by any of the applicants. None is therefore awarded.

Costs

41. There is no dispute that the costs of the proceedings in each application, including all costs previously reserved and the costs of the hearing on 23 February 2009, should be paid by the respondents to the applicant, to be taxed if not agreed, and that the applicants' own costs in HCAL 79/2008 and HCAL 83/2008 should be taxed in accordance with

legal aid regulations. I so order. The Court also certifies for two counsel.

Temporary suspension orders

42. I now deal with the respondents' application for a temporary suspension order in each case. Put briefly, the striking down of the relevant provisions in the Ordinance leaves a lacuna in the electoral law concerned. The Government, the Legislative Council and the public need time to consider what, if any, restrictions on the right to vote should be put in place to replace the provisions to be struck down. The Government has issued a public consultation paper proposing three possible options, but it is accepted that the final solution adopted by the Legislative Council, after the six-week public consultation, may or may not take the form of any of the three options suggested.

43. Likewise, there is no guarantee that short of giving all prisoners an unrestricted right to vote (subject to some immaterial exceptions), the eventual solution adopted by the Legislative Council will necessarily be free from future challenges.

44. All this is in the future.

45. The respondents' case is that a reasonable period of time is required in order to enable all concerned to complete the consultation exercise and legislative process. A temporary suspension order is therefore required to postpone the coming into operation of the declarations that the Court has indicated it will make in relation to the

provisions under challenge. Without such an order, and if there should be a Legislative Council by-election in the meantime, the Government would be unable to function in accordance with the existing provisions without breaching the Court's declarations. For obvious reasons, breaching the Court's declarations would be a most serious matter. Not only would it involve the risk of the Government official concerned (as opposed to the Government itself – see *M v Home Office* [1994] 1 AC 377) committing a contempt of court, it would also adversely affect the Government's credibility, weaken the governance of Hong Kong by the rule of law, and damage the credibility and integrity of the electoral process in Hong Kong.

46. On the other hand, it is contended, if the Government were to comply with the declarations (assuming that no temporary suspension be ordered), prisoners who could and would have been prevented from voting in the by-election constitutionally if sufficient time had been afforded to the Legislative Council to pass the necessary law to replace the struck-down provisions, would have been entitled to vote in the by-election. This, it is argued, would equally damage the integrity of the electoral process and the credibility of the election result. It would be, as it were, a wholly unjustifiable 'windfall' to these undeserving prisoners.

47. It has also been emphasised in the respondents' written skeleton that public confidence lies in a clearly defined, acceptable and transparent overall electoral system for registering voters and recording and counting votes; a legal 'vacuum' within that system would exist between the Court's determination that existing provisions are

unconstitutional and their replacement by Basic Law-compliant provisions acceptable to the public; confidence in the conduct and outcome of any elections held during that period would be diminished if election is allowed to be held with a legal vacuum; ad hoc measures to facilitate voting, urgently improvised without proper consultation, might undermine confidence in the electoral process, prove ineffective and create security risk within and outside prison; and there would be confusion and false expectations if no temporary suspension order is granted.

48. The respondents therefore ask for a temporary suspension of the declarations up to end of October 2009.

49. I can follow easily the respondents' argument. There is indeed material before the Court to justify the requirement for time. The temporary period up to 31 October 2009 seems reasonable enough. The arguments centre on several matters.

Temporary suspension – registration restrictions

50. First, the restrictions on registration. In the words of Mr Thomas, the registration restrictions are 'irredeemably bad'.

51. In my view, there is no or insufficient justification for granting a temporary suspension order regarding the striking down of the registration restriction provisions, regardless of whether convicted persons and prisoners should be allowed to vote in a by-election that may be held between now and end of October this year. For it must be

remembered that whilst registration as an elector is a pre-requisite to voting, removing the registration restriction provisions from the statute book would not in itself lead to the apprehended result described above. Whether a prisoner or convicted person can vote in a by-election between now and end of October would still depend on whether there is any temporary suspension of the declarations of unconstitutionality regarding the voting restriction provisions (see below). On the other hand, granting a temporary suspension order in relation to the registration restriction provisions would have the wholly unacceptable result of preventing those prisoners, who are expected to be released from prison before the next election to be held, from registering as an elector in the meantime. And, of course, there are deadlines for registration as an elector in each year's electoral register: see s 32 of the Legislative Council Ordinance.

52. No difficulties whatsoever have been put forward by the respondents regarding allowing prisoners to be registered as electors, save in relation to one matter. It is said that s28 of the Legislative Council Ordinance requires a person seeking registration as an elector to have, amongst other things, a residential address that is his 'only or principal residence in Hong Kong'. The latter phrase is defined to mean 'a dwelling place in Hong Kong at which the person resides and which constitutes the person's sole or main home': s 28(3). It is said that by reason of his imprisonment, particularly in the case of a long sentence, a prisoner may well not have a dwelling place in Hong Kong at which he resides and which constitutes his sole or main home. So it will be impossible for such a person to be registered as an elector. Mr Thomas suggests that the residence requirement contained in the Ordinance has

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been drafted on the premise that prisoners are not entitled to be registered and to vote.

53. I do not accept the argument. The fact that some may not have a residence or principal residence in Hong Kong so as to entitle them to be registered pursuant to s 28, which is not itself challenged to be unconstitutional, is no good justification for depriving those prisoners who do have a residence or principal residence in Hong Kong and thus are able to satisfy the requirement of s 28 of their rights to be registered as an elector.

54. The proposed temporary suspension is even more unfair for those belonging to these latter group of prisoners who are to be released after the lapse of the current registration period for, but before or during the currency of, the next electoral register for 2009/2010. They would then not be entitled to vote for want of registration as an elector even as a free person during the currency of the next electoral register in case there should be any by-election.

55. Mr Thomas argues that it is fairer to allow time for the legislature to pass new residence requirements (if any) so as to cater for the special circumstances of prisoners, so that if all or some of the prisoners are allowed to vote in future, they all stand on an equal footing.

56. I do not accept this argument. In fact, not having a residence or principal residence in Hong Kong is not a problem confined to some prisoners. Homeless people in Hong Kong may also have difficulties in satisfying the residential requirement of s 28. And one

could think of others who might have similar difficulties. Nobody has suggested that the existence of these odd cases should mean that all other adult permanent residents in Hong Kong who can satisfy the residential requirement in s 28 should not be registered as electors unless and until all these odd cases are satisfactorily sorted out by amending legislation.

57. In my view, whilst it is certainly a good thing to reconsider the wisdom of s 28 in all marginal circumstances, there is simply no or insufficient justification for making a temporary suspension order in relation to the declarations of unconstitutionality regarding the registration restriction provisions.

58. I refuse the application to that extent.

Temporary suspension – voting restrictions

59. Turning to the declarations pronouncing as unconstitutional the voting restrictions, as I put it during argument, the temporary suspension order sought by the respondents may be ‘too little, too *early*’.

60. I will deal with the two comments in reverse order. First, ‘too early’. The concern is that between now and end of October, there may or may not be any by-election. It is not a matter that anybody can predict. There is before the court an election petition relating to a functional constituency election. The petition is scheduled to be heard in April. There is no other outstanding election petition; the time for filing such a petition has long passed. The outstanding election petition, needless to say, may or may not result in a vacancy in membership of the

Legislative Council, thereby calling for a by-election to be held. Furthermore, the eventual outcome of the litigation may or may not be known before end of October 2009, particularly if there should be any appeal from the Court of First Instance's decision.

61. All these are contingencies, which nobody can predict with any degree of certainty. If history is any guide, the chances of having a by-election by reason of death, resignation and so forth during a term of office within the next seven months or so may not be too high.

62. The leading authority in Hong Kong on temporary suspension is no doubt the Court of Final Appeal's decision in *Koo Sze Yiu v Chief Executive of the HKSAR* (2006) 9 HKCFAR 441. In that case, s 33 of the Telecommunications Ordinance (Cap 106) and the Chief Executive's Law Enforcement (Covert Surveillance Procedure) Order were struck down by the Court of First Instance as being unconstitutional. But the Government successfully persuaded the judge (Hartmann J, as he then was) to grant a temporary validity order for six months, so as to allow corrective legislation to be passed as a matter of urgency and to enable covert surveillance to be carried on as before in the meantime. The order was upheld by the Court of Appeal. The applicants in that case appealed to the Court of Final Appeal against the temporary validity order. The Court of Final Appeal doubted whether there is jurisdiction to grant a temporary validity order and left the point open (paras 32, 61-62 at pp 456, 460 to 461). But the Court substituted the temporary validity order with a temporary suspension order, holding that courts have inherent jurisdiction to grant such an order, as a concomitant of the courts' power to make a declaration striking down a piece of legislation

A in the first place. The existence of the courts' jurisdiction does not
B depend on any doctrine of necessity. However, necessity comes into the
C picture when a court decides whether to exercise the power. See para 35
D at p 456. Sometimes, the danger to be averted by suspension would be
E of such magnitude that suspension of a declaration of unconstitutionality
F would not offend against the rule of law. Whether or not to suspend in
G any given case is a question to be decided with that in mind. And it
H would be decided by an independent judiciary after a full, fair and open
I hearing and with reasons given. Importantly, the Court of Final Appeal
J pointed out, suspension would not be accorded if it is not necessary, or
K for longer than necessary. See paras 40 and 41 at p 457.

63. The Court also pointed out, equally importantly, that unlike
A a temporary validity order (assuming there is jurisdiction to grant one in
B Hong Kong), a temporary suspension order does not provide a 'legal
C shield' to the Government. The Government is not shielded from legal
D liability for functioning pursuant to what has been declared
E unconstitutional. All a temporary suspension order does is to allow the
F Government, during the period of suspension, to function pursuant to
G what has been declared unconstitutional, doing so without acting contrary
H to any declaration in operation. It does not provide any legal immunity
I for the Government's action. See paras 33, 35, 50 and 59 at pp 456, 459
J and 460.

64. In other words, in my understanding, in continuing to do
A what it used to do in accordance with the statutory provisions that have
B been successfully challenged, the relevant Government official will not
C be acting in contravention of an operative declaration and risk committing

a contempt of court for so acting, which would have been the case if there had been no suspension. However, it does not mean that the Government and the official concerned will not be acting contrary to *law*. For regardless of whether there is an operative declaration, the Court's judgment in which it is held that the offending provisions are unconstitutional constitutes, by definition, part of the common law of Hong Kong. The *ratio decidendi* of the decision of the Court constitutes part of the case law of Hong Kong. To continue acting as before, the Government and its official would be acting contrary to the common law of Hong Kong as decided by the Court. So regardless of whether there is any operative declaration, by acting contrary to the common law as held by the Court, the Government and its official would be acting contrary to law and incurring legal liability as a result. The temporary suspension of the declaration of unconstitutionality only prevents the Government from acting in contravention of a declaration in operation and removes the risk of the Government official's action amounting to a contempt of court, which is an even more serious matter than acting contrary to the law (including common law) of Hong Kong.

65. That, I believe, was the reason why the Court of Appeal in *A v Director of Immigration*, CACV 314/2007, 18 July 2008, refused to grant a stay, pending (possible) appeal, of the declarations that the Director of Immigration had acted unconstitutionally, contrary to art 5(1) of the Hong Kong Bill of Rights, in detaining some torture claimants under powers of detention which were held by the Court to be unlawful, for want of accessible grounds and procedure for their exercise (see [2008] 4 HKLRD 752). The Secretary for Justice's application for a stay of the declarations was made for the purpose of staying 'the effect of the Court

of Appeal's judgment' in similar cases, where it was apprehended that similar judicial review proceedings would be launched as a result of the Court's judgment (paras 3 and 4). The Court, in refusing the application, emphasised that once delivered, the judgment of the Court formed part of the law of Hong Kong, binding on other courts, with or without the declarations to be granted (paras 8 and 9).

66. The second matter raised by the Court with Mr Thomas during submission is, therefore, whether the order sought will serve any useful purpose in case there should be a by-election during the suspension period. As explained, a temporary suspension order, as opposed to a temporary validity order (assuming there is jurisdiction to grant one), does not provide the Government with a legal shield against liability for doing what has already been held by the Court to be unconstitutional. It does mean, however, that the Government and its official involved will not be acting in contravention of an operative court declaration (and thus there is no question of the official committing a contempt of court).

67. This may well have served the purposes of the Government in a case such as the covert surveillance case. In a covert surveillance situation, almost by definition, the victim of covert surveillance would probably have been unaware of the unlawful covert surveillance at the time it took place. There would be, in such a case, no question of the victim seeking immediate relief against the Government, such as applying to court for an injunction to stop the surveillance. If, as is to be expected in most cases, the covert surveillance was only discovered after the event, all the victim could realistically do would be to sue the

Government for damages. Maybe he would also seek a declaration of the wrongful act in the past.

68. In those circumstances, one could immediately see why a temporary suspension order would serve the Government's purposes well and strike a fair balance of the conflicting interests between the victim and the Government/public. On the one hand, the Government could continue to conduct covert surveillance under warranting circumstances pending the corrective legislation. On the other, the victim's right would be protected because the Government would nonetheless be legally liable for the covert surveillance.

69. However, in a case such as the present one, the analysis or equilibrium so struck breaks down. An election is, by definition, an open and public affair. If the Government continues to prevent prisoners and convicted persons from exercising their constitutional rights to vote on election day, the prisoners can always sue and ask for a mandatory injunction from the court to enjoin the Government to allow them to exercise their rights to vote on election day. Of course, the court is not bound to grant them an injunction, but there is a possibility of the court acceding to the application.

70. But not only that. Since a temporary suspension order does not provide any legal validity to the Government's act, the election result may well be put in doubt by reason of the fact that some eligible electors (namely, those prisoners and convicted persons who have been registered as electors) have been unconstitutionally and unlawfully prevented from voting. This could lead to election petitions being filed to challenge the

A election result. Again, the result of any such litigation would not be
B certain. But the possibility of litigation is there.

C
D 71. In a covert surveillance case, even if the victim were to
E discover the unlawful surveillance in time and go to court to successfully
F obtain an injunction against the Government to stop the surveillance, the
G impact of his successful litigation would only be restricted to the
H surveillance and investigation in his case. It would not affect other
I covert surveillance activities. Not so in an election situation. Any
J successful challenge by a prisoner or group of prisoners (or convicted
K persons) could have wide-ranging ramifications so far as the particular
L by-election is concerned.

M 72. The above discussion illustrates that a temporary suspension
N order may not, in the present case, serve fully the Government's purposes,
O unlike in a covert surveillance case.

P 73. Mr Thomas informs the Court that the respondents have
Q indeed considered all these difficulties and the probable need for a
R temporary validity order in case of a by-election. However, senior
S counsel submits, given that there is as yet no by-election on the horizon,
T it may be premature to ask for a temporary validity order.

U 74. In a different way, counsel has described the two points that
V I have raised, namely 'too little, too early'.

75. Mr Thomas has referred the Court to the Canadian case of
Corbiere v Canada (Minister of Indian and Northern Affairs) [1999] 2

SCR 203. That case involved the exclusion of off reserve members of an Indian band from the right to vote in band elections. The Supreme Court of Canada found the exclusion to be inconsistent with the equality rights in the Canadian Charter. In terms of relief, the Court ordered that the effect of its declaration of invalidity be suspended for 18 months. The extended period of time was to enable Parliament to consult with the affected groups, and to redesign the voting provisions in the relevant Act in a nuanced way that respected equality rights and all affected interests, should it so choose.

76. However, on a careful reading of the case, it would seem that when the Court spoke of suspending the effect of the declaration, it actually meant validating the offending provisions for a period of 18 months. Thus understood, the case does not provide much assistance to Mr Thomas' application for a temporary suspension order. In this regard, it should also be noted that in *Koo Sze Yiu, supra*, Sir Anthony Mason NPJ specifically said that in his reading of the Canadian authorities cited to the Court of Final Appeal in that case and of Professor Hogg's *Constitutional Law of Canada* (4th ed, 1997), Vol 2, para 37.1(d), 'Temporary Validity', both the authorities and the learned author had treated the exercise of the power to suspend the operation of the declaration of invalidity of an unconstitutional statute as synonymous with the grant of a period of temporary validity to an unconstitutional statute (see pp 459-460, para 56). Given this warning, Canadian authorities on the point under discussion must be read with special care.

77. On reflection, the Court must deal with the application *as it is*. Whilst the Court can and should anticipate to some extent what will

happen in the future, there must be a limit to it. And, by definition, it is quite impossible to foresee all possibilities and their outcomes. Moreover, it is important not to say anything that might give rise to either a false hope or a false alarm. Everything will depend on the facts. The Government's attitude towards demands for being allowed to vote in a by-election by prisoners serving very short sentences and by prisoners serving long ones (such as convicted murderers or drug traffickers) may well be different, judging from the three proposals that the Government has put forward for public consultation. Likewise, the court's reaction in an application for a mandatory injunction by a prisoner for the purpose of allowing him to vote on election day may well turn on, amongst other things, whether the prisoner is serving a short sentence or a long one. Again, everything will depend on the facts.

78. For the time being, the Government is content to ask for a temporary suspension order, and I have set out the Government's justification for the application in gist. In short, the Government wishes to have the option of acting in accordance with the existing voting restriction provisions, even at the risk of incurring legal liability and inviting fresh litigation. The Government does not find it advisable to seek a temporary validity order at this stage. That must, of course, be and remain a matter for the Government, not the Court.

79. The Court's function here is to see whether there is sufficient justification for a temporary suspension order. The test is essentially one of necessity. And it involves a balancing exercise. In my view, nobody has an absolute right to vote. That is the starting point. A permanent resident's constitutional right to vote is susceptible to

reasonable restrictions. A prisoner is no different from any other permanent residents of the Special Administrative Region. His right to vote is not absolute but is susceptible to reasonable restrictions. The striking down of the existing voting restriction provisions will leave a lacuna in the electoral law. The legislature has in the past clearly and consistently evinced an intention to impose restrictions on the rights of prisoners and convicted persons to vote. No contrary intention has thus far been evinced by the legislature. In those circumstances, the legislature must be afforded a reasonably necessary period of time to work out whatever new restrictions, if any, it may wish to put in place in replacement of the old restrictions that have been found by the Court to be unreasonable. Whether at the end of the day, any such reasonable restrictions can ever be identified and properly set out in the amending legislation is quite a different matter. It does not detract from the fact that the legislature (and the Government as well as the public) legitimately require and deserve a reasonable period of time to work out a replacement arrangement, whatever it may be. Such a period of time must not longer than what is reasonably necessary. I do not find the period suggested (up to 31 October 2009) to be beyond what is necessary.

80. If no temporary suspension is granted, there will be in place fully operative declarations preventing the Government from functioning in accordance with the old provisions. In the face of the declarations, the Government will have no choice but to allow all prisoners to vote, including those who would not have been allowed to vote if new legislation could have been enacted in time – assuming that such new legislation would have passed the reasonable restriction test. As mentioned, the integrity and credibility of the electoral process and

A election result could be adversely affected. This would by no means be
B a small matter.

C
D 81. True it is that some may sue. That is a possibility. But
E equally, nobody may sue. That is also a possibility. In the latter case,
F the temporary suspension order would have worked. The possibility
G that the temporary suspension order might not work perfectly, as it had
H worked in the case of covert surveillance, is in itself no answer for not
I granting it now. All it means is that if challenged in court, the
J Government might be forced to apply for a further temporary validity
K order. That, again, would be a possible future development.

L
M 82. The point remains – that the stopgap solution the
N Government is now seeking may not be foolproof under all possible
O circumstances is no reason for rejecting it.

P
Q 83. As to the question of prematurity for the grant of a
R temporary suspension order in the absence of any actual by-election, first,
S the possibility of a by-election is always there. So the application is not
T entirely academic. There is some factual foundation for it. Secondly
U and more importantly, the prematurity argument cuts both ways. While
V it diminishes the need of the Government for a temporary suspension
order, it likewise reduces the prejudice or potential prejudice to the
applicants and/or prisoners or convicted persons in similar positions by
reason of the temporary suspension order. The two tend to neutralise
each other.

84. I do not see granting a temporary suspension order as threatening the rule of law in Hong Kong. As already explained, such an order will not immune the Government from legal liability. The Government will continue to enforce the voting restriction provisions in any forthcoming by-election at its own legal risk. And those affected can always resort to court for remedy. The rule of law is left wholly intact. On the other hand, permitting those who should not have been allowed to vote because of the reasonable restrictions that could have been put in place to restrict their rights to vote if the legislature had been given sufficient time to enact amending legislation would be a threat to the rule of law because it would mean that the right to vote accorded by art 21(b) would be exceeded in substance, although maybe not in form. And there would not be any legal remedy for any such excess, unlike the situation that the Government would be in when acting on the strength of a temporary suspension order, which would not provide any legal shield. Acting in excess of one's right or power is as bad, in terms of the rule of law, as being denied what one is due.

85. The problem faced by the Government and the legislature goes well beyond mere inconvenience. Whilst the jurisdiction to make a temporary validity order (if such jurisdiction exists in Hong Kong) may well be restricted to an apprehended situation that would pose a danger to the public, threaten the rule of law or result in the deprivation of benefits from deserving persons (*Koo Sze Yiu, supra*, at p 460, para 58), the circumstances justifying the exercise of the Court's jurisdiction to grant a temporary suspension order are not so limited.

86. The existence of a viable alternative to suspension is a reason for denying an order of temporary suspension. See *Koo Sze Yiu, supra*, at p457, para 42. But no viable alternative has been seriously suggested in the present case.

87. For all these reasons, I am prepared to grant a temporary suspension order in relation to each of the declarations that I have indicated the Court will grant in each application, up to 31 October 2009, save and except those relating to registration restrictions or to remanded persons.

88. If good cause can be shown, there is a possibility of extension of the temporary suspension orders: *Koo Sze Yiu, supra*, at p 458, para 44. For the avoidance of doubt, liberty to apply for an extension is given.

Temporary validity order

89. I have also mentioned the possibility of the respondents needing a temporary validity order. Whether there is jurisdiction to grant such an order is in doubt. There is also doubt as to whether this Court will still have jurisdiction to entertain a further application for a temporary validity order or whether it will have become *functus officio* by then, leaving aside the possible grant of an extension of the temporary suspension order which is quite a separate matter.

90. However, for what it is worth, as the matter has not been fully argued before me and is in any event a hypothetical situation lying

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in the future, I would grant the respondents liberty to apply, if they so wish, for a temporary validity order in respect of the declarations, such liberty being given without prejudice to the questions of whether the courts have jurisdiction to grant such an order and whether this Court is not *functus officio* to entertain such an application. This further liberty to apply is given at the express request of Mr Thomas. I believe given the two reservations I have described, granting the liberty to the respondents will do no harm.

91. During submission, Mr Pun has suggested the possibility of the respondents commencing *fresh* proceedings to ask the court to exercise its jurisdiction (if it has any) to grant such a temporary validity order. That has the attraction of avoiding any argument as to whether this Court will be *functus officio*. Another possibility I have mentioned is that in any future litigation brought against the Government, the Government could possibly ask the court for a temporary validity order.

92. But all this is in the future. For now, it only remains for me to thank counsel for their assistance.

(Andrew Cheung)
Judge of the Court of First Instance
High Court

Mr Hectar Pun and Mr Earl Deng, instructed by Tang, Wong & Chow,
for the applicants in HCAL 79/2008 and HCAL 83/2008

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C

Mr Michael Thomas SC and Mr Simon N M Young, instructed by the
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applications

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