

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 804 OF 2018

BETWEEN

CHOW TING

Petitioner

and

TENG YU-YAN ANNE (THE RETURNING OFFICER
FOR THE HONG KONG ISLAND CONSTITUENCY)

1st Respondent

AU NOK-HIN

2nd Respondent

Before: Hon Chow J in Court

Date of Hearing: 17 June 2019

Date of Judgment: 2 September 2019

J U D G M E N T

INTRODUCTION

1. Three principal questions arise for determination in this Election Petition, namely:

- (1) whether it is a substantive requirement that a person, to be validly nominated as a candidate in a Legislative Council election for a geographical constituency, should genuinely

intend to uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region in addition to having signed a declaration to that effect;

(2) whether a returning officer for a geographical constituency should, before he decides that a nomination of a candidate is invalid, give the candidate a reasonable opportunity to respond to the materials intended to be relied upon by the Returning Officer for the decision that the nomination is invalid;

(3) in the event the court holds that the 1st Respondent ought to have given the Petitioner such reasonable opportunity but failed to do so, whether –

(a) the irregularity should be regarded as a “material” irregularity; and

(b) if “yes”, whether the court should nevertheless dismiss the Election Petition on the ground that giving the Petitioner an opportunity to present her case would have made no difference to the outcome.

2. For reasons which I shall endeavour to explain below, my answers to the above questions are:

- (1) Question (1) – “Yes”;
- (2) Question (2) – “Yes”;
- (3) Question (3)(a) – “Yes”; and
- (4) Question (3)(b) – “No”.

BASIC FACTS

3. The Petitioner (“Ms Chow”) is a Hong Kong permanent resident and the holder of a Hong Kong Permanent Identity Card. She has been a registered elector since 2015. In January 2018, she decided to run for the Legislative Council by-election for the Hong Kong Island Geographical Constituency (“the By-election”) to be held on 11 March 2018. The 1st Respondent (“the Returning Officer”) was the returning officer for the By-election.

4. On 18 January 2018, Ms Chow submitted a duly completed and signed nomination form (“the Nomination Form”) to the Returning Officer in order to run as a candidate for the By-election. The Nomination Form contained a declaration (“the Declaration”) by Ms Chow as follows –

“I declare that I will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region”.

5. In the Nomination Form, Ms Chow stated that she was affiliated with “Demosistō” (香港眾志). Accompanying the Nomination Form was a promissory oath (“the Promissory Oath”) signed by Ms Chow on 18 January 2018, in which she stated that –

“if elected as a Member of the Legislative Council in the above by-election, I will not do anything during my term of office that would result in any one of the conditions specified in section 40(1)(b)(iii) of the Legislative Council Ordinance (Cap 542).”

6. Ms Chow also submitted a duly signed confirmation form (“the Confirmation Form”) dated 18 January 2018 to the Returning Officer, in which she declared and confirmed, *inter alia*, the following –

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“1. In respect of the above by-election, I have, in accordance with section 40(1)(b)(i) of the Legislative Council Ordinance (Cap. 542), already declared in the nomination form that I will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region.

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2. I understand that to uphold the Basic Law means to uphold the Basic Law including the following provisions:

D

Article 1

The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China.

E

Article 12

The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government.

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Article 159(4)

No amendment to this Law shall contravene the established basic policies of the People's Republic of China regarding Hong Kong.

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3. I understand that in accordance with section 103 of the Electoral Affairs Commission (Electoral Procedure) (Legislative Council) Regulation (Cap. 541D), a person who, in an election related document, makes a statement which that person knows to be false in a material particular or recklessly makes a statement which is incorrect in a material particular or knowingly omits a material particular from an election related document commits an offence. I also understand that this confirmation form will be made available for public inspection together with the nomination form.

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4. I hereby confirm that I understand the content of paragraph 2 above and, in particular, the reference to Article 1, Article 12 and Article 159(4) of the Basic Law, and, on that basis, I have declared in the nomination form that I will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region.”

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7. On 24 January 2018, the Returning Officer informed Ms Chow that it had come to her (the Returning Officer's) notice from a

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A media report that she (Ms Chow) had previously held UK citizenship but had subsequently renounced it, and asked her to provide documentary proof of the same. On 25 January 2018, Ms Chow provided to the Returning Officer a letter from the UK Home Office to Bond NG Solicitors dated 29 December 2017 confirming that Ms Chow had renounced her British Citizenship. There were no further inquiries raised by the Returning Officer with Ms Chow regarding the validity of the Nomination Form or her nomination as a candidate in the By-election.

8. By a “Notice of Decision as to Validity of Nomination” dated 27 January 2018 (“the Decision”), the Returning Officer informed Ms Chow that her nomination as a candidate in the By-election had been declared by her (the Returning Officer) to be invalid. Essentially, the Returning Officer made the Decision on the ground that she was not satisfied that Ms Chow had duly complied with Section 40(1)(b)(i) of the *Legislative Council Ordinance*, Cap 542 (“the Ordinance”). Attached to the Notice of Decision was a document titled “Reasons for Ruling CHOW Ting’s Nomination as Invalid” (“Reasons for Decision”), a copy of which is attached to this judgment as “Annex I”.

9. As a result of the Decision, Ms Chow was precluded from standing as a candidate in the By-election. The By-election took place on 11 March 2018, with 4 candidates contesting in the By-election. The voter turnout rate was 43.80%, with 272, 294 valid votes cast. On 12 March 2018, the Returning Office published a “Notice of Result of Election” in the Gazette declaring the 2nd Respondent (Au Nok Hin) to be elected for the Hong Kong Island Geographical Constituency.

A 10. On 3 May 2018, Ms Chow commenced the proceedings A
B herein to challenge the Decision. In the Election Petition, Ms Chow B
C seeks the court's determination of (*inter alia*) the following questions: C

D (1) whether Au Nok Hin declared by the Returning Officer for D
E the Hong Kong Island Geographical Constituency to be E
F elected in the Notice of Result of Election was duly elected; F
G and G

H (2) if the court determines that Au Nok Hin was not duly elected, H
I whether the Petitioner or some other person was duly elected I
J in his place. J

K 11. The substantive hearing of the Election Petition took place K
L on 17 June 2017. On behalf of Ms Chow, Mr Paul Shieh, SC raised two L
M principal arguments in support of the Election Petition: M

N (1) By virtue of Ms Chow having signed the Declaration N
O contained in the Nomination Form, the Returning Officer O
P ought to have regarded Ms Chow as having satisfied the P
Q requirements of Section 40(1)(b)(i) of the Ordinance. Q

R (2) Even if there is a substantive requirement that Ms Chow R
S should genuinely intend to uphold the Basic Law and pledge S
T allegiance to the HKSAR, the Returning Officer was not T
U entitled to reject Ms Chow's nomination without giving her a U
V reasonable opportunity to respond to the materials that the V
Returning Officer said were contrary to an intention to carry
out the obligations under the Declaration.

A By reason of the aforesaid, the court is invited to find that material A
B irregularities have occurred in relation to the By-election within the B
C meaning of Section 61(1)(a)(iv) of the Ordinance¹. C

D *LEGAL REGIME FOR VALID NOMINATION AS A CANDIDATE IN A D*
E *LEGISLATIVE COUNCIL ELECTION* E

F 12. Section 37(1) of the Ordinance sets out the basic eligibility F
G criteria for a person to be nominated as a candidate in an election for a G
H geographical constituency, including requirements as to age, ordinary and H
I permanent residence in Hong Kong, and Chinese citizenship. I

J 13. Section 40 of the Ordinance sets out the requirements for a J
K valid “nomination” of a person as a candidate in an election for a K
L constituency. In particular, Section 40(1)(b)(i) provides that a person is L
M not validly nominated unless the nomination form includes or is M
N accompanied by – N

O “a declaration to the effect that the person will uphold the Basic O
P Law and pledge allegiance to the Hong Kong Special P
Q Administrative Region”. Q

R 14. Article 104 of the Basic Law (“BL104”) is also relevant for R
S the purpose of the present discussion. It states as follows: S

T “When assuming office, the Chief Executive, principal officials, T
U members of the Executive Council and of the Legislative U
V Council, judges of the courts at all levels and other members of V
the judiciary in the Hong Kong Special Administrative Region must, in accordance with law, swear to uphold the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China and swear allegiance to the Hong Kong Special Administrative Region of the People’s Republic of China.”

T ¹ See paragraph 3 of Mr Shieh’s Submissions for the Petitioner dated 5 June 2019. T
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A 15. The requirement for a valid nomination under
B Section 40(1)(b)(i) of the Ordinance must now be read together with
C BL104 because, on 7 November 2016, the Standing Committee of the
D National People’s Congress of the People’s Republic of China (“the
E NPCSC”) issued an interpretation of BL104 (“the BL104 Interpretation”),
F paragraph 1 of which states as follows:

“To uphold the Basic Law of the Hong Kong Special
Administrative Region of the People’s Republic of China’ and
to bear ‘allegiance to the Hong Kong Special Administrative
Region of the People’s Republic of China’ as stipulated in
Article 104 of the Basic Law of the Hong Kong Special
Administrative Region of the People’s Republic of China, are
not only the legal content which must be included in the oath
prescribed by the Article, but also the legal requirements and
preconditions for standing for election in respect of or taking up
the public office specified in the Article.”

J *QUESTION (1): WHETHER SIMPLY SIGNING THE DECLARATION IS*
K *SUFFICIENT TO SATISFY THE REQUIREMENT OF*
L *SECTION 40(1)(b)(i) OF THE ORDINANCE*

L 16. Question (1) raises the question of whether the requirement
M of a candidate in a Legislative Council election to uphold the Basic Law
N and pledge allegiance to the HKSAR under Section 40(1)(b)(i) of the
O Ordinance is a “formal” or a “substantive” requirement. Mr Shieh
P argues that the requirement is a formal one and is fully complied with by
Q a candidate by simply signing the relevant declaration contained in a
R nomination form. This, says Mr Shieh, is the plain meaning and effect
S of the Section 40(1)(b)(i), which does not impose any requirement that
T the candidate should *in fact* possess any intention to uphold the Basic
U Law or pledge allegiance to the HKSAR. Mr Shieh further submits that
V the subsection does not even impose any requirement on the candidate.
It only concerns what should be stated *on the form*. The subsection

A which ties the declaration to the candidate is Section 40(2) and the
B requirement there is only that he must “sign” the declaration².

C 17. The substance of this argument of Mr Shieh has recently
D been considered and rejected by Au J (as he then was) in *Chan Ho Tin v*
E *Lo Ying Ki Alan* [2018] 2 HKLRD 7. At [30] of his judgment, Au J
F identified two contentions raised by leading counsel on behalf of
Mr Chan in that case which are relevant to the present discussion:

G “(1) Properly construed with all the relevant statutory
H provisions, the Declaration requirement under
I section 40(1)(b)(i) is only a requirement in formality
J which is complied with by the mere signature of the
K nominee on the nomination form. Mr Chan had signed
the Declaration and thus complied with the
requirement. It was therefore unlawful and wrong for
the RO to look to matters relating to whether Mr Chan
in fact or had the truthful intention to uphold the
Basic Law in deciding whether Mr Chan had complied
with the requirement (‘the Declaration Requirement
Argument’).

L (2) Properly construed with the relevant statutory
M provisions, in determining whether Mr Chan had
N satisfied the Declaration requirement under
section 40(1)(b)(i), the RO in any event did not have
any statutory power to look beyond the mere signature
of the nominee and take into account those materials
that he had taken into account in the present case
O (‘the RO’s Power Argument’).”

P 18. At [100] of his judgment, the learned Judge rejected the
Declaration Requirement Argument:

Q “For all the above reasons, I reject Declaration Requirement
R Argument and conclude that on a proper construction of
section 40(1)(b)(i):

S (1) The Declaration requirement is objectively intended by
the legislature to be a substantive one, which is only

T ² See paragraph 8 of Mr Shieh’s Submissions for the Petitioner.

A satisfied if the nominee makes the Declaration A
B genuinely and truthfully, in that at the time of making B
C the Declaration, the nominee *objectively* has a genuine
D and truthful intention to uphold the Basic Law and
E pledge allegiance to the HKSAR.

C (2) The Declaration requirement is *prima facie* complied C
D with when the nomination form is submitted with the
E signed Declaration, unless there are cogent, clear and
F compelling materials to show *objectively and plainly*
G that the nominee does not have that necessary intention
H to uphold the Basic Law and pledge allegiance to the
I HKSAR.”

G 19. At [118] of his judgment, the learned Judge rejected the
H RO’s Power Argument:

H “For these reasons, I reject the RO’s Power Argument and H
I conclude that the RO had the relevant statutory power and was I
J under a statutory duty to determine whether Mr Chan’s J
K nomination complied with the substantive Declaration K
L requirement. In doing so, he was entitled to look at matters L
M beyond the formal compliance of the nomination form to come
N to a view as to whether Mr Chan at the time of the nomination
O intended to uphold the Basic Law and to pledge allegiance to
P the HKSAR.”

L 20. In short, Au J held that the requirement under L
M Section 40(1)(b)(i) of the Ordinance is a substantive, and not a mere M
N formal, requirement, and is satisfied only if, by an objective assessment, N
O the candidate genuinely and truthfully intends to uphold the Basic Law O
P and pledge allegiance to the HKSAR.

P 21. Mr Shieh submits that this court is not bound by the P
Q judgment of Au J in *Chan Ho Tin*, and it is under a duty to make a Q
R decision on the merits of the submissions put before the court, giving R
S appropriate weight, but no more, to the authorities which may be S
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A persuasive but are not binding. He relies on *Re Taylor (A Bankrupt)* [2007] Ch 15 at [46] in support of this submission³.

22. I accept, as a matter of principle, that the judgment of Au J in *Chan Ho Tin*, being a judgment of a court of co-ordinate jurisdiction, is not strictly binding on me. Nevertheless, as stated by Deputy High Court Judge Robert Tang QC (as he then was) in *Kan Fat-tat v Kan Yin-tat* [1987] HKLR 516 at 534, I should follow the judgment of Au J as a matter of judicial comity unless I am *convinced* that the judgment is wrong. I am far from being so convinced. In any event, I consider this issue to be conclusively settled by paragraph 1 of the BL104 Interpretation. That interpretation is binding on this court. Mr Shieh submits that the BL104 Interpretation only concerns the oath taken upon assuming the office of a member of the Legislative Council, but does not touch on *candidacy for election*⁴. This submission seems to me to be contrary to the express statement in paragraph 1 of the BL104 Interpretation, *viz* "... also the legal requirements and precondition for standing for election in respect of or taking up the public office specified in the Article". Mr Shieh further argues that if the BL104 Interpretation purports to impose substantive requirements on candidacy for election, it would go beyond the permissible powers of the NPCSC. Leaving aside the question of the court's competence to determine this issue, there is, in any event, no expert evidence on PRC law on the scope or width of the interpretative powers of the NPCSC. In the absence of such evidence, I do not see how Mr Shieh's argument can even get off the ground.

³ See paragraph 5 of Mr Shieh's Submissions for the Petitioner.

⁴ See paragraph 17(1) of Mr Shieh's Submissions for the Petitioner.

A 23. In all, I reject the contention that the requirement of a
B candidate in a Legislative Council election to uphold the Basic Law and
C pledge allegiance to the HKSAR under Section 40(1)(b)(i) of the
D Ordinance is a mere “formal” requirement which is satisfied by the
E candidate by simply signing a declaration to that effect in the nomination
F form.

F 24. There is one other matter that I should mention in passing.
G In *Chan Ho Tin*, Au J expresses the view that, in order to overcome the
H *prima facie* evidence of the Declaration, there has to be “cogent, clear and
I compelling materials to show *objectively and plainly* that the nominee
J does not have [the] necessary intention to uphold the Basic Law and
K pledge allegiance to the HKSAR”. I have no difficulty with this view if
L it is merely intended to emphasise the importance of the right under
M consideration, namely, the right of a person to stand in a Legislative
N Council election, and hence the need for caution before a returning officer
O decides that the candidate’s nomination is invalid. However, if it is
P intended to lay down a legal requirement on the quality of the materials
Q required to overcome the *prima facie* evidence of the Declaration, it could
R lead to an endless or fruitless debate on whether the materials are
S sufficiently “cogent, clear and compelling” for this purpose, and whether
T they “plainly” establish that the candidate does not have the necessary
U intention to uphold the Basic Law and pledge allegiance to the HKSAR.
V As I see it, the question for the returning officer is simple enough, namely,
whether the candidate genuinely and truthfully intends to uphold the
Basic Law and pledge allegiance to the HKSAR, although it may not be
easy to answer that question on the facts of any given case. It is open to
reasonable debate whether it is a legal requirement that the contrary
materials required to overcome the *prima facie* evidence of the

A Declaration must satisfy the abovementioned qualification. Since this
B issue does not arise for determination in the present case, I would prefer
C to leave it open until the time when an actual case comes up which
requires its determination.

D *QUESTION (2): WHETHER MS CHOW SHOULD HAVE BEEN*
E *GIVEN A REASONABLE OPPORTUNITY TO RESPOND TO THE*
F *MATERIALS THAT THE RETURNING OFFICER INTENDED TO RELY*
G *UPON TO DECIDE THAT HER NOMINATION WAS INVALID*

H 25. As can be seen from the Reasons for Decision, the Returning
Officer, in coming to her decision that Ms Chow's nomination was
invalid, relied upon the following matters:

- I (1) Ms Chow's political affiliation with Demosistō;
J (2) the doctrine of "democratic self-determination" ("the
K Doctrine") as promoted by Demosistō, which the Returning
L Officer considered, upon legal advice, to be inconsistent
with the principle of "one country two systems" as enshrined
M in and implemented by the Basic Law;
N (3) the fact that Ms Chow was one of the founding members of
O Demosistō and had taken on different roles as representative
of Demosistō since its establishment, eg as its Deputy
P Secretary and Standing Committee Member;
Q (4) the fact that Ms Chow had not dissociated herself with
R Demosistō and her different roles as representative of
S Demosistō showed her continued subscription to the
T Doctrine;
U (5) the recent media reports which did not indicate that
V Ms Chow had changed her intention or disowned her
subscription to the Doctrine;

- A (6) the fact that Ms Chow declared in the Nomination Form her
B political affiliation with Demosistō even though such
C declaration was “optional”, which amounted to a clear and
D explicit statement that, at the time when she filled in the
E Nomination Form, she was a representative of Demosistō
F and subscribed to the Doctrine; and
- E (7) the developments since the 2016 Legislative Council
F election, including the BL104 Interpretation.

G 26. In short, notwithstanding the fact that Ms Chow had made
H the Declaration and signed the Confirmation Form, the Returning Officer
I was not satisfied that she genuinely and truthfully intended to uphold the
J Basic Law and pledge allegiance to the HKSAR. Accordingly,
K Ms Chow failed to comply with the requirement of Section 40(1)(b)(i) of
L the Ordinance, and her nomination was not valid.

M 27. There is no dispute that the Returning Officer did not give
N Ms Chow any reasonable opportunity to respond to the materials relied
O upon by her in reaching the Decision that Ms Chow’s nomination was
P invalid. The Returning Officer’s failure to do so is contrary to the
Q principle of natural justice or procedural fairness, which is applicable to a
R decision on whether a nomination as a candidate in a Legislative Council
S election is valid or not, as confirmed by Au J in *Chan Ho Tin*, at [101]:

T “... when a signed Declaration is provided with the nomination
U form, procedural fairness dictates that the nominee must
V generally be given a reasonable opportunity to respond to any
materials that the Returning Officer regards as negating a
genuine intention on the part of the nominee to make the
declaration, and the Returning Officer should take into account
the responses in deciding whether there are such cogent, clear
and compelling materials to show *objectively* that the nominee
does not have the requisite intention.”

A 28. The Returning Officer's reason for denying Ms Chow an
B opportunity to be heard appears in paragraphs 26 and 27 of her Affidavit
C dated 31 August 2018, as follows:

D "26. I refer to paragraphs 35 and 38 of the Affidavit of
E Chow Ting stating that I was obliged to afford the
F Petitioner a reasonable opportunity to deal with and
respond to any materials or allegation on which
I intended to rely on in arriving at a decision adverse to
her and that the Petitioner had never been given an
opportunity to respond to the allegations in the Reasons
for Decision.

G 27. In view of the matters set out above, I was satisfied that
H there was cogent and clear evidence to show that the
I Petitioner did not genuinely and truly intend to uphold
J the Basic Law and pledge allegiance to the HKSAR
K when she signed the Declaration and the Confirmation
Form and, after consulting legal advice, I was satisfied
that the cogent and clear evidence would be the
sufficient basis for the determination of the validity of
the Petitioner's nomination and it was not necessary to
invoke section 10(10) of the EAC Regulation to require
the Petitioner to furnish any other information."

L 29. In my view, even if the Returning Officer considered that she
M had clear and cogent evidence that Ms Chow did not genuinely and
N truthfully intend to uphold the Basic Law and pledge allegiance to the
O HKSAR, she should still have given Ms Chow an opportunity to refute
P such evidence and explain her position with a view to persuading the
Q Returning Officer to come to a different conclusion. The right to be
R heard is an important procedural safeguard which should not be lightly
S displaced. There was, so far as one can see, no particular urgency for
T the Returning Officer to reach a decision on the validity of Ms Chow's
U nomination which made it impracticable for her to give Ms Chow a
V reasonable opportunity to respond to the materials or answer the
allegations against her. I consider that there was a breach of the
principle of natural justice or procedural fairness in the present case,

A contrary to the ruling of Au J in *Chan Ho Tin*, although it would be right A
B to point out that the judgment of his Lordship was handed down on 13 B
C February 2018, after the Returning Officer had made the Decision on 27 C
January 2018. C

D *QUESTION (3): WHETHER THERE WAS A MATERIAL* D
E *IRREGULARITY IN THE BY-ELECTION AND WHETHER THE* E
F *OUTCOME WOULD HAVE BEEN THE SAME IN ANY EVENT* F

F 30. On behalf of the Returning Officer, Mr Johnny Mok, SC F
G argues that even if Ms Chow was given an opportunity to explain her G
H position, as she has now done in her 1st Affidavit dated 3 May 2018, it H
I would still be clear that she did not satisfy the requirement of I
J Section 40(1)(b)(i) of the Ordinance and the outcome would have been J
K the same. Hence, says Mr Mok, the irregularity in the By-election (if K
L any) was not “material” or, alternatively, if there was “material L
M irregularity”, the court could and should decide the matter afresh by M
N taking Ms Chow’s explanation into account and dismiss the Election N
O Petition. O

M 31. Guidance on whether an irregularity in an election should be M
N regarded as “material” can be found in the judgment of Andrew Cheung J N
O (as he then was) in *Lee Chun Hung v Sin Kin Man Francesca* [2011] 3 O
P HKLRD 175, at [22]: P

Q “My view is that in order to determine whether an irregularity Q
R is material, all relevant circumstances should be taken into R
S account and that judgment should not be made solely on the S
T basis of whether the irregularity complained of has affected the T
U result of the election in any ‘material’ way. In my judgment, U
V what the term ‘material irregularity’ is targeted at are the V
significance and gravity of the irregularity in question, considered in the light of the cardinal principle that an election

must be conducted fairly, justly and openly; its effect on the result of the election is not the only consideration.”

32. In my view, the principle of natural justice is an important principle which ought generally to be observed in administrative decisions. Moreover, one has to bear in mind the nature of the decision under consideration. It relates to the right of a Hong Kong permanent resident to stand as a candidate in a Legislative Council election, which is a right protected by Article 26 of the Basic Law and Article 21 of the Hong Kong Bill of Rights. While the right is not absolute and can be restricted by law, the deprivation of such right is a serious matter. I consider that the Returning Officer’s failure to give Ms Chow a reasonable opportunity to put forward her case before she made the Decision is a “material” irregularity in the By-election.

33. The more difficult question is whether the court should nevertheless dismiss the Petition on the basis that the outcome would have been the same even if the Returning Officer had given Ms Chow a reasonable opportunity to put forward her case.

34. As can be seen from the Reasons for Decision, the Returning Officer came to the conclusion that Ms Chow did not genuinely and truthfully intend to uphold the Basic Law and pledge allegiance to the HKSAR because she subscribed to the doctrine of “democratic self-determination” (民主自決) as advocated or promoted by Demosistō. At paragraph 4 of the Reasons for Decision, it was pointed out that the doctrine encapsulated 3 main principles and a 5-point plan. In particular, it advocated the application of the principle of “sovereignty of the people” (主權在民) after 30 June 2047, and proposed that the future of

A Hong Kong should be determined through a constitutionally effective A
B referendum by Hong Kong people (所以香港眾志主張透過具憲制效力 B
C 的前途公投，由香港人共同認受香港主權和憲制)。 At paragraph 5 of C
D the Reasons for Decision, the Returning Officer stated that, having D
E obtained legal advice, she was satisfied that the doctrine of “democratic E
F self-determination” as promoted by Demosistō was inconsistent with the F
principle of “one country two systems” as enshrined in and implemented
by the Basic Law.

G 35. In her 1st Affidavit, Ms Chow seeks to explain her G
H understanding of the concept of “democratic self-determination” (“the H
I Explanation”), as follows: I

J “[45] ... I shall set out below the explanation that I would J
K have given to the 1st Respondent had I been allowed a K
reasonable opportunity to address the materials relied
on by the 1st Respondent before she came to the
Decision ...

L [46] First, I wish to explain my understanding of the concept L
M of ‘democratic self-determination’, and why it is M
entirely compatible with my intention to ‘uphold the BL
and pledge allegiance to HKSAR’.

N [47] I wish to emphasize first and foremost that support for N
O ‘democratic self-determination’ does not mean support O
P for the secession, or ‘independence’, of Hong Kong P
from PRC. Neither Demosistō nor myself supports the
secession or ‘independence’ of Hong Kong from the
PRC. Indeed, both Demosistō and I support
One Country Two Systems (‘OCTS’).

Q [58] The above materials are entirely consistent with my Q
R understanding that Demosistō’s support for ‘democratic R
S self-determination’ has always been directed at (1) S
T giving the people of Hong Kong a chance to participate T
U in the determination of their future, and (2) providing U
V the sovereign with an opportunity to care more and pay V
more regard to the views of the Hong Kong [people] on
the same.

A	[59]	It has never been the intention of Demosistō (and certainly not my intention) to hold a referendum by itself. Rather, the intention is to persuade the HKSAR Government to hold a referendum on Hong Kong's future so that the referendum would enjoy the international recognition and constitutional status associated with a government-held referendum ...	A
B			B
C			C
D	[60]	It is the aspiration of Demosistō (including myself) that even though the referendum may not be legally binding (indeed few, if any, referenda, even if held by a Government, is legally binding in the sense that the Government is legally bound to abide by the result of the referendum), the result of such a referendum would be respected by both the HKSAR and the Chinese Governments. It will be for the HKSAR and Chinese Governments to determine the way forward in view of the collective views of the people of Hong Kong as expressed through the referendum. I believe that this is consistent with OCTS as well as the principles of democracy and self-determination.	D
E			E
F			F
G			G
H			H
I	[62]	It is important to emphasize that in my understanding, Demosistō's support for the inclusion of 'independence' as an option (provided that it has sufficient support at the time of the proposed referendum) should not be equated with its (or any of its founders') support for the independence of Hong Kong. As explained above, Demosistō does not support the independence of Hong Kong, nor will I personally advocate for independence under any circumstances...	I
J			J
K			K
L			L
M	[63]	If (for the sake of argument) the majority of the referendum is in favour of 'independence', then even if the referendum is not legally binding and that 'Hong Kong independence' is regarded to be constitutionally, legally and politically impossible, then surely such a result should still provide a warning sign and serious food for thought for the HKSAR Government and the Central People's Government as to why there were so many people who harboured such discontent against the motherland that they opted for independence. Politically, any responsible government and sovereign should take such discontent into account seriously in formulating future plans for Hong Kong and the Hong Kong people by, for example conferring a greater degree of autonomy to Hong Kong...	M
N			N
O			O
P			P
Q			Q
R			R
S	[64]	Further, through such referendum, Hong Kong people would be regarded as being able to participate in	S
T			T
U			U
V			V

A mapping their future. It is not possible for me now, A
standing in 2018, to speculate or go into detailed B
discussions as to the sort of autonomy that Hong Kong B
should have after 2047 and the kind of political C
manoeuvring involved, for the simple reason that there C
are so many unknowns and imponderables between now
and the time of any such referendum ...

D [67] In summary, I have always intended to uphold the BL D
and pledge allegiance to the HKSAR. I verily believe D
that my support of Demosistō's campaign for E
'democratic self-determination' does not diminish or E
otherwise affect my intention to uphold the BL and
pledge allegiance to the HKSAR of the PRC in any F
way." F

G 36. The question of whether the Returning Officer would have G
H come to the same conclusion even if she had given Ms Chow a chance to H
I put forward the Explanation is a hypothetical one. The starting point I
J must be the fundamental principle that the HKSAR is an inalienable part J
K of the People's Republic of China. This is stated in Article 1 of the K
L Basic Law. Regardless of whether the Basic Law will apply for only 50 L
M years as from 1 July 1997, or whether it may continue to apply (with or M
N without modification) after 30 June 2047, this starting point is a legal fact N
O which underlines the establishment of the HKSAR under the Basic Law O
P and has to be accepted by anyone who wishes to assume the public office P
Q of a member of the Legislative Council. Any person who advocates for Q
R the independence of Hong Kong, or for a process of "self-determination" R
S by Hong Kong People (in the ordinary sense in which that expression is S
T used), whether before or after 30 June 2047, cannot genuinely and T
U truthfully intend to uphold the Basic Law and pledge allegiance to the U
V HKSAR. V

S 37. It is also important to bear in mind that Hong Kong law does S
T not provide for important issues to be determined by "referendum". The T
U
V

A concept of referendum has no basis under our legal system. In any event, A
to advocate the determination of Hong Kong's future by a constitutionally B
effective, or binding, referendum by Hong Kong people could potentially C
lead to the secession or independence of Hong Kong and would therefore D
be incompatible with the fundamental principle that the HKSAR is an E
inalienable part of the People's Republic of China.

F 38. Nevertheless, it would appear from Ms Chow's Explanation F
that she only supports what may be described as a watered-down version G
of the doctrine of self-determination involving the use of a non-binding H
referendum essentially to forge public opinion and put pressure on the I
Central People's Government and HKSAR Government when J
formulating future plans for Hong Kong and Hong Kong people with a K
view to pushing for a greater degree of autonomy for Hong Kong.

L 39. Had the Returning Officer afforded Ms Chow an opportunity L
to put forward her case and elicited a response from Ms Chow along the M
lines of the Explanation, it might well be the case that the Returning N
Officer would still have rejected it as being incompatible with the O
principle of "one country two systems", and concluded that Ms Chow did P
not genuinely and truthfully intend to uphold the Basic Law and pledge Q
allegiance to the HKSAR. However, that is a matter for the Returning R
Officer to decide, at least in the first instance. In this regard, I note that S
even with the Explanation now proffered by Ms Chow, the Returning T
Officer has not expressed a view on whether it is incompatible with the U
principle of "one country two systems" or the principle that the HKSAR V
is an inalienable part of the People's Republic of China. Neither has the
Returning Officer stated that she would have come to the same
conclusion even if she had received and considered Ms Chow's

A Explanation before making the Decision. In any event, these matters A
B ought to be considered by the Returning Officer after hearing Ms Chow's B
C representations and prior to making the Decision, and not retrospectively C
after the event.

D 40. Mr Shieh has drawn my attention to the judgment of D
E Cheung JA in *Leung Fuk Wah v Commissioner of Police* [2002] 3 E
F HKLRD 653 at [39], in which reference was made to the judgment of F
G Bingham LJ (as he then was) in *R v Chief Constable of Thomas Valley, ex G
H p Cotton* [1990] IRLR 344 and his article titled "Should Public Law H
I Remedies be Discretionary" to explain why it would be rare that someone I
who was denied the opportunity to be heard would be held not to have
been treated unfairly:

J "In *R v Chief Constable of Thomas Valley, ex p Cotton* [1990] J
K IRLR 344, Bingham L.J., who accepted that the applicant was K
L given a full opportunity to present his case and was not treated L
M unfairly, stated that the circumstances in which someone who M
N was denied the opportunity to present his case and yet held not N
O to be unfair should be rare. He gave six reasons for this which O
P he repeated in an article entitled '*Should Public Law Remedies P
Q be Discretionary*' 1991 Public Law 64: Q
R
S
T
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- (1) Unless the subject of the decision has had an opportunity to put his case it may not be easy to know what case he could or would have put if he had had the chance.
- (2) As memorably pointed out by Megarry J in *John v Rees* [1970] Ch 345 at p.402, experience shows that that which is confidently expected is by no means always that which happens.
- (3) It is generally desirable that decision-makers should be reasonably receptive to argument, and it would therefore be unfortunate if the complainant's position became weaker as the decision-maker's mind became more closed.
- (4) In considering whether the complainant's representations would have made any difference to the

outcome the court may unconsciously stray from its proper province of reviewing the propriety of the decision-making process into the forbidden territory of evaluating the substantial merits of a decision.

(5) This is a field in which appearances are generally thought to matter.

(6) Where a decision-maker is under a duty to act fairly the subject of the decision may properly be said to have a right to be heard, and rights are not to be lightly denied.”

41. The learned judge was there discussing the matter in the context of an application for judicial review. Assuming, without deciding, that the court also has a discretion to refuse to grant relief in an election petition where a material irregularity has been found (which Mr Shieh has not argued otherwise), it seems to me that similar considerations should apply when the court comes to decide whether to exercise the discretion to refuse to grant relief.

42. While I would not rule out the possibility that the court may, in some exceptional circumstances, find that the fairness and integrity of an election has not been compromised even where a candidate was denied an opportunity to be heard prior to his nomination being declared to be invalid by a returning officer, having regard to the circumstances of the present case as set out in paragraphs 30 to 39 above, I do not consider this to be an appropriate one for the court to pre-empt the decision of the Returning Officer on whether to (i) accept the Explanation of Ms Chow, or (ii) find that it would have made no difference to the outcome had she given Ms Chow a reasonable opportunity to put forward the Explanation prior to making the Decision. Accordingly, I do not consider it appropriate for the court to exercise its discretion to refuse to grant relief in the present case.

DISPOSITION

43. For the foregoing reasons, I allow the Election Petition, and declare that (i) Au Nok Hin was not duly elected as a member of the Legislative Council for the Hong Kong Island Geographical Constituency as stated in the Notice of Result of Election published in the Gazette on 12 March 2018, and (ii) neither the Petitioner nor any of the candidates standing in the By-election was duly elected in his place.

44. The 1st Respondent shall pay two-third of the costs of the Petitioner to be taxed if not agreed, with certificate for two counsel (to reflect the fact that the Petitioner has failed in one of the two principal issues argued at the hearing, namely, the first issue referred to in paragraph 11(1) above). The Petitioner's own costs are to be taxed in accordance with Legal Aid Regulations.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Mr Paul Shieh, SC and Mr Jeffrey Tam, instructed by Ho Tse Wai & Partners, assigned by Director of Legal Aid, for the Petitioner

Mr Johnny Mok, SC and Mr Adrian Lai and Mr Kevin Lau, instructed by Department of Justice, for the 1st Respondent

The 2nd Respondent was absent

Reasons for Ruling CHOW Ting’s Nomination as Invalid

1. Section 40(1)(b)(i) of the Legislative Council Ordinance provides that a candidate is not validly nominated unless the nomination form includes a declaration to the effect that the candidate will uphold the Basic Law (“BL”) and pledge allegiance to the Hong Kong Special Administrative Region (“HKSAR”). The declaration is contained in section 5 of Part II of the nomination form. Miss CHOW submitted the duly signed declaration on 18 January 2018 together with the Confirmation Form.

2. In addition, the Electoral Affairs Commission has prepared a Confirmation Form for the use of the Returning Officer, in order that every candidate may confirm that in signing the relevant declaration in the nomination form, he/she has clearly understood Articles 1, 12 and 159(4) of the BL, the legal requirements and obligations. According to the content of the Confirmation Form, a candidate may confirm that he/she understands that to uphold the BL means to uphold the BL including the aforesaid articles. Miss CHOW submitted a Confirmation Form duly signed by her on 18 January 2018.

3. It has also come to my attention from the nomination form submitted that Miss CHOW indicates her political affiliation with Demosistō.

4. According to the information promulgated by Demosistō at its website: <https://www.demosisto.hk>, Demosistō adopts “democratic

A self-determination” (民主自決) as its “最高綱領”. The Doctrine of A
B “democratic self-determination” as promoted by Demosistō was B
C explained in an article published in Ming Pao dated 27 June 2016 C
D entitled “香港眾志：民主自決此際起航 — 我們的自決運動路線 D
E 圖”. The article is also currently available at the website of E
F Demosistō. Demosistō’s Doctrine of democratic self-determination F
G was encapsulated in 3 main principles (“3 個主張”) and 5 point plan G
H for the democratic movement for the self-determination of the Hong H
I Kong people (民主自決運動五大方向) (“5 point plan”). In I
J particular, it advocates the application of the principle of J
K “sovereignty of the people” (主權在民), namely, “「50 年不變」後 K
L 的前途問題應以香港人的意願為最終依歸。所以香港眾志主張 L
M 透過具憲制效力的前途公投，由香港人共同認受香港主權和憲制。 M
N 即使香港眾志並不提倡港獨，但為着體現「主權在民」的理念， N
O 我們同意公投應該包括獨立和地方自治等選項，而不管未來的主 O
P 權狀態和憲政框架如何改變，大前提必然是要給予港人實踐民主 P
Q 自主自治。” Q

N 5. Having obtained legal advice, I am satisfied that the Doctrine of N
O “democratic self-determination” (民主自決), as promoted by O
P Demosistō and as reported in detail in the above article, is P
Q inconsistent with the principle of “one country two systems” as Q
R enshrined and implemented under the BL.

R 6. It is widely reported that Miss CHOW is one of the founding R
S members of Demosistō. Miss CHOW is also reported to have taken S
T different roles as representatives of Demosistō since its T
U
V

A establishment, e.g. Deputy Secretary (副秘書長) and Standing
B Committee member (常委). As a founding member of Demosistō,
C Miss CHOW's intention at the time of founding the organization
D must be to promote and advocate the Doctrine of "democratic
E self-determination" (民主自決) as reflected in Demosistō's "最高綱
F 領". The fact that Miss CHOW has not disassociated herself with
G Demosistō since then and has held different key roles to represent
H Demosistō shows that she continues to subscribe to the Doctrine.
I Therefore, *prima facie*, Miss CHOW does not uphold the BL and
J bear allegiance to the HKSAR, because of her association with
K Demosistō, in the sense of her being its founder and representative
L who subscribes to a particular version of "self-determination" as
M reflected in the Doctrine.
N

7. The recent media reports do not indicate that Miss CHOW has
K changed her intention or disowned any subscription of hers to the
L Doctrine. In fact, such materials positively confirm Miss CHOW's
M association with Demosistō and also indicate that Miss CHOW
N continues to represent Demosistō when running in this Legislative
O Council By-election.

8. Miss CHOW declared in the nomination form her political affiliation
P with Demosistō. The indication of "political affiliation" is an
Q optional entry in the nomination form. Yet Miss CHOW chose to
R explicitly state her political affiliation as she did. By choosing to
S state her political affiliation with Demosistō in the nomination form,
T Miss CHOW made a clear and explicit statement that, at the time
U when she filled in the nomination form, she was a representative of
V

A Demosistō and subscribed to its Doctrine of “democratic A
B self-determination”. As Miss CHOW represents Demosistō in this B
C Legislative Council By-election and subscribes to the Doctrine, I am C
D satisfied that she does not and does not have the intention to uphold D
the BL and pledge allegiance to the HKSAR.

E 9. Miss CHOW signed both the declaration required under section E
F 40(1)(b)(i) of the Legislative Council Ordinance and the F
G Confirmation Form. While the signed Confirmation Form is one of G
H the relevant factors to be taken into account, it remains necessary to H
I see whether there are materials with contrary indication. Miss I
J CHOW’s political affiliation with Demosistō, as declared in the J
K nomination form, is a clear indication to the contrary which shows K
L that Miss CHOW does not genuinely and truly intend to uphold the L
M BL and pledge allegiance to the HKSAR when she signed the M
N declaration form and the Confirmation Form. N

O 10. I note the nomination of LAW Kwun-chung (Nathan), another O
P founder of Demosistō, was ruled valid in the 2016 Legislative P
Q Council General Election. However, each case must be considered Q
R on its own merits and assessed at the time of such nomination. In R
S assessing the validity of Miss CHOW’s nomination, I have taken S
T into consideration developments since the 2016 Legislative Council T
U General Election, including the Interpretation of Article 104 of the U
V BL promulgated by the Standing Committee of the National People’s V
Congress.

11. Having considered the above factors and the legal advice obtained, I
am not satisfied that Miss CHOW duly complied with section

40(1)(b)(i) of the Legislative Council Ordinance in making the declaration. I therefore decide that Miss CHOW Ting is not validly nominated.

Ms Anne TENG
Returning Officer for the
Hong Kong Island Geographical Constituency
2018 Legislative Council By-election

27 January 2018