

4 HKC 428, \*; [2000] 4 HKC 428

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Hong Kong Cases

SECRETARY FOR JUSTICE & ORS V CHAN WAH & ORS

[2000] 4 HKC 428

FINAL APPEAL (CIVIL) NOS 11 AND 13 OF 2000

COURT OF FINAL APPEAL

**HEARING-DATE-1:** 20-23 NOVEMBER 2000

**DECIDED-DATE-1:** 22 DECEMBER 2000

LI CJ, BOKHARY AND RIBEIRO PJJ, SILKE NPJ AND LORD MILLETT

**CATCHWORDS:**

Elections - Village representative elections - Eligibility to vote - Eligibility to stand as candidate - Exclusion of non-indigenous villagers - Unreasonable restriction to right to participate in public affairs - Basic Law of the HKSAR (04/04/90) art 39 - International Covenant on Civil and Political Rights 1966 art 25 - Hong Kong Bill of Rights Ordinance (Cap 383) art 21

Constitutional Law - Basic Law - Protection of lawful traditional rights and interests of indigenous inhabitants of New Territories - Whether exclusive right of indigenous villagers to vote for village representatives derived from such lawful traditional rights and interests - Basic Law of the HKSAR (04/4/90) arts 39, 40

Human Rights - Right to participate in public affairs - Exclusion of non-indigenous villagers from voting in village representative elections - Whether unreasonable restriction - Basic Law of the HKSAR (04/04/90) art 39 - International Covenant on Civil and Political Rights 1966 art 25 - Hong Kong Bill of Rights Ordinance (Cap 383) art 21

Human Rights - Sex **discrimination** - Village representative elections - Male non-indigenous villager married to female indigenous villager not eligible to vote but female non-indigenous villager eligible to vote if married to male indigenous villager - Whether electoral arrangements discriminatory - Sex **Discrimination** Ordinance (Cap 480) ss 5(1)(a), 6(1), 35

New Territories - Indigenous inhabitants - Traditional rights and interests - Whether political rights capable of being derived from such rights and interests - Village representative elections - Exclusion of non-indigenous villagers - Whether village electoral arrangements valid - Heung Yee Kuk Ordinance (Cap 1097)

Chinese language catchwords omitted from electronic copy. Please consult paper publication. **[\*429]**

## HEADNOTES:

Chan Wah and Tse Kwan Sang (the first and second respondents) were both born and bred and had lived all their lives in their respective village in the New Territories. Since they could not establish their patrilineal descent from ancestors who in 1898 were residents of villages in the New Territories, they were not indigenous villagers. Each village was represented by a village representative who carried out various functions, including, among others, participating in the relevant rural committee as a member and electing among themselves chairmen and vice-chairmen of rural committees. Rural committees were represented in the respective District Council and the Heung Yee Kuk. The Heung Yee Kuk formed a functional constituency electing one member of the Legislative Council.

In the context of elections for village representatives generally, the indigenous villagers had the right to vote and the right to stand as a candidate. In the electoral arrangements for the election of village representatives in 1999, Mr Chan was excluded as a voter and Mr Tse from standing as a candidate. Mr Chan was excluded not only because he was a non-indigenous villager but as a non-indigenous man married to an indigenous villager, he was still excluded from voting. This was not the case if it concerned a non-indigenous woman married to an indigenous villager, who would have the right to vote. In the case of Mr Tse, non-indigenous villagers were eligible to vote but were not eligible to stand in the election.

Mr Chan applied for judicial review of the decision to exclude him from being a voter in the village representative election. He also alleged that he was discriminated against on the ground of sex. Mr Cheung, an indigenous villager of the village, intervened to oppose the application. Mr Tse applied for judicial review of the validity of the village representative election in his village. Both Mr Chan and Mr Tse were successful in their applications at first instance (see *Chan Wah v Hang Hau Rural Committee* [1999] 2 HKC 160 and *Tse Kwan Sang v Pat Heung Rural Committee* [1999] 3 HKC 457). The respective rural committees appealed to the Court of Appeal, which heard the two appeals together. The Court of Appeal (Chan CJHC, Nazareth VP and Mayo JA) dismissed both appeals, holding the electoral arrangements for both villages to be inconsistent with arts 21 and 26 of the Hong Kong Bill of Rights Ordinance (Cap 383) and contrary to s 35 of the Sex **Discrimination** Ordinance (Cap 480) (*Chan Wah v Hang Hau Rural Committee* [2000] 1 HKLRD 411). The Secretary for Justice, [\*430] together with the Sai Kung District Office and Mr Cheung, the indigenous villager, now appealed to the Court of Final Appeal. The Equal Opportunities Commission obtained leave to provide the Court with the assistance of counsel as amicus curiae (*Secretary for Justice v Chan Wah*[2000] 3 HKC 565).

**Held, dismissing the appeals unanimously but granting, in substitution for all reliefs granted below, declarations that the Secretary for Home Affairs not to approve any person elected as a village representative in each of the two villages concerned under the 1999 electoral arrangements as being inconsistent with art 21(a) of the Hong Kong Bill of Rights Ordinance and/or s 35(3) of the Sex Discrimination Ordinance:**

per Li CJ (Bokhary and Ribeiro PJJ, Silke NPJ and Lord Millett concurring):

*The Hong Kong Bill of Rights Ordinance (Cap 383)*

(1) The Hong Kong Bill of Rights Ordinance (Cap 383) was engaged in these two

cases since the Government was involved under s 3(3)(a) of the Heung Yee Kuk Ordinance (Cap 1097), which provided that approval by the Secretary for Home Affairs was essential before a person elected to represent a village could become a village representative (at 440D-E).

(2) In discharging his duty to decide whether to approve or not to approve a person elected to represent a village, the Secretary for Home Affairs, being bound by the Hong Kong Bill of Rights, had to consider whether the person elected to represent a village was elected in accordance with electoral arrangements which were consistent with the Hong Kong Bill of Rights and would be bound not to approve where those arrangements were inconsistent with it (at 440F-G).

(3) A village representative, upon election and approval by the Secretary for Home Affairs, engaged in the conduct of public affairs within art 21(a) of the Hong Kong Bill of Rights. This was reflected by the requirement that to become a village representative, the person elected had to be approved by a public official, the Secretary for Home Affairs. A village representative represented, as a matter of fact and also as a matter of the proper construction of s 3(3)(a) of the Heung Yee Kuk Ordinance, both indigenous villagers and non-indigenous villagers which made up the population of the village. Public affairs would cover all aspects of public administration including at the village level (at 441H-443E).

(4) The electoral arrangements of the villages in restricting Mr Chan from voting and Mr Tse from standing as a candidate were unreasonable restrictions on their rights to take part in the conduct of public affairs and were inconsistent with art 21(a) of the Hong Kong Bill of Rights. Whether restrictions were reasonable or unreasonable had to be considered objectively, having regard to the nature of the public affairs involved and the nature of the restrictions on the right and the opportunity to participate and any reason for such restrictions. Mr Chan and Mr Tse had been respectively excluded from voting and from standing as a candidate on the ground that they were not indigenous, ie they were not descendants by patrilineal descent of ancestors who in 1898 were residents of villages in the New Territories. But bearing in mind that the village representative by statute was to, and in fact, did represent the village as a whole (comprising both the indigenous and the non-indigenous villagers) and further had a role to play beyond the village level, the restriction on the ground of not being indigenous could not be considered as a reasonable restriction (at 443H-444E).

#### **[\*431]**

#### *The Sex **Discrimination** Ordinance (Cap 480)*

(5) The electoral arrangements governing the village representative election of Mr Chan's village involved unlawful **discrimination** on the ground of sex. But for his sex, the non-indigenous man (married to an indigenous villager) would have received the same treatment (ie having the right to vote), as the non-indigenous woman (married to an indigenous villager). *R v Birmingham City Council, ex p Equal Opportunities Commission* [1989] 1 AC 1155 and *James v Eastleigh Borough Council*[1990] 2 AC 751 applied (at 445F).

#### *Article 40 of the Basic Law*

(6) Article 40 of the Basic Law of the HKSAR and specific provisions in domestic

legislation protected the lawful traditional rights and interests of indigenous inhabitants of the New Territories. Assuming that it was possible and legitimate to deduce derivative rights from rights and interests expressly provided for in the Basic Law, the political rights contended for, namely those of indigenous villagers to vote and to stand as candidates in village representative elections to the exclusion of others could only be derived if they were necessarily implicit within the rights and interests expressly provided by art 40. This would require the Court to conclude that the traditional rights and interests could not be adequately protected without the political rights contended for. On this assumption, such rights could not be deduced. With the constitutional protection of art 40, there was no justification for deriving the political rights contended for from the rights and interests within art 40 to ensure their adequate protection (at 447B-E).

*Whether challenge premature*

(7) Although the Secretary for Home Affairs had not made any decision to approve any person elected in the two village representative elections and thus there was no decision by the Secretary for Home Affairs that could be subject to a judicial review challenge, the courts could grant declarations of right on a judicial review challenge where there was a genuine dispute between the parties. There was plainly a dispute between the parties (at 447F-H).

*Chan Wah v Hang Hau Rural Committee* [1999] 2 HKC 160, [1999] 2 HKLRD 286 (CFI), [2000] 1 HKLRD 411 (CA)

*James v Eastleigh Borough Council* [1990] 2 AC 751, [1990] 2 All ER 607, [1990] 3 WLR 55 (HL)

*R v Birmingham City Council, ex p Equal Opportunities Commission* [1989] 1 AC 1155, [1989] 1 All ER 769, [1989] IRLR 173 (HL)

*Tse Kwan Sang v Pat Heung Rural Committee* [1999] 3 HKC 457, [1999] 3 HKLRD 267 (CFI)

*Abdulaziz Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471

*Attorney General of Hong Kong v Lee Kwong Kut* [1993] AC 951 (PC)

*Attorney General v Prince Ernest Augustus of Hannover* [1957] AC 436 (HL)

*Campbell v Hall* (1774) 1 Cowp 204

*Costello-Roberts v United Kingdom* (1993) 19 EHRR 112

*HKSAR v Ng Kung Siu* [1999] 3 HKLRD 907 (CFA)

**[\*432]**

*Ho Tsz Tsun v Ho Au Shi* (1915) 10 HKLR 69 (FC)

*Jones v Tower Boot Co Ltd* [1997] ICR 254 (CA)

*Kan Fat Tat v Kan Yin Tat* [1987] HKLR 516 (HC)

*Lau Kong Yung v Director of Immigration* [1999] 3 HKLRD 778 (CFA)

*Lee Miu Ling v Attorney General (No 2)* (1995) 5 HKPLR 181 (HC)

*Libman v Attorney General of Quebec* (1997) 151 DLR (4th) 385

*Lopez-Oztra v Spain* (1994) 20 EHRR 277

*Marshall v Canada* (Comm 205/1986, 4 November 1991, unreported)

*Mathieu-Mohin v Belgium* (1987) 10 EHRR 1

*Nagarajan v London Regional Transport* [2000] 1 AC 501 (HL)

*Ng Ka Ling v Director of Immigration* [1999] 1 HKLRD 315 (CFA)

*Pacific Century Insurance Co Ltd v Insurance Claims Complaints Bureau* [1999] 3 HKLRD 720 (CFI)

*Platform Artze fur das Leben v Austria* (1988) 13 EHRR 204

*R v Criminal Injuries Compensation Board, ex p Lain* [1967] 2 QB 864 (QBD)

*R v Panel on Takeovers & Mergers, ex p Datafin plc* [1987] QB 815 (CA)

*R v Secretary of State for Employment, ex p Equal Opportunities Commission* [1995] 1 AC 1 (HL)  
*Rediffusion (Hong Kong) Ltd v Attorney General of Hong Kong* [1970] AC 1136 (PC)  
*Sammut v Strickland* [1938] AC 678 (PC)  
*Winfat Enterprise (HK) Co Ltd v Attorney General of Hong Kong* [1985] AC 733 (PC)

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (4/4/1990) arts 26, 39, 40, 68(2), 122  
District Councils Ordinance (Cap 547) ss 9, 61  
Government Rent (Assessment and Collection) Ordinance (Cap 515)  
Heung Yee Kuk Ordinance (Cap 1097) ss 2(2), 3(3)(a), (d)(i), 4, 9  
Hong Kong Bill of Rights Ordinance (Cap 383) s 7(1), art 21  
Legislative Council Ordinance (Cap 542) s 20A  
Rating Ordinance (Cap 116) s 36  
Sex **Discrimination** Act 1975 [Eng]  
Sex **Discrimination** Ordinance (Cap 480) ss 5(1)(a), 6(1), 7(1)(a), 35(2), (3)(c), (5)(a)  
Adoption Ordinance (Cap 290) s 25(2)  
Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (4/4/1990) arts 8, 45, 68, 112 Annex II  
District Councils Ordinance (Cap 547) ss 2, 3  
Fatal Accidents Ordinance (Cap 22) s 2(j)  
High Court Ordinance (Cap 4) s 2  
Hong Kong Bill of Rights Ordinance (Cap 383) s 13 art 22  
Hong Kong Letters Patent 1917-1991 art VII  
Hong Kong Letters Patent (Amendment) 1994  
**[\*433]**  
Interpretation and General Clauses Ordinance (Cap 1) s 3  
Law Amendment and Reform (Consolidation) Ordinance (Cap 23) s 20C(5)(j)  
Legislative Council Ordinance (Cap 542) ss 18-23, 37 Sch 1 Pt 1  
Legitimacy Ordinance (Cap 184)  
Marriage Reform Ordinance (Cap 178)  
New Territories Leases (Extension) Ordinance (Cap 150)  
Provisional District Boards Ordinance (Cap 366) s 6  
Regional Council Ordinance (Cap 385) s 6  
Rules of the High Court (Cap 4A) O 53  
Sex **Discrimination** Ordinance (Cap 480) ss 1-7, 62, Sch 5  
Societies Ordinance (Cap 151) s 6

#### **OTHER-REF-TO:**

*Halsbury's Laws of England* (4th Ed, Reissue) Vol 44(1) paras 1218, 1473  
International Covenant on Civil and Political Rights 1966 art 25  
Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China over the Question of Hong Kong 1984 Annex III  
Captain Elliott's Declarations  
**Convention** of Peking 1860  
**Convention on the Elimination** of all Forms of **Discrimination** against **Women**  
Decision of the Standing Committee of the National People's Congress on Treatment of Laws Previously in Force in Hong Kong in accordance with art 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (23/02/1997)  
European **Convention** on Human Rights arts 8-11; Protocol 1 arts 1, 3

Ghai, Yash *Hong Kong's New Constitutional Order* (2nd Ed) pp 449-451  
Harris & Joseph *The International Covenant on Civil and Political Rights and United Kingdom Law* pp 535-550  
Heung Yee Kuk (Amendment) Bill 1988  
Hogg *Constitutional Law of Canada* Vol 2 paras 34-24, 34-25  
Hong Kong Legislative Council *Reports of Debates 1988* pp 975-6, 1297-1299  
International Covenant on Civil and Political Rights 1966, Preamble, art 26, Reservations  
Kuan Hsin Chi and Lau Siu Kai *Planned Development and Political Adaptability in Rural Areas*; King and Lee *Social Life and Development in Hong Kong* (1981)  
Lester and Pannick *Human Rights Law and Practice* (1999) pp 73-75  
Miners, Norman *The Government and Politics of Hong Kong* (5th Ed) pp 169-180  
Nowak *UN Covenant on Civil and Political Rights*; CCPR Commentary pp 442, 443  
Zamir & Woolf *The Declaratory Judgment* (2nd Ed) paras 4.032-4.036 **[\*434]**

### **Final Appeal**

These were final appeals (civil) from the judgment of the Court of Appeal (Chan CJHC, Nazareth VP and Mayo JA) dated 26 January 2000 (see [2000] 1 HKLRD 411) dismissing the appeals by the Secretary for Justice, the Sai Kung District Office and Cheung Kam Chuen, against the judgment of Findlay J dated 12 March 1999 (see [1999] 2 HKC 160), granting relief to the first respondent, Chan Wah; and from the judgment of Cheung J dated 29 June 1999 (see [1999] 3 HKC 457), granting relief to the second respondent, Tse Kwan Sang. The Equal Opportunities Commission appeared with leave as *amicus curiae*. The facts appear sufficiently in the following judgment.

Daniel Fung SC and Johnny Mok (Law Officer (Civil Law)) for the first and second appellants.

Clive Grossman SC and James Collins (Clarke & Kong) for the third appellant.

Philip Dykes SC and Stephen Yam (Yuen & Partners) for the first and second respondents.

Hang Hau Rural Committee, the third respondent (absent).

Pat Heung Rural Committee, the fourth respondent (absent).

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

**JUDGMENTBY:** LI CJ, BOKHARY PJ, RIBEIRO PJ, SILKE NPJ, LORD MILLETT, LI CJ

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

#### *Indigenous villager*

By the Government Rent (Assessment and Collection) Ordinance (Cap 515), certain properties held by indigenous villagers are exempted from liability to pay Government rent. The Ordinance implements art 122 of the Basic Law which has its origin in Annex III to the Joint Declaration. The Ordinance defines 'indigenous villager' to mean 'a person who was in 1898 a resident of an established village in

Hong Kong or who is descended through the male line from that person'. 'Established village' is defined to mean a village that was in existence in 1898 and which the Director of Lands has satisfied himself was then in existence.

The villages concerned, Po Toi O Village and Shek Wu Tong Village, are established villages (The latter is a branched off village from another village which existed in 1898 but nothing turns on this). For the purposes of these proceedings, the term 'indigenous villager' has been used in the same sense as in the Ordinance and the term 'indigenous inhabitant' has [\*435] been used in a similar sense. This is common ground although Mr Dykes SC for Mr Chan and Mr Tse has entered a caveat (as to the meaning of indigenous inhabitant in art 40 of the Basic Law) which is not material for present purposes.

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

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

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

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

#### *Judicial review challenge*

By judicial review proceedings, Mr Chan and Mr Tse have challenged the validity of these electoral arrangements. The grounds relied on are that those arrangements are inconsistent with the Basic Law, the Hong Kong Bill of Rights Ordinance (Cap 383) (the Bill of Rights Ordinance) and the Sex **Discrimination** Ordinance (Cap 480). They succeeded in the Court of [\*436] First Instance. See *Chan Wah v Hang Hau Rural Committee*[1999] 2 HKLRD 286 (Findlay J). Also at [1999] 2 HKC 160. *Tse*

*Kwan Sang v Pat Heung Rural Committee*[1999] 3 HKLRD 267 (Cheung J). Also at [1999] 3 HKC 457. They also succeeded in the Court of Appeal where the appeals were consolidated. See *Chan Wah v Hang Hau Rural Committee* [2000] 1 HKLRD 411 (Chan CJHC as he then was, Nazareth VP and Mayo JA as he then was).

### *The appeal*

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

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

### *The village representative*

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

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

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

### **[\*437]**

### *The village*

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

- (1) Assisting in certifying the indigenous status of villagers for the purpose of their applying to build houses under the Small House Policy.
- (2) Arranging for those villagers with the indigenous status to obtain exemption from rates and discounts on government rent.
- (3) Witnessing and arranging for hillside burials.
- (4) Witnessing villagers' applications for succession to estates

- under the New Territories Ordinance.
- (5) Certifying the indigenous status of the descendants of people who come to Hong Kong from other countries and assisting them in applying for Hong Kong identity cards.
  - (6) Liaising between various government bodies (the District Office and Lands Office in particular) and villagers [on] various matters, including:
    - (a) Applications for building houses under the Small House Policy;
    - (b) Village removal, development clearance and resumption of lands;
    - (c) Passing on concerns and complaints made by the villagers to government bodies; and
    - (d) Making government policies and government notices known to the villagers.

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

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

#### **[\*438]**

##### *Beyond the village*

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

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

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

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

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

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

(1) Ex-officio Councillors. They consist of the Chairmen and Vice-Chairmen of Rural Committees (who as mentioned above are elected by village representatives) and New Territories Justices of the Peace.

(2) Special Councillors (a maximum of 21). They are elected from among village representatives (or such other persons as may be approved by the Secretary) by the Ex-officio Councillors. Each of the three districts of Tai Po, Yuen Long and Southern District (which comprise the New Territories) shall elect not more than seven.

**[\*439]**

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

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

- (a) to promote and develop mutual co-operation and understanding among the people of the New Territories;
- (b) to promote and develop co-operation and understanding between the Government and the people of the New Territories;
- (c) to advise the Government on social and economic developments in the interests of the welfare and prosperity of the people of the New Territories;
- (d) to encourage the observance of all such customs and traditional usages of the people of the New Territories as are conducive to

- their welfare and to the preservation of public morality; and
- (e) to exercise such functions as they may be invited to from time to time by the Chief Executive.

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

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

#### *The issues*

The issues in this appeal are:

- (1) Whether the Bill of Rights Ordinance is engaged and if so whether the electoral arrangements in question are inconsistent with it.
- (2) Whether the electoral arrangements for Po Toi O Village are inconsistent with the Sex **Discrimination** Ordinance.
- (3) Whether art 40 of the Basic Law protects any right of indigenous villagers to vote and any right of indigenous villagers to stand as a candidate in elections for village representative to the exclusion of others.

#### **[\*440]**

- (4) Whether the present judicial review challenge is premature and if not what is the proper remedy.

#### *The Bill of Rights Ordinance*

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

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

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

Here, the Government is involved. Under s 3(3)(a) of the Kuk Ordinance, approval

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

*Article 21(a)*

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

*Article 21 Right to participate in public life*

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

**[\*441]**

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

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

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

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

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

*The persons represented by the village representative*

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

**[\*442]**

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

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

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

Leaving aside the position as a matter of fact, and turning to the proper construction of the phrase, 'a person ... to represent a village', should it be construed to mean to represent only the indigenous villagers? Even assuming that in 1959 when the Kuk Ordinance was enacted, the population in the villages consisted only of indigenous villagers, there is no justification for suggesting that the meaning of the statute was intended to be frozen at the time of its enactment. The Kuk Ordinance providing for the Kuk's incorporation and its functions looks to the future. As is usual with statutes, the Court should construe it in accordance with the need to treat it as

continuing to operate as current law. See *Halsbury's Laws* (4th Ed, Reissue) Vol 44(1) paras 1218 and 1473. So construing it, the phrase 'to represent a village' carries its ordinary meaning of representing the whole village. It cannot be read to mean only a part of the [\*443] village. Accordingly, both indigenous villagers and non-indigenous villagers which make up its population would be represented.

#### *Public affairs*

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

#### *Unreasonable restrictions*

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

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

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

Mr Chan and Mr Tse have lived in their respective villages all their lives and can plainly be properly regarded as villagers of each village. But [\*444] they have respectively been excluded from voting and from standing as a candidate on the ground that they are not indigenous, that is, they are not descendants by patrilineal descent of ancestors who in 1898 were residents of villages in the New Territories. But bearing in mind that the village representative by statute is to and in fact does represent the village as a whole (comprising both the indigenous and the non-

indigenous villagers) and further has a role to play beyond the village level, the restriction on the ground of not being indigenous cannot be considered a reasonable restriction.

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

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

### *The Sex **Discrimination** Ordinance*

It is not disputed that where the electoral arrangements for village representative contravene the Sex **Discrimination** Ordinance (Cap 480), the Secretary is bound not to approve the person elected. Indeed, s 35(5)(a) in Pt IV of that Ordinance specifically provides that:

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

Section 6(1) applies the relevant provisions in the Ordinance (s 5 and Pts III and IV including s 35) relating to sex **discrimination** against **women** to men. They -- shall be read as applying equally to the treatment of men, and for that purpose shall have effect with such modifications as are necessary.

The Court of Appeal held, affirming the judgments in the Court of First Instance, that the electoral arrangements for the two villages in question in certain respects contravene the Sex **Discrimination** Ordinance. In **[\*445]** Mr Tse's case, the Court of Appeal's judgment on **discrimination** has not been appealed. The Court is only concerned with the **discrimination** issue in Mr Chan's case which has been appealed by Mr Cheung, the indigenous villager. It should be noted that the Government has not appealed to this Court on any **discrimination** issue.

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

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

A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Ordinance if -- (a) on the ground of her sex he treats her less favourably than he treats or would

treat a man.

Section 35(3)(c) provides:

It is unlawful for a person to discriminate against another person in --  
(c) determining the eligibility of a person to vote in elections of members of a relevant body or the holder of a relevant position, or to take part in the selection of the holder of a relevant position;

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

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

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

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

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

**[\*446]**

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

*Article 40 of the Basic Law*

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

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

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

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

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

There is no doubt that the lawful traditional rights and interests of the indigenous inhabitants are protected by art 40. One is not concerned here with a comprehensive definition of the rights and interests within art 40. It is not disputed that they include various property rights and interests such as exemption from Government rent and rates in respect of certain properties held by indigenous villagers and benefits relating to land granted to male indigenous inhabitants under what is known as the small **[\*447]** house policy. The question is whether one could derive the political rights contended for from the lawful traditional rights and interests of the indigenous inhabitants within art 40.

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

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

#### *Whether challenge premature*

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

approve a village representative in either case, any judicial review is premature.

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

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

**[\*448]**

*Proper relief*

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

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

(2) In Mr Tse's case: An identical declaration to that in (1) above with the substitution of Shek Wu Tong Village for Po Toi O Village.

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

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

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

On this appeal, a number of legal authorities as well as academic writings on the

New Territories were drawn to the Court's attention. It has not been necessary to refer to such materials in the judgment. The Court is grateful for the assistance rendered by all leading counsel and their respective teams.

**[\*449]**

### *Costs*

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

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

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

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

**BOKHARY PJ** I agree with the judgment of the Chief Justice.

**RIBEIRO PJ** I agree with the judgment of the Chief Justice.

**SILKE NPJ** I agree with the judgment of the Chief Justice.

**LORD MILLETT** I agree with the judgment of the Chief Justice.

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

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