

Statement of the Hong Kong Bar Association on Disqualification

The Hong Kong Bar Association notes and welcomes the affirmation and reiteration, in the recent judgment of Mr Justice Au in the election petition of Mr Chan Hoi Tin, of the fundamental principle of natural justice that a person is entitled to be heard before his right is adversely affected. The judgment also emphasises the need for cogent, clear and compelling evidence to establish objectively that a nominee plainly does not have the intention to uphold the Basic Law and to swear allegiance to the HKSAR, before a Returning Officer is justified in coming to a conclusion that the nomination of a candidate for election is invalid.

In this context the Bar is concerned about the recent disqualification of Ms Agnes Chow from taking part in the by-election of the Legislative Council in March 2018. The decision of the Returning Officer was apparently made without affording Ms Chow any opportunity to be heard.

The Hong Kong Bar Association is also concerned about the disqualification of a candidate to stand for election on the basis of his or her association with a political party or the holding of certain political beliefs. In that regard, the court held that the declaration to be made in the election nomination form that one “will uphold the Basic Law and pledge allegiance to the Hong Kong Special Administrative Region” is a substantive requirement and the Returning Officer has the power to confirm the validity of the nomination. This power is held to be a substantive power. It follows that the Returning Officer will have a corresponding substantive duty to confirm the validity of the nomination by inquiring into a candidate’s personal and political beliefs to satisfy himself or herself of the truthfulness of the declaration. This regrettably is equivalent to the introduction of a political screening process for any prospective candidate, and there is no fair, open, certain and clear procedure to regulate this process; nor any timely remedy against an adverse decision of the Returning Officer, resulting in an indefinite duration of disqualification of the persons concerned. It is particularly worrying that the requirement of “upholding the Basic Law” is a vague and imprecise political concept, which has now to be interpreted and administered by a civil servant under a closed door inquiry.

HONG KONG BAR ASSOCIATION

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