

HONG KONG / JUDGMENT

RE CHEUNG WAI NANG

COURT

Court of First Instance

DECIDED

24 April 2007

CASE / FILE NUMBER

HCMP633/2007

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bjbj HCMP 633/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE
REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 633 OF 2007

IN THE MATTER of section 40(1) of the Elections (Corrupt and Illegal Conduct) Ordinance
(Cap.554) and IN THE MATTER of Election of Indigenous Inhabitant Representative for Tong
Sheung Tsuen, Lam Tsuen, Tai Po, New Territories, Hong Kong Ex parte CHEUNG Wai Nang,
Applicant

Before: Deputy High Court Judge L. Chan in Court Date of Hearing: 24 April 2007 Date of
Judgment: 24 April 2007

J U D G M E N T

This is an application by the applicant for relief under section 40 of the Elections Corrupt and
Illegal Conduct Ordinance, Cap. 554. The applicant seeks an order that he be allowed to file his
election return within three days from the date of an order that this court may make. The
applicant is in his 70

- s. He is barely literate as he had not even completed his primary education. He was nominated
in early December 2006 as a candidate for the election as a resident representative of Tong
Sheung Village. Shortly after that, he learned that the health of his wife had deteriorated.
His wife was also in her 70
- s. She was suffering from diabetes and was wheelchair-bound. She was in England then. So the
applicant flew to England on 13 December 2006 to see his wife. He returned here with his
wife in a wheelchair on 25 January 2007. He then learned that he had been elected as the
resident representative. The election result was published on 19 December 2006. He thought

that he had to file his election return as soon as practicable. So he tried to lodge his return on 26 January 2007, which was the next day after his return from England. However, he was told by a Mr Chan of the Tai Po District Office that he should have filed his return within 30 days from the publication of the election result. The deadline was in fact on 19 January 2007 and that had already passed. He was told to consult a lawyer. He had not incurred any election expenses and had not received any donation in his campaign. After he was advised to approach a lawyer, he did so in late January this year, but without success. In February, he had spent some time to look after his wife, who was in poor health. Being the resident representative, he also had to play a role in organising the festivities for the Chinese New Year. He was therefore quite fully engaged and could not find the time to engage a lawyer in that month. However, he tried his very best to make amends in March this year. He approached four firms of solicitors, but they either charged too high a fee or declined service on the ground of unfamiliarity with the subject matter. Eventually, on 23 March, he succeeded in engaging the service of his current solicitors and the papers were filed on 2 April, this year. His counsel relies section 40(2), which reads:

- (2) On the hearing of an application made under subsection (1), the Court may make the order sought, but only if it is satisfied that the inability or failure to lodge an election return as required by section 37 was attributable to-
- (a) the applicant's illness or absence from Hong Kong; or (b)
 - (c) inadvertence or an accidental miscalculation by the applicant or any other person; or (d)
- and was not due to the applicant's bad faith. Ms Cheung of the Department of Justice, who presents the Returning Officer, the Director of Home Affairs, the Director of Public Prosecution, and the ICAC, takes a neutral stance and does not seek to challenge the facts as deposed by the applicant as well as furnished by counsel. Mr. Chan, counsel for the applicant, also refers to the judgment in Chan Wai Ming, HCMP3463/2003, by Lam J. The learned judge, in paragraph 15 of the judgment cited with approval paragraph 728 of volume 15 of the 4th edition of Halsbury's Laws of England: Inadvertence means negligence or carelessness where the circumstances showed an absence of bad faith. Inadvertence may proceed from the applicant not knowing what was done or not knowing that it was wrong. I take the same view as Lam J and I agree that this application should be allowed. I am satisfied that the applicant's delay was caused by a combination of his absence from Hong Kong as well as his inadvertence. I therefore make an order in terms of the notice of motion and allow him to lodge his return within three days from today. I also make no order as to costs since Ms Cheung is not seeking any. (L. Chan) Deputy High Court Judge Mr Josiah Chan, instructed by Messrs Kevin Li & Co., for the Applicant Ms Leona Cheung, GC, for the Department of Justice. PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk i\$&`G L. Chan-HCMP.dot setup Microsoft Word 9.0 Judiciary Hong Kong Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 29 October 2026 · Esheria