

HONG KONG / JUDGMENT

RE YIU CHUN FAT

COURT

Court of First Instance

DECIDED

5 November 2007

CASE / FILE NUMBER

HCMP1482/2007

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bjbj HCMP 1482/2007 IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF FIRST INSTANCE MISCELLANEOUS PROCEEDINGS NO. 1482 OF 2007

BETWEEN IN THE MATTER of Elections (Corrupt and Illegal Conduct) Ordinance, Cap. 554. and IN THE MATTER of Village Representation Election for Kwu Tung (South) Constituency, Sheung Shui District Rural Committee, held on 14th day of January 2007. and IN THE MATTER of the application by YIU CHUN FAT (Y/c|v) epresentative Election for Kwu Tung South Constituency held on 14 January 2007. The Applicant was not elected in the said election.

2. It is a legal requirement that each candidate, whether he was elected or not, should file an election return within 30 days from the publication of the result of the election. The result of this particular election was published on 19 January in the Gazette and the Applicant should have filed his election return by mid-February 2007. He failed to do so. Attempts by the staff at the Election Office to contact him were to no avail.
3. The Applicant said he was, during that period, under some financial difficulties and he had switched off his mobile phone to avoid contacts by his creditors. The Applicant has a shop and there was a telephone number for the shop. According to the Applicant, his daughter answered the phone during that period and the daughter had not told him about attempts by the Election Office to contact him. The purpose of those contacts was to remind the Applicant of his obligation to file an election return.
4. In this regard, I must highlight the fact that, based on the materials placed before me, the Election Office had done everything possible to assist candidates to comply with the law. The documents supplied to every candidate include:
 - (1) guidelines on election-related activities in respect of the election;
 - (2) checklist for candidates;
 - (3) a set of returns and declaration of election expenses and donations;

- (4) a summary setting out important information for the election;
 - (5) a copy of the Elections (Corrupt and Illegal Conduct) Ordinance; and
 - (6) ICAC Village Representative Election Information Booklet. I need not go through these documents in detail. Suffice to say that it is quite clearly set out in these documents that a candidate has an obligation to file an election return within 30 days.
5. The Election Office also arranged for a briefing to candidates at which the requirements of the law were explained. For this particular election, a briefing session was held on 16 December 2006, and the Applicant had been invited to attend. However, the Applicant did not attend because he believed he had all the necessary information from the documents. That is, of course, a matter for him. But one must emphasize the primary obligation of complying with the legislation is on the part of each and every candidate. If a candidate fails to comply with the law, he himself has to bear the consequences. The same can be said with regard to the attempts to remind the Applicant to file election return after the election.
 6. In the present case, I had the benefit of hearing the Applicant giving evidence before me in order to supplement what he had said in his affirmations. The Applicant candidly admitted that he was aware of this requirement of filing the election return. In fact, in his oral testimony the Applicant said he was, working on the expenses shortly after the election, with a view to file the election return. Therefore, this is not a case where the applicant said he was not aware of the legal requirement. Rather, it is a case where the Applicant, with knowledge of this requirement, simply failed to comply with it. The Applicant said this was due to his inadvertence. Therefore, he asks this court to grant him relief under section 40(1) of the Elections (Corrupt and Illegal Conduct) Ordinance.
 7. The Applicant said his inadvertence arose because of the fact that he was under financial pressure and he was preoccupied with that during that particular period of time. It is necessary to bear in mind the period that we are talking about runs from 19 January 2007 and the 30 days thereafter. The Applicant also said that he was engaged in terms of preparation for the Chinese New Year. The Chinese New Year in February 2007 started on 18 February. Therefore, between 19 January and that, there were about 4 weeks time.
 8. The Applicant has included in his second affirmation, exhibited thereto, a draft election return. According to that draft, the Applicant did not spend much in terms of election expenses. It would have been a simple matter for him to fill in the return and file it with the Election Office. The Applicant said he at one stage did consider the matter, but later on just forgot about it. If the Applicant has actually considered the matter, and bearing in mind that this is just a simple and straightforward matter regarding election return, I do not understand why he did not do it immediately.

9. In my view, it is more likely to be a case where the Applicant simply put this obligation of filing the election return as an item of very low priority. He said he forgot about it. Sometimes one can put it that way in regard to matters of low priority, but the more accurate way of describing this sort of situation is that the Applicant simply did not care about it enough.
10. Although the law did give the court the power to grant relief in cases of inadvertence absent of bad faith, I think it is important that each candidate should bear in mind and take seriously their obligation to file an election return. I think it is high time that a strong message should be passed to every candidate that one cannot expect this court to grant relief simply because they say, Well, I failed to do it because of my forgetfulness. If relief is granted too readily, I am afraid there is a tendency that people do not take this requirement of the law seriously enough. Regrettably, this is exactly what has happened in this particular case.
11. In Tsang Wai-ming HCMP3463 of 2003, at paragraph 17, I stressed that one must draw a distinction between cases where applicant turns a blind eye, or acts recklessly as to the legal requirement, and a case where an applicant has tried to understand what the legal requirement is but failed to get it correctly.
12. In my judgment, if an applicant did not place enough significance on the obligation to file an election return, the court would require some good reason before it should exercise its discretion to grant relief. Section 40(2) gives the court a discretion. I think it is important that the discretion should be exercised in a manner which is consistent with the integrity of our election legislation. Those participate in election should be aware that these are serious matters and therefore they should take reasonable steps to comply with their legal obligation at the time when they put themselves forward as a candidate for any election.
13. Bearing all this in mind, though I have some sympathy with the Applicant, particularly since he is only educated up to primary level and this is the first time he participated in this sort of election, I do not consider it is right to grant relief under section 40. I will therefore dismiss the application.
14. Having said that, as Miss Cheung points out, it does not necessarily follow that the Applicant will be prosecuted. It is a matter for the prosecuting authority to consider in the light of what has happened, particularly the information put forward for the purpose of this application and also the personal background of the Applicant, whether this is a case where there should be any prosecution at all.
15. As far as the court is concerned, I do not think relief should be granted. Therefore, the application is dismissed. (Discussion re costs)
16. The Applicant should bear the costs of the Respondent. (M H Lam) Judge of the Court of First Instance High Court Mr Wilson W S Lau, instructed by Joseph Tang & Co., for the Applicant Miss Leona Cheung, Government Counsel of the Department of Justice, for the

Respondent PAGE - PAGE CRT30/5.11.2007/GTT HCMP1482/2007/Proceedings A B C D E F G
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