

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

CIVIL APPEAL NO 73 OF 2020

(ON APPEAL FROM HCAL 3042/2019)

BETWEEN

JUNIOR POLICE OFFICERS' 1st Applicant
ASSOCIATION OF THE HONG KONG
POLICE FORCE

AA 2nd Applicant

and

ELECTORAL AFFAIRS 1st Respondent
COMMISSION

CHIEF ELECTORAL OFFICER 2nd Respondent

ELECTORAL REGISTRATION 3rd Respondent
OFFICER

and

HONG KONG JOURNALISTS Intervener
ASSOCIATION

Before: Hon Poon CJHC, Lam VP and Barma JA in Court

Date of Hearing: 5 May 2020

Date of Judgment: 21 May 2020

JUDGMENT

Hon Poon CJHC:

1. I agree with the judgment of Lam VP.

Hon Lam VP:

2. This appeal was brought by the applicants against the judgment of Chow J (“**Judge**”) in HCAL 3042/2019 dated 8 April 2020 (“**Judgment**”), which concerned their application for judicial review against an aspect of the current registration and electoral system in Hong Kong requiring the electoral registers showing the names of the registered electors together with their principal residential address (“**Linked Information**”) to be made available for public inspection (“**Impugned Measures**”).

3. The respondents are the electoral authorities in charge of the various aspects regulating the system on electoral affairs in Hong Kong. Their respective roles and functions were set out by the Judge at [3] to [6] of the Judgment:

“ 3. The Electoral Affairs Commission (“**EAC**”) is a body corporate established under s 3 of the Electoral Affairs Commission Ordinance. It consists of a Chairman (who must be a Judge of the High Court and whose appointment must be made in consultation with the Chief Justice of the Court of Final Appeal) and 2 other members appointed by the Chief Executive. The functions of the EAC are, *inter alia*, (i) to be responsible for the conduct and supervision of elections, (ii) to supervise the registration of electors, and (iii) to generally make arrangements, take such steps or do such other things as it considers appropriate for the purpose of ensuring that elections are conducted openly, honestly and fairly.

4. The Regulation and the Electoral Procedure Regulation are subsidiary legislation made by the EAC pursuant to the powers conferred on it under s 7 of the Electoral Affairs Commission Ordinance.

5. The Chief Electoral Officer (“**CEO**”) is appointed by the Chief Executive under s 9(1) of the Electoral Affairs Commission Ordinance. The EAC performs its functions through the CEO, with the exception of certain specific functions which are to be performed through the Director of Home Affairs. The CEO is required to do all acts and things necessary for implementing the decisions of the EAC.

6. The Electoral Registration Officer (“**ERO**”) is appointed by the Chief Executive under s 75(1) of the Legislative Council Ordinance, with such functions and duties as are conferred or imposed on him by or under that Ordinance, and other legislation including the Regulation and the Electoral Procedure Regulation, the relevant aspects of which will be further described below.”

4. The Hong Kong Journalists Association (“**HKJA**”) applied for and was granted leave to join as Intervener in the proceedings below.

5. In the Judgment, the Judge granted leave to apply for judicial review on the basis that the Impugned Measures engaged the registered voters’ rights to privacy, family and home (“**BOR 14 right**”) and their right to vote (“**BL 26 right**”), but dismissed the substantive application, finding the Impugned Measures to be lawful and proportionate.

6. The relevant statutory scheme and the Impugned Measures were described by the Judge in detail in the Judgment at [7]-[22]. In summary, a person must register as an elector before he can vote in a District Council election or a Legislative Council election. Registration requires the person to give to the ERO his principal residential address. The address is essential for the verification of the eligibility of a person to vote in a particular District Council constituency or a particular Legislative Council geographical constituency. That piece of information must be set out in the register of electors which shall be open to public inspection. Extracts of the published

register can also be supplied by the ERO to candidates in elections and other persons on request. The information supplied can only be used for purposes related to an election.

7. The Judge found that public inspection of the register served the following legitimate aims¹:

- “ (1) assisting in the determination of the electoral status of electors and according the correct constituencies in which they may exercise their right to vote, as well as maintaining the accuracy and completeness of the electoral registers (“**the Electoral Status Aim**”);
- (2) ensuring a highly transparent mechanism for the public to inspect, and make claims and objections in respect of, the registers, and to detect vote-rigging and/or other corrupt/illegal electoral conduct, thereby contributing to the preservation of the integrity of the electoral system (“**the Transparent Election Aim**”); and
- (3) facilitating electioneering activities by candidates, in particular enabling them to send their election materials or conduct personal visits to particular electors or groups of electors at their places of residence (“**the Electioneering Aim**”).

8. The Judge also found that the Impugned Measures are rationally connected with the latter two of these aims. But he was not satisfied that they are connected with the Electoral Status Aim².

9. In this appeal, Mr Abraham Chan SC (appearing on behalf of the applicants together with Mr Tony Ko and Mr John Leung) did not challenge these conclusions of the Judge.

10. The background leading to the applicants making the present judicial review application was set out in this Court’s judgment (Poon

¹ See [48] to [53] and [56] of the Judgment.

² See [57] to [60] of the Judgment.

Ag CJHC and Lam VP) (“**the CA Judgment**”) of 22 October 2019³ and the Judgment of the Judge of 8 April 2020⁴. As highlighted by the Judge, the challenge is not advanced upon any special rights or interests of police officers⁵. Instead, it is based upon the rights to privacy, family and home under BOR 14 and BL26 enjoyed by every ordinary member of the public. Whilst the application was brought against concerns over large scale and malicious doxxing practices⁶, such practices involved misuse of personal data in various respects. In light of the evidence, we accept that the Judge was entitled to find that abolition of public access to the electoral registers is not the answer to doxxing. However, retrieving personal data of targeted individuals for misuse is an aspect (though not the only aspect) of doxxing. The crux of this appeal relates to the misuse of the Linked Information and it could occur in the context of doxxing as well as other contexts.

11. The applicants’ challenges are two-fold:

- (1) A **Constitutional Challenge**, being a systemic challenge to the Impugned Provisions, i.e. Section 20(3) of the Electoral Affairs Commission (Registration of Electors) (Legislative Council Geographical Constituencies) (District Council Constituencies) Regulation (Cap.541A) (“**the Regulation**”) and Section 38(1) of the Electoral Affairs Commission (Electoral Procedure) (District Councils) Regulation (Cap.541F) (“**the Electoral Procedure Regulation**”); and

³ At [4] to [7] of the CA judgment.

⁴ At [26] to [28] of the Judgment.

⁵ See also [20] of the CA Judgment which referred to the grant of interim injunction against doxxing in favour of newspaper and news reporters.

⁶ Such practices were described at [18] of the CA Judgment.

- (2) A **Fact-Specific Challenge** to Respondents' decisions for the 2019 District Council elections making the Linked Information publicly available pursuant to Sections 20(4) and 21 of the Regulation and Section 38(1) of the Electoral Procedure Regulation.

12. The appeal focuses primarily on the Constitutional Challenge though the applicants also appealed against the Judge's determination on the Fact-Specific Challenge. Mr Chan however accepted that if he succeeds on the Constitutional Challenge, the Fact-Specific Challenge would pale into insignificance.

13. Moreover, before us, Mr Chan did not challenge the following aspects of the system:

- (1) the requirement for a person registering as elector to provide his residential address to the electoral authorities; and
- (2) the proportionality of having public inspection of Linked Information in cases where a registered elector does not have real concerns for personal safety arising from general public disclosure of his residential address.

With respect, we are of the view that these positions adopted by Mr Chan are well-considered and proper.

14. On (1), since having a principal residence at a particular constituency is an eligibility requirement, it goes without saying that a registered elector must inform the electoral authorities of his principal residential address.

15. On (2), in light of the undisputed evidence on the reliance placed in Hong Kong on public scrutiny to maintain the integrity of the electoral registers⁷, having public inspection of the register as part of the system in ordinary cases is clearly proportionate. In this respect, we accept the submissions of the respondents that there are resource-sensitive and policy considerations in the application of the proportionality analysis and the court should adopt the “manifestly without reasonable foundation” standard in respect of the electoral system in general. That said, as will be seen from what we say below, the same standard of assessment does not necessarily apply when considering particular aspects of such system.

16. Further, although Mr Chan did comment upon the utility of publication of Linked Information as a measure to serve the Transparent Election Aim in his written submissions, at the hearing of the appeal we did not understand Mr Chan to be objecting to the disclosure of Linked Information to professional reporters and public media as a mode of public scrutiny of the electoral register for purposes related to an election. Nor did Mr Chan appear to be objecting to disclosure of the Linked Information to the candidates in an election for electioneering purposes. In those respects, we agree with the assessment of the Judge that there is sufficient basis to conclude that disclosure of Linked Information in those circumstances is generally proportionate and strikes a fair balance.

17. What gives rise to concern on our part, however, is the absolute unrestricted nature of public inspection and the lack of possibility of exemption from disclosure to the public generally even in cases where the

⁷ Discussed by the Judge at [49] to [53] of the Judgment.

registered elector can demonstrate that he has a real concern for the safety of himself and those residing with him, resulting in an interference with his BOR 14 and BL 26 rights. This was the focus of debate in this appeal.

Overview of the Constitutional Challenge

18. In the court below, the applicants challenged three provisions, Sections 20(3) and 21(1) of the Regulations and Section 38(1) of the Electoral Procedure Regulation. In this Appeal, Mr Chan narrowed the Constitutional Challenge to focus on Section 20(3) of the Regulation and Section 38(1) of the Electoral Procedure Regulation (“**Impugned Provisions**”):

- (1) Section 20(3) of the Regulation reads: “The Electoral Registration Officer must make available for public inspection, a copy of the final register at the place or places specified in the notice during ordinary business hours.”
- (2) Section 38(1) of the Electoral Procedure Regulation reads: “The Chief Electoral Officer must supply to each candidate—
 - (a) in the case of the first ordinary election, a copy of the part of the final register; or
 - (b) in the case of any subsequent ordinary election, an extract of the part of the final register,which relates to the constituency for which that candidate is nominated.”

19. In short, under the Impugned Provisions, the Linked Information of a registered elector as recorded in the Final Register would

be available (1) to the public for inspection at place(s) specified by the ERO and (2) to the candidate(s) for the constituency to which the elector belongs.

20. In his oral submissions, counsel focused more on the publication of the register to the public, viz the challenge against Section 20(3) of the Regulation.

The discretion under Section 21(1) of the Regulation

21. For the sake of completeness, reference should also be made to Section 21(1) of the Regulation which provides that the ERO may, at any time after the publication of a register, make available an extract from such published register for any purpose related to an election to any person the ERO considers appropriate.

22. There is however an issue between Mr Chan and Mr Raymond Leung SC (who appeared together with Ms Grace Chow for the Respondents) on whether there is a discretion to delink the addresses and the names in the extracts which may be made available under Section 21(1). Though the arguments were advanced in the context of the Fact-Specific Challenge, it is convenient for us to address them at this juncture as it is part of the overall statutory regime.

23. The relevant part of Section 21(1) reads: “the ERO may, before making available an extract, arrange entries in the extract in a form that Officer considers appropriate for the purposes of this section”.

24. Mr Leung drew attention to Section 3(2) of the Regulation which provides that an entry in a register must show the name and principal

residential address of the person. Thus, a delinking of the information would mean that such information, once delinked, is not an entry.

25. On the other hand, Mr Chan submitted that under Section 2 of the Regulations a section of a register simply means “a part of the register”. There is no requirement that any “part” of the register must include the Linked Information.

26. In this respect, the Judge apparently agreed with Mr Leung. He alluded to the requirement of an entry at [7] of the Judgment. At [35], the Judge held as follows:

“ The ERO has a discretion under s 21(1) to make available an extract of a published register to any person for any purpose related to an election. However, once he decides to exercise his discretion to make available an extract of the register to a person, he must provide a proper extract of the register showing the Linked Information.”

27. In our judgment, the construction of the Judge as to the scope of the discretion under Section 21(1) is correct. The arrangement that the ERO can make under that subsection is to arrange entries in the extract in a form appropriate for the purpose of the section. This could not encompass the alteration of the entries in a manner which delinks the addresses from the names as that would involve a partial redaction of each entry so as to render it no longer an entry as defined by Section 3(2). The resulting document would not be an extract from the register. Instead, it would only be the supply of incomplete information derived from the entries in the register.

28. Hence, as the statutory framework presently stands, the ERO does not have a discretion to publish the register or extracts from it in a manner delinking the names of registered electors from their addresses.

The Omissions and the Grounds of Appeal

29. In his skeleton submissions, Mr Chan identified, in his words, “three fundamental defects” or “Core Omissions” in the electoral registration system (the “**Omissions**”):

(1) “Absolute lack of choice” for voters to opt out of providing the Linked Information to others beyond the electoral authorities, irrespective of the severity of potential harm to privacy and personal and family safety and how clearly that risk can be shown.

(2) “Total lack of discretion” for the Respondents to withhold the Linked Information regardless of the nature and extremity of the prevailing circumstances and the risks of harm upon disclosure.

(3) “Complete lack of differentiation” in providing access to the Linked Information as between the disparate categories of the public.

It seems to us that all these Omissions ultimately come down to a complaint that the requirement of unrestricted public inspection of the registers is absolute without regard to the concerns for incursion to privacy interest and the potential seriousness of the consequence in a particular case. Since it is not for this Court to devise a regime and we are only concerned with the constitutionality of the current regime, it is not necessary to discuss the three aspects of Omissions (which are largely different facets of the same complaint) separately.

30. Mr Chan emphasized the systemic nature of his challenge. He did not advocate that the line should be drawn in a particular way. Instead, his complaint was that the existing system adopted the absolute position that the Linked Information of all registered electors have to be open to public inspection irrespective of how serious the consequences of giving unrestricted public access to the information would be to a particular elector. No exception is permitted and the only other option open to such elector is not to register, thereby forfeiting his or her right to vote. In short, counsel said this is not a case where a line has been drawn and there were hard cases irrespective how the line is drawn. He said it is a case where no line has been drawn.

31. Relying on the judgment of Lord Phillips of Worth Matravers PSC in *R (F) v Justice Secretary* [2011] 1 AC 331, at [41], Mr Chan submitted that the crucial issue in the application of the proportionality test in the present context is to ask to what extent the value served by public inspection of the register would be eroded if the inspection is subject to a limited discretion to provide for an option to restrict publication in cases where there is real concern on the part of a registered elector for risk to personal or family safety if information on his residential address is available to the public without restriction. Mr Chan said that Mr Leung for the respondents and Mr Paul Shieh SC (appearing with Mr Robert Pang SC and Ms Natalie So for HKJA) had failed to provide a satisfactory answer.

32. Mr Chan submitted that the Judge’s analysis of the Omissions and his proportionality assessment suffered from “five sets of critical errors”:

- (1) Set 1: devaluing the fundamental BOR 14 and BL 26 rights engaged and downplaying the extent of systemic encroachment and severity of the Impugned Provisions.

(2) Set 2: failing to evaluate respondents' generalized case on the Linked Information provision specifically against the Omissions. No matter what the general need or benefits of public access to the Linked Information, there is no justification why it is necessary, fair and proportionate to have an absolute unrestricted public access to the Linked Information with the Omissions.

(3) Set 3: failing to identify from the evidence any sufficient causal contribution of the Linked Information towards the Transparent Elections and Electioneering Aims, and the extent of any such benefits (so as to determine their proportionality against the degree of interference with fundamental rights).

(4) Set 4: failing to recognize other clear marks of disproportionality.

(5) Set 5: errors as to the proper standard of review and the burden of justification.

Like the different aspects of the Omissions, these are different facets of the challenge to the proportionality analysis by the Judge. We do not think it is Mr Chan's case that if he succeeds on any single facet, that by itself would be sufficient to upset the ultimate conclusion reached by the Judge. They should all be considered together in the overall exercise of proportionality assessment. In our judgment, instead of addressing these different angles separately, it is more appropriate to touch upon the various facets in the course of an overall examination of proportionality. This will be the course we adopt below.

The Nature of the Infringement of BOR 14 and BL 26 Rights

33. BOR 14 provides:

“(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.”

34. The Judge held at [44] of the Judgment that the right to privacy under BOR 14 is engaged in the systemic challenge. However, in the context of considering the standard of review in the application of the proportionality test, he took into account that the right of privacy is not amongst the most fundamental rights and only minimal personal information is divulged in the electoral register and the level of privacy attached to residential address is not high⁸. He also rejected the submission that there was a drastic limitation of the rights to privacy, family and home⁹.

35. With respect, there seems to be a conflation between the extent of incursion of the right of privacy and the consequences of such incursion. Whilst the Judge had at [38] of the Judgment correctly alluded to the right of privacy as a right to control one’s information, he failed to apply that approach in the subsequent analysis in the context of the disclosure of residential address by way of the publication of the register for inspection.

⁸ See [70] to [72] of the Judgment. He cited the judgment of the English Divisional Court in *Corporate Officer of the House of Common v The Information Commissioner* [2008] EWHC 1084 (Admin) in support. That case was decided in the context of ordinary circumstances (see [38] of that judgment) when the relevant rules had provision for exception for special security reason, see [35]). The Divisional Court also added at the end of the judgment at [44] that were there be change of circumstances, the issues of privacy might lead to a different conclusion.

⁹ See [75] of the Judgment.

36. The facet of privacy interest which forms the subject matter in the Constitutional Challenge is the right to control the extent of dissemination of one's residential address. As observed by the Judge at [41] of the Judgment, there is no doubt that the right to control the dissemination of such information is subject to the protection under the right to privacy.

37. It was submitted before us (and the Judge) that people from time to time give their residential address to others, whether for private or business or other purposes, including submitting addresses to public authorities in furtherance of certain public purposes (like the address of directors given to the Companies Registry, the address of a licence holder given to the Transport Department, the address of a landowner to the Land Registry). It is then argued from this that the privacy interest in one's residential address is not high.

38. With respect, in the context of the issue which falls for determination in this appeal, this line of argument fails to give recognition to a person's right to determine the extent of dissemination of his residential address which forms the essence of the right of privacy in this regard. In most cases, a person can decide whether to provide his residential address for a particular purpose to a particular recipient or institution after making his own assessment as to the balance between the utility of the transaction requiring the disclosure of address and the safeguards (both legal as well as practical safeguards) in place provided by such recipient or institution against the misuse of the information. But there is no such choice if he or she wishes to exercise the right to vote which is a constitutionally entrenched right. As we have seen, a registered elector is obliged to disclose his

residential address and the information will then be available for public inspection, failing which he forfeits his right to vote.

39. As regards other kinds of registers or records which contained information on addresses which are open to public inspection, we have not been referred to the relevant statutory schemes and therefore have had no submissions on the extent of public inspection (viz whether the scheme provides for unrestricted public access) and the safeguards in place against abuses in those schemes. Nor have we been informed about the purposes behind permitting public inspection under those schemes. We are therefore unable to, and do not, express any view on whether the incursion upon privacy interest in such schemes are proportionate.

40. However, as Mr Chan quite rightly pointed out, the coverage of such other schemes is not as wide as that for electoral registers. In some of those other cases, a person could freely choose whether to engage in the activities or assume a position which is subject to the relevant scheme. For example, a person can decide whether to become a director or shareholder of a company. In the context of the Land Registry, the address put forward in an assignment need not be the person's residential address.

41. As regards family members and friends, the person could exercise his or her own judgment as to the reliability of such recipients in protecting the confidentiality of his address before giving them the information.

42. Hence, the fact that people disclose residential addresses from time to time does not undermine the importance of the right to control the dissemination of that piece of information. That right is the subject of protection of the right to privacy.

43. By virtue of the Impugned Measures, such right of control of a registered elector in this respect is taken away. Whilst there are safeguards in place, and we shall discuss those safeguards later, the incursion of the right is nonetheless a substantial one since a registered elector is deprived of any choice to retain effective control over the extent of dissemination of information on his residential address to the outside world if he wishes to exercise the right to vote.

44. The importance of the privacy interest in one's residential address varies from individual to individual. Depending on personal circumstances, lifestyles and preferences, there are some who place greater regard on the privacy of their home addresses and there are also others who do not mind giving away such information to others.

45. Also the consequences of such disclosure for each individual would be different. For someone who is or has been a victim of stalking or who has the unfortunate experience of domestic violence or may otherwise be targeted for attack, the confidentiality of his residential address would be highly important and the consequences for negating such confidentiality could be serious.

46. Thus, there cannot be any generalization on the utility of the right of privacy over one's residential address. The essence of the right is the ability of a person to control the extent of the dissemination of such piece of information. It does not depend on the consequences that may follow upon disclosure. Once the right is taken away, the right of privacy is substantially interfered with. It does not matter that for some people, the consequences of such disclosure is perceived as minimal interference. This analysis explains the importance of identifying the essence of the right precisely and avoids the conflation of the consequences of incursion with the

incursion of the right. However, as we explain below, when conducting the proportionality analysis, the consequences of the incursion will assume a greater significance (both in terms of the applicable standard of review and the striking of the balance at the appropriate standard).

47. The right to vote under BL 26 is also engaged, albeit indirectly. This stems from the deterrent effect on an individual in the effective exercise of his voting right if he has to disclose to the public his principal residential address even when such disclosure could put his or his family's life and safety in danger. Based on the principles discussed in *Stunt v Associated Newspapers Ltd* [2017] 1 WLR 3985, at §54 *per* Popplewell J; *Mosley v United Kingdom* (2011) 53 EHRR 30, at §§129 and 132, the Judge found at [47] of the Judgment that such right is also encroached upon.

Systemic challenge not confined to concerns arising from doxxing

48. The Judge considered the absence of evidence of connecting the specific instances of doxxing with the publication of the Linked Information in the registers¹⁰.

49. In our view, although we would agree with the Judge in holding that the answer to doxxing could not be the abolition of public access to the electoral registers, we do not regard this holding as sufficient to resolve the Constitutional Challenge. Whilst the present challenge was brought against the background of doxxing campaigns targeted against police officers and their family members, involving extensive leakage of personal information and cyber-bullying on the Internet and various social and other media, which sprang up in the aftermath of the now withdrawn Fugitive

¹⁰ See Judgment [74] and [84(6)].

Offenders and Mutual Legal Assistance in Criminal Matters Legislation (Amendment) Bill 2019, it is not particularly helpful in considering the Constitutional Challenge to focus too much on the causal link between the publication of the registers and doxxing in assessing the validity of the challenge.

50. Before us, Mr Chan submitted that the Constitutional Challenge was a systemic one and that doxxing was not the only way in which the Linked Information could be misused. Thus at paragraphs 25 and 41 of the Amended Form 86, it was pleaded as follows:

“25. The challenge against s.20(3) of the Regulation and s.38(1) of Cap 541F is non-fact specific and systemic insofar as: (1) s.20(3) of the Regulation makes it mandatory for the ERO in every election and regardless of the circumstances to make a copy of Final Register containing the Linked Information available for public inspection without giving the ERO the power to consider in the circumstances of each case whether the disclosure is warranted; and (2) s.38(1) of Cap 541F makes it mandatory for the CEO to supply to each candidate contents of the Final Register containing the Linked Information without giving the ERO the power to consider in the circumstances of each case whether the disclosure is warranted. Accordingly, the 1st and 4th Decisions by the EAC and the CEO to make and apply these provisions are also unlawful.

...

41. The availability of registers containing the Linked Information under the present regime facilitate political acts such as doxxing (or other forms of harmful action) towards Police Officers or indeed any politically exposed electors whose names and home addresses are made accessible. The threat posed to the exercise of the BL 26 right is real and substantial. The problem is particularly significant from the perspective of voters’ rights and overall electoral integrity in that, the more heated and conflict-ridden the political and electoral climate, the greater the risk of misuse of the Linked Information and in turn the adverse impact on voters and the electoral process.”

51. In our judgment, it is not difficult to envisage cases where a person’s right to privacy and right to vote may be severely encroached upon by the unrestricted publication of the electoral registers outside the context of doxxing. Take, for example, a person who is a victim of domestic violence. Such a person could have changed residential address to hide from a violent partner and could have justifiable concern over the unrestricted public disclosure of the new address. If the person wishes to vote, he or she has to inform the electoral authorities of the new address, which would then become publicly available in the published registers in the form of the Linked Information. Assuming that the partner has a general idea as to the district in which the victim is residing, it would not be difficult for the partner to track down the victim with the Linked Information through public inspection of the register. In the absence of any opt-out mechanism, the victim would be forced to choose between risking personal safety and giving up the right to vote. A similar dilemma may arise for someone who tries to escape from the threatening acts of a stalker. These examples are not exhaustive.

52. Whilst these may not be common occurrences, we cannot say there is no real possibility that the Linked Information may be misused to track down a target of vengeance or stalking. Though Hong Kong should not blindly follow what is happening in other jurisdictions and this Court must carry out the proportionality analysis with reference to the local circumstances, the fact that there are provisions for “silent”, “unpublished” or “anonymous” electors in Australia, New Zealand and the UK¹¹, all of which seek to cater for genuine and properly evidenced fears for personal safety, reflects that there are legitimate concerns in these regards. Such

¹¹ See [89(3)] of the Judgment. The relevant overseas regimes are summarized in a table at Appeal Bundle B(1) p. 146 to 147. As noted by the Judge, there are jurisdictions where public inspection of electoral registers is, like our present system, unrestricted.

possibility, in our view, should be taken into account when assessing the extent and consequences of infringement of the right of privacy and the justification for such infringement.

53. In this connection, we can dispose of an argument on the evidential requirement for this kind of systemic challenge. Mr Shieh submitted that it was necessary for the Applicants to show “real and substantial risk” of harm and they could not do so because there is no evidence to show that there would likely be “profound impact” on the electors’ right to privacy or right to vote, relying on *RXG v Ministry of Justice* [2020] 2 WLR 635 at [60]-[61].

54. With respect, *RXG v Ministry of Justice*, supra, was not a case in which a systemic challenge was brought. In that case, the court was asked to consider whether on the facts and circumstances of the case, a contra mundum injunction should be extended the reporting restriction on the identity of a person convicted of terrorist offence beyond his attainment of the age of 18. Though it concerned the balancing of the right of privacy of the applicant under Article 8 of the European Convention and the freedom of expression, it was a case specific exercise as there was no issue on the existence of the jurisdiction to grant the injunction. We do not derive much assistance from that case on the evidential requirement in the present context.

55. The case cited by Mr Chan, *R (F) v Justice Secretary*, supra, was a systemic challenge, see [5] of the judgment. We shall discuss this case further in the discussion on the proportionality analysis. At this stage, we note that the approach of the Supreme Court was to examine if the impugned notification requirements were capable of causing significant interference with article 8 rights, see [44]. At [42] Lord Phillips referred to the reality implicit in the requirement and at [43] His Lordship found that

there was an obvious risk inherent in the practical compliance with the requirements.

56. Another systemic challenge case is *R (UNISON) v Lord Chancellor* [2017] 3 WLR 409 which concerned the challenge to the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 as a disproportionate hamper to access to justice. The argument was advanced that the fees could not be unlawful unless it was proved that they have prevented access to justice in specific cases. That was not proved because no one gave evidence that they were unable to bring a claim because they could not afford the fees and there was discretionary power to remit the fees. That argument was rejected. At [91] of the judgment, Lord Reed JSC held that conclusive evidence was not necessary and it was sufficient if a real risk was demonstrated.

57. In the present appeal, the systemic challenge is brought against the absolute nature of the requirement of public inspection of the electoral registers. Like the case of *R (F) v Justice Secretary*, supra, the scope of the Constitutional Challenge is a narrow one. The main thrust of the submissions of Mr Chan was directed against the absence of any discretion to restrict general public inspection even on occasions of real risk to personal or family safety of a particular elector. Arguments were run on similar approach to the reasoning of Lord Phillips at [57] that there are bound to be cases in which an exception to the general requirement were called for in order for the system to be proportionate.

58. We hold that in this context, a real risk of harm occasioned by the unrestricted public inspection of the electoral registers is demonstrated and is sufficient to support the Constitutional Challenge. In the

circumstances, there is no need to have evidence of specific instances of such harm to be put before the Court.

Proportionality

59. The Judge applied the proportionality test as explained by the Court of Final Appeal in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, at §§133-135:

“ [133] Where such encroachment on the right is established, the extent, if any, of the encroaching measure’s validity is determined by a proportionality analysis.

[134] In Hong Kong, such a proportionality assessment has been viewed as involving a three-step process of asking (i) whether the intrusive measure pursues a legitimate aim; (ii) if so, whether it is rationally connected with advancing that aim; and (iii) whether the measure is no more than necessary for that purpose.

[135] A fourth step should be added. In line with a substantial body of authority, where an encroaching measure has passed the three-step test, the analysis should incorporate a fourth step asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.”

60. As stated above, there is not much dispute on the first two steps in this appeal. It is plain to us, for the reasons given by the Judge, that the disclosure of Linked Information to the public in general under the Impugned Provisions served legitimate aims and is rationally connected with those aims.

61. At [69] of the Judgment, the Judge held that the “manifestly without reasonable foundation” standard should be applied at the third step in the present case. He explained his reasons for so holding at [70] to [76].

62. It should be noted that the Judge applied that standard without differentiating between the proportionality of the Impugned Provisions in general and the proportionality of the absence of a limited discretion to provide for an option to restrict publication in cases where there is real concern on the part of a registered elector for risk to personal or family safety if information on his residential address is available to the public without restriction.

63. In this appeal, as explained above, the argument of Mr Chan is more focused. Whilst we accept that the standard of “manifestly without reasonable foundation” is appropriate in a general assessment of the Impugned Provisions, we are of the view that a higher standard should be adopted in the examination of the proportionality of absence of discretion.

64. As held by Ribeiro PJ in *Hysan Development Co Ltd v Town Planning Board*, supra, at [140] and elaborated by the Chief Justice in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs* (2017) 20 HKCFAR 353 at [37]-[46], the location of the appropriate standards in the spectrum depends on many factors: the significance and degree of interference with the right; the identity of the decision-maker; the margin of discretion; the separate constitutional and institutional responsibilities and expertise of the Judiciary as compared with the decision-maker. The Judge described it as a holistic assessment. We respectfully agree.

65. The scope of challenge we have to decide in this appeal is much narrower than that advanced before the Judge. We have already explained the essence of the right of privacy by reference to the control over the extent of dissemination of information on a person’s residential address. The incursion to such a right, as analysed above, is substantial though the practical ramifications of such incursion may vary according to the personal

circumstances of each individual. However, for those who have real concerns and would be likely to apply if there were a limited discretion to restrict publication, the consequences could be serious as their personal and family safety is at stake.

66. Confining ourselves to the single issue of whether there should be some form of limited discretion, we are unable to see any institutional handicap or any constitutional inhibition for the Court to consider the same. Counsel have taken us through the relevant Legislative Council papers and we cannot find anything focusing on the issue at hand in the debate on various proposals to reform the electoral system.

67. As observed by Sir Anthony Mason NPJ in *HKSAR v Lam Kwong Wai* (2006) 9 HKCFAR 574 at [45] and repeated by the Chief Justice in *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at [81] and more recently in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*, supra, at [39]:

“ the weight to be accorded to the legislative [and I would add, the executive and other authorities] judgment by the court will vary from case to case depending upon the nature of the problem, whether the executive and the legislature are better equipped than the courts to understand its ramification and the means of dealing with it.”

68. What is the nature of the problem in this appeal? We must emphasize that in this appeal we are not asked to formulate the precise criteria or to set up a mechanism for the exercise of the limited discretion regarding restricted public inspection of the electoral registers in the exceptional cases we have highlighted. It is not our function to lay down the scope of those exceptions. We fully acknowledge that in these aspects, there is much room for policy and resource sensitive debates with underlying political implications and the Court should accord a margin of discretion to

the electoral authorities and the legislature. In those respects, as Lord Phillips had said in another context in *R(F) v Justice Secretary*, supra, it is open to the authorities to set a high threshold. We understand that Mr Chan accepted this to be the case.

69. We are presently concerned with whether a fair balance is struck in the overall scheme of things when there is no discretion at all in respect of the general publication of the electoral registers for public inspection notwithstanding that there are bound to be cases where such publication would seriously encroach upon the rights of privacy of a registered elector who has legitimate concerns about the unrestricted disclosure of his residential address. As we have explained, for such person, in order to protect his privacy over the confidentiality of his residential address the only option is to forego his right to vote.

70. The importance that the courts have attached to the right to vote is illustrated by the judgment of A Cheung J (as he then was) in *Chan Kin Sum v Secretary for Justice* [2009] 2 HKLRD 166. At [149], the learned judge had this to say in addressing the submission that the executive authority and the legislature was better equipped to determine the policy related to prisoner disenfranchisement:

“ ... However, the Court is not asked in these applications to settle the issue by defining what the reasonable restrictions should be. That is not the task of the Court. What the Court is asked to do is to examine the restrictions imposed ... are unreasonable. The Court is not here to perform the hypothetical task of settling a reasonable restriction. That is the task of the legislature and Executive. Nobody has suggested that it is an easy task.”

71. We believe the same can be said in respect of the principal issue which is before us in this appeal though the question should now be framed in terms of proportionality instead of reasonable restrictions.

72. In *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*, supra, at [41], the Chief Justice cited the following passage from the judgment of McLachlin CJ in *Sauvre v Canada (Chief Electoral Officer)* [2002] 3 SCR 519 and said at [42] that this placed the margin of appreciation in proper context. The relevant part of the judgment of McLachlin CJ reads:

“ ... The right to vote is fundamental to our democracy and the rule of law and cannot be lightly set aside. Limits on it require not deference, but careful examination. This is not a matter of substituting the Court’s philosophical preference for that of the legislature, but of ensuring that the legislature’s proffered justification is supported by logic and common sense.”

73. We are concerned more with the right to privacy though it could also have significant impact on the right to vote for the reasons canvassed above. Having regard to the issue raised in the appeal and the justifications for the restriction put forward by Mr Leung (and also by Mr Shieh), we are of the view that we should adopt the “no more than necessary” approach for the determination of the present appeal. In so doing, though we respectfully depart from the approach of the Judge, we wish to highlight that we have had the benefit of more focused submissions and the issue has been narrowed down in the appeal.

74. At the same time, we are in agreement with the Judge¹² that “no more than necessary” means no more than reasonably necessary and there is no requirement that the measure should be the least intrusive method or result in the least interference with the engaged rights. The Judge further said that the question for the court is not whether the best, or optimal measure, has been adopted, or whether there is any alternative, better, measure that could be adopted. We have no quarrel with that as a general proposition. But

¹² See [77] to [80] of the Judgment.

the Court has to examine if a fair balance has been struck having regards to the tension between the rights engaged and the legitimate aims which are to be achieved.

75. In this connection, we accept the submission of Mr Chan that the approach of Lord Phillips at [41] in *R(F) v Justice Secretary*, supra, is pertinent. That case was not cited to the Judge and he did not have the benefit of the submissions based on the same. In that case, the Supreme Court of the United Kingdom considered if the notification requirement under the Sexual Offences Act 2003 (Travel Notification Requirements) Regulations 2004 was compatible with the right to privacy under art 8 of the European Convention. Under those Regulations, a sexual offender who intended to leave the country for a period of three days or longer had to give a notification to the police of the details of foreign travel plan. There was no mechanism for any review of such requirement even when an offender is able to demonstrate that he no longer posed any significant risk of committing further sexual offences. It was claimed that such requirement caused significant interference with art 8 rights. The challenge was held to be valid and a declaration of incompatibility was granted.

76. As mentioned above, the courts in that case were not concerned with the details of the review mechanism and the only issue was whether there should be one. At [41], in the discussion on proportionality, Lord Phillips identified the relevant questions as follows:

“ ... The issue is whether the notification requirements ... without any right to a review are proportionate to that aim. That issue requires consideration of three questions. (i) What is the extent of the interference with article 8 rights? (ii) How valuable are the notification requirements in achieving the legitimate aims? and (iii) to what extent would that value be eroded if the notification requirements were made subject to review? The issue is a narrow one. The claimants’ case is that the notification requirements

cannot be proportionate in the absence of any right to a review. The challenge has been to the absence of any right to a review, not to some of the features of the notification requirements that have the potential to be particularly onerous.”

77. Mr Shieh submitted that the judgment of Lord Phillips did not establish any general proposition of law that similar questions have to be asked in respect of any scheme which has no provision to cater for exceptions. We accept that it cannot be right to treat the approach adopted in that case as a proposition of law. There are of course cases where the court would uphold a scheme without any provision for exceptions. A recent example can be found in *Cheung Tak Wing v Director of Administration* [2020] 1 HKLRD 906 at [132] to [137]. Much depends on the scheme in question, the legitimate aims which it serves and the extent and significance of incursion of fundamental rights in issue.

78. For the purpose of this appeal, the approach adopted by Lord Phillips is instructive as it sheds light on how the court can strike a fair and proportionate balance. We have already discussed on the extent of interference on the right of privacy in the earlier part of this judgment. The legitimate aims served by the Impugned Provisions, as found by the Judge and accepted by us, are two-folded: the Transparent Election Aim and the Electioneering Aim.

79. At this juncture, it will be more helpful to consider the challenge against Section 20(3) of the Regulation and Section 38(1) of the Electoral Procedure Regulation separately. Both legitimate aims are served by Section 38(1), but Section 20(3) only serves the Transparent Election Aim.

80. In respect of the Electioneering Aim, we agree with the Judge’s analysis at [93] and [94] of the Judgment. There can be impediments to effective canvassing if Linked Information of a registered elector is not made

known to a candidate. In other words, the Electioneering Aim could be partially frustrated if there is a limited discretion in withholding Linked Information of some electors to a candidate. The extent of the adverse impact would depend on the number of electors involved. If the threshold for the exercise of the discretion is high, the number may not be substantial.

81. At the same time, given the limited scope of disclosure under Section 38(1) (confined to candidates to an election), we cannot see any real risk of such candidates having any interest in misusing the Linked Information to cause harm to a registered elector.

82. Further, the disclosure under Section 38(1) would also serve the Transparent Election Aim as the candidates to an election would certainly have an interest in upholding the integrity of the same and can make use of the Linked Information to participate in cross-checking against vote-rigging.

83. Taking all these factors into account, we agree with the Judge that the disclosure under Section 38(1) is proportionate even under the “no more than necessary” approach. In other words, even if there were to be a mechanism for the exercise of a limited discretion for the vulnerable persons mentioned at [53] above, we do not think that such limited discretion should affect the operation of Section 38(1).

84. Turning now to Section 20(3) of the Regulation, it serves only the Transparent Election Aim. As we have said at the beginning of this judgment, having public inspection of the register as part of the system involves resource-laden and policy considerations and for ordinary cases we are in agreement with the Judge that it is proportionate.

85. Quite rightly, the Respondents attach great importance to ensuring the openness and transparency of the election process as these are highly conducive to maintaining the integrity of elections and public confidence in the same. We certainly do not want this judgment to be read as casting any doubt on these values. In particular, we are aware of the need of public vigilance for detecting and uncovering election malpractices, as shown by the evidence on various examples where the journalists' or the public's inspection of the Linked Information led to further investigation and the detection of vote-rigging and other election malpractices.

86. The general benefit of disclosure of the Linked Information to the public and to election candidates is recognized. We further accept the submissions of Mr Shieh that the role of the press in this regard should also be borne in mind. It is not necessary for us to recite in this judgment the evidence that Mr Shieh took us through on the efforts of the journalists in carrying out investigations which helped to uncover vote-rigging and other election malpractices. The EAC's Report on the 2011 District Council Election¹³ and the paper submitted by the Registration and Electoral Office to LegCo in LC Paper No. CB(2) 2238/11-12(02)¹⁴ acknowledged the contribution of the press in this regard. The Deputy Secretary for Constitutional and Mainland Affairs also alluded to the indispensable role of the political parties and the press in the maintenance of the integrity of the electoral system at paragraphs 29 to 30 and 37 to 38 of her Second Affirmation of 6 November 2019¹⁵. There is also evidence before the Court that the journalists took care to safeguard the information obtained from the electoral registers, which was circulated to members of the editorial team on

¹³ See paragraph 12.17 of the Report at Appeal Bundle B(2) p.351.

¹⁴ See paragraph 2 of the Paper at Appeal Bundle B(2) p.363

¹⁵ Appeal Bundle A p.77 and 81 to 85

a “need-to-know” basis¹⁶. We do not find any basis to suggest that there had been misuse of the Linked Information by the press.

87. But the crux of this appeal is not about the operation of the system in ordinary cases. Instead, the crucial examination focuses on the extent to which the Transparent Election Aim would be eroded if there is a limited discretion for restricting public access to the Linked Information of a limited number of registered electors. The limited discretion would only be exercised when an elector can persuade the ERO that there is a real risk of harm to the safety of himself or his family if unrestricted public access is not withheld.

88. If there were to be such limited discretion, a person who seeks to have the discretion to be exercised in his favour would have to provide the necessary materials to support the application. As we have said earlier, the threshold can be high. To counter-balance against the withholding of his Linked Information from public inspection (thus reducing the extent of public monitoring of accuracy of the addresses of registered electors as stated on the registers), it would be a legitimate requirement to demand him to submit satisfactory proof of his principal residential address (which is not required when an elector makes his registration as an elector). Further, as we have said above, the Linked Information would still be made available to the candidates in the election under Section 38(1).

89. In addition, though it is ultimately a matter for the Respondents, in light of the role played by the press and the political parties, there could be provisions for the restricted publication of the Linked Information to these

¹⁶ Affirmation of Alvin Wong of 16 November 2019 at paragraph 19, Appeal Bundle A p.123.

specified categories of persons even if general publication is to be restricted. In *R(F) v Justice Secretary*, supra, at [64], Lord Rodger (with the agreement of Lord Hope) made the following observations:

“ ... it is possible that the information which offenders provide to the police will be wrongly conveyed to third parties in circumstances where disclosure is not appropriate. The same can be said of the information which we have to supply, say, to Her Majesty’s Revenue and Customs, or to the social security authorities. The proportionality of the requirements to provide that information has to be judged by reference to its proper use, not by reference to any possible misuse. Organisations which gather sensitive information will, in practice, have adopted administrative practices that are designed to minimize the risk of misuse. The Data Protection Act 1998 provides a legal framework for handling personal data and makes knowing or reckless disclosure of the data a criminal offence. That framework applies to the gathering and retention of information supplied under the 2003 Act. In that situation the proportionality of the requirements made by the Act should be judged on the basis that the information supplied will be handled appropriately. If, as may well happen on occasions, the information is wrongly disclosed or otherwise misused, then the assumption must be that appropriate steps will be taken both to identify and punish those who misuse it and to prevent similar misuse in the future.”

90. These comments were made in the context of the use of the relevant information by public authorities. We are prepared to extend this to members of the press (who, as we have observed, have so far been using the Linked Information responsibly) and the political parties. We are, however, unable to say the same with regard to someone who has the ulterior and nefarious intent to obtain the Linked Information of a targeted person for unlawful use, which is the kind of situation where the limited discretion is called for.

91. With the possible counter measures discussed above that could be put in place, it is difficult to see any real inroad to the Transparent Election Aim occasioned by having a limited discretion to withhold Linked Information generally. The integrity of the register can be maintained by

verification of the principal residential address through the proof of address submitted by a person to the ERO and inspection limited to candidates, political parties and the press. Public confidence in the electoral process will also be maintained by the knowledge that the limited discretion is only restricted to cases with justifiable safety concerns and that there are other counter-balance measures in place to warrant the integrity of the register.

92. Notwithstanding that, Mr Leung on behalf of the Respondents and Mr Shieh on behalf of the HKJA sought to argue that the existing system has already struck a fair balance. First, it is said that the infringement of the right to privacy is minimal and there is no evidence on the causal link between doxxing and the publication of the electoral registers.

93. We have explained above our analysis on the nature and extent of interference of the privacy rights. For those who have justifiable fear for safety arising from unrestricted public disclosure of residential address, we do not accept that the interference is minimal. As the limited discretion is to cater for these people as opposed to ordinary members of the public, the extent of interference should be examined from their angle. We have also explained why we do not confine our analysis by reference to the phenomenon of doxxing though it was the background leading to the present application for judicial review.

94. Second, it is said that the design of the electoral system should be left to the electoral authorities and the Court should not insist on a particular system practised in a foreign jurisdiction to be adopted in Hong Kong. Further, even there if could be hardship in some special cases, they are just cases falling onto the wrong side of a bright line which has to be drawn in a system. The question for the Court is not whether the best, or optimal, measure has been adopted or whether there is any alternative better

measure that could be adopted. The question for the Court is whether the current system sets a proportionate restriction on the rights engaged.

95. As discussed, we have no quarrel with these propositions as general statements of familiar public law principles. We also have no intention of prescribing that the Hong Kong system must follow a particular model practised elsewhere. As said above, it is not the function of this Court to formulate electoral policy or to devise a particular electoral system. These remain the task to be performed by the electoral authorities and the legislature and they must have regard to local social and political circumstances in formulating electoral policies and system for Hong Kong.

96. However, the Court cannot abdicate its function as the ultimate guardian of the law. In this instance, the law obliges this Court to consider if a proportionate balance is struck between the right of privacy (with the right to vote being indirectly engaged for the reasons already canvassed) and the measures adopted in the current electoral system to achieve the Transparent Election Aim. When the Transparent Election Aim is equally achievable without substantial interference with the right of privacy, the Court is duty bound to scrutinize the position. Such scrutiny is made not with a view to achieve the best or perfect system, but to ensure that a fair balance is struck and the law is complied with. If, after conducting the necessary assessment, we come to the view that a fair balance has not been struck, we would so declare not because Hong Kong did not follow a particular system practised overseas, but because of the disproportionate interference with the rights protected by BOR 14 and BL 26.

97. We must also respectfully reject the submission that the predicaments of electors who have justifiable concerns for safety are merely hard cases falling on the wrong side of a bright line. This argument may

hold water if there is a limited discretion in place and the threshold is set stringently so that an elector may have difficulty in meeting the same. But in the present case, there is no discretion at all. The situation is akin to the blanket disenfranchisement of prisoners in *Chan Kin Sum v Secretary for Justice*, supra.

98. Third, it is submitted by Mr Shieh that the Transparent Election Aim would inevitably be undermined if there is a discretion to restrict public inspection of electoral registers, no matter how restrictive the discretion is and how high the threshold is set. With respect, this is a very bold statement and we cannot accept the submission. As illustrated above, there are effective counter measures to maintain the integrity of the elector registers that can be put in place in conjunction with the conferring of discretion on the electoral authorities to withhold the disclosure of the Linked Information in a limited number of cases.

99. Fourth, it is submitted that there are resource and policy implications and the Court should give due weight to the balance struck by the electoral authorities and the legislature. We have actually covered these grounds in the discussion on the appropriate standard of review. In short, in view of the substantial incursion upon the fundamental rights in the context of the limited issue raised in this appeal, and the absence of any institutional handicap in carrying out the assessment, this Court should apply the no more than necessary standard in the proportionality analysis. Whilst the Court will accord a margin of discretion to the electoral authorities and the legislature on the scope of the limited discretion and mechanism for its operation, on the question whether there should at least be some form of discretion the Court cannot avoid asking the relevant questions as discussed at [76] to [91] above.

100. Fifth, it is submitted that there are legal and administrative safeguards against misuse of the Linked Information and the right of privacy has been duly taken care of. The Judge also alluded to the safeguards in place at [84] and [85] of the Judgment. The safeguards were described at [84(1) to (5)] as follows:

“(1) Under s 22(3) of the Regulation, any person who –

- ‘ (a) reproduces or permits another person to reproduce in any form any particular contained in an entry in a register or an extract from a register;
- (b) uses or permits another person to use any information relating to a person obtained for the purpose of compiling a register;
- (c) uses or permits another person to use any information relating to a person contained in a register or an extract from a register; or
- (d) imparts to any other person any information referred to in paragraph (a), (b) or (c),

for a purpose other than a purpose related to an election, commits an offence and is punishable with a fine at level 2 and imprisonment for 6 months.

- (2) These prohibitions apply to any person who inspect a register under s 20 of the Regulation, and any candidate to whom an extract of a relevant part of the final register is supplied by the CEO under s 38(1) of the Electoral Procedure Regulation.
- (3) Under s 21(3) of the Regulation, a person to whom an extract of a register is made available under s 21(1) must not, in relation to that extract, do any act specified in s 22(3)(a), (c) or (d) for a purpose other than a purpose related to an election. Under s 22(5), any person who contravenes s 21(3) commits an offence and is liable to a fine at level 2 and to imprisonment for 6 months.
- (4) Any person who wishes to inspect a register under s 20, or requests for the provision of (or permission to copy) an extract of a register under s 21, of the Regulation is required to fill in a form giving his personal details, including his full name and identity document number, and informed of the aforesaid statutory prohibitions. He is also required to give an undertaking that the information obtained by him

from the register will not be used for any purposes unrelated to an election.

- (5) Likewise, any candidate to whom an extract of a relevant part of the final register is supplied by the CEO under s 38(1) of the Electoral Procedure Regulation is required to give an undertaking to use the information solely for a purpose related to electioneering activities, and reminded of the offences under ss 21(3) and 22(3) of the Regulation.”

101. In addition, there are administrative constraints imposed on a person inspecting a register which renders it difficult or impracticable to obtain information for the purpose of doxxing against a large group of persons. The Judge gave such constraints limited weight for the reason he gave at [85].

102. As we have stressed in this judgment, this appeal should not be focused on doxxing against a large group of persons. For reasons already canvassed, we are actually more concerned about misuse of Linked Information against one or a few targeted individuals by someone who intends to do harm to them. For such type of cases, an elector could have a legitimate worry that the legal and administrative safeguards would not provide sufficient protection. In this respect, we repeat our observation at [90] above.

103. Sixth, it is submitted that in registering as an elector, the person participates in public affairs and the incursion on privacy should be regarded as the price to pay for one’s involvement in public life. Reliance was placed on the dicta of Hartmann J in *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804 at [59]:

“ ... Second, respect for an individual’s privacy will be narrower when it is brought into contact with public life or is in conflict with other protected interests.”

104. That case was concerned with the compatibility of public inspection of register of the names and addresses of members of a private company under the then section 98 of the Companies Ordinance with, inter alias, the right of privacy. It was held that a fair balance had been struck between the demands of the general interests of society and the protection of the individual's fundamental rights. One matter which the court took account in so holding was that those who incorporate could have chosen other forms of association. Further, the public inspection under section 98 was not absolute and there was a discretion to refuse inspection for improper purpose.

105. The context was therefore quite different from what we are concerned with in the present appeal. In terms of general principle, we respectfully agree with the dicta of Hartmann J. However, much depends on the aspect and extent to which the interest of privacy is interfered with. The dicta referred to narrower respect for privacy but not the wholesale abrogation of respect. In relation to the participation in public life by way of registration as an elector, we can certainly accept that the elector would have to provide his principal residential address to the electoral authority. Also in ordinary cases, we would accept that the Linked Information should be open for public inspection. But it certainly does not mean a total disregard of the interest in privacy in all respects. Hence, one must go back to the proportionality analysis as we have conducted above.

106. Seventh, Mr Leung submitted that as there were other registers open to public inspection containing similar information, one should not single out the electoral registers for blame. With respect, as the challenge in the present case is about the Impugned Provisions, the Court must address the proportionality of the same. There is no question of singling out the

electoral registers for blame, whether in respect of doxxing (as to which the Judge made the finding against the casual connection with the inspection of electoral registers) or the other forms of interference with the right of privacy. As already said, it is not appropriate for us to examine the proportionality of the publication of similar personal data under other regimes as it is not the issue in this appeal. But we note that, at least in the context of the Companies Ordinance Cap 622, there are apparently proposed changes (though not yet come into operation) towards giving more recognition to the right of privacy regarding residential address, see Section 644 and the proposed Companies (Residential Addresses and Identification Numbers) Regulation¹⁷.

107. Eighth, though he did not urge the Court to adopt a double proportionality analysis, Mr Shieh submitted that the freedom of press should also enter into the equation in the overall balancing exercise. As it would be clear from what has been said so far, we are keenly aware of the role played by the press in maintaining the integrity of the electoral system and we do not wish anything in this judgment to be read as suggesting that such role should be reduced. It should also be clear from [89] and [90] above that we do not see the need to have the limited discretion we think is called for being exercised to restrict inspection by the press.

108. For these reasons, we are of the view that Section 20(3) as it stands interferes with the BOR14 and BL 26 rights of those registered electors who have safety concerns over the unrestricted public inspection of their Linked Information in a manner which is more than reasonably necessary to achieve the Transparent Election Aim. The absence of any

¹⁷ See the Consultation Document published by the Financial Services and the Treasury Bureau in November 2012 at Appeal Bundle B(3) p.553 to 562.

limited discretion to permit some restricted form of inspection of the registers, in our view, renders the section disproportionate.

109. For those cases, the existing scheme under Section 20(3) fails to strike a fair balance between the rights of the individual electors concerned and the societal benefit to be derived from the same in terms of the furtherance of the Transparent Election Aim.

110. We will therefore allow the appeal to that limited extent.

111. As we said above, it falls upon the electoral authorities and the legislature to decide how the limited discretion should be formulated and implemented in practice. We acknowledge that these are matters involving policy and resource considerations to which the Court would accord due margin of discretion.

The Fact-Specific Challenge

112. In light of our conclusion on the Constitutional Challenge, as submitted by Mr Chan there is no need to dwell on the Fact Specific Challenge. We do not propose to address the same in this judgment.

Relief

113. At the moment, there is an interim injunction restraining the publication of the electoral registers or supply of extracts or information “such that members of the public are able to associate the electors’ names with their respective principal residential address”.

114. It is obvious from this judgment there should be relaxation of that injunction at least in the following respects:

- (a) The supply of the Linked Information to candidates pursuant to Section 38(1);
- (b) The restricted inspection of the electoral registers by members of the press and political parties for a purpose related to the election.

115. We are reminded by Mr Leung that for the purposes of the upcoming Legislative Council election, the provisional electoral registers have to be published by 1 June 2020.

116. To minimize the disruption to the upcoming election, we shall hear parties on the terms of the order that we should make in light of this judgment. If there is any application for temporary suspension order, we shall hear the same at the same time.

117. For these purposes, we shall list the appeal for hearing on 27 May 2020 at 10:00 am. Skeleton submissions shall be lodged and served as follows:

- (a) The Applicants shall lodge and serve their submissions by 12:00 noon on 25 May 2020;
- (b) The Respondents and the Interveners shall lodge and serve their submissions by 12:00 noon on 26 May 2020.

118. Last but not least, we thank counsel for their able assistance.

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Hon Barma JA:

119. I agree with the judgment of Lam VP.

(Jeremy Poon)
Chief Judge of the
High Court

(M H Lam)
Vice President

(Aarif Barma)
Justice of Appeal

Mr Abraham Chan SC, Mr Tony Ko and Mr John Leung, instructed by Li & Partners, for the applicants

Mr Raymond Leung SC, Ms Grace Chow, instructed by the Department of Justice, for the respondents

Mr Paul Shieh SC, Mr Robert Pang SC and Ms Natalie So, instructed by L & L Lawyers, for the intervener