

Issue 21

Controversial Statutory Definition of “Indoor Smoking”

“室内吸烟”的法律定义争议

Introduction (简介)

On 21st April 2010, the Court of Final Appeal (终审法院) overturned a ruling of fine against a smoker Ho Yau-yin for smoking in an outside section of a restaurant in 2008. The Judiciary now concluded a clear and stringent definition of “indoor smoking”. This article may be of interest for those who smoke and do not smoke.

Magistrate’s Finding (裁判司判决)

Mr. Ho, a hawker-control officer, was convicted by a Magistrate of holding a lit cigarette in a designated no-smoking area i.e. the extension of Fu Kee cafeteria in Sham Tseng, an area that was enclosed by plastic curtains but outside the main place of business. It was held that Ho was smoking ‘indoor’ under the Smoking (Public Health) Ordinance (Cap 371) and committed a criminal offence (刑事罪).

Appeal against conviction (上诉)

Mr. Ho appealed against the fine to High Court (高等法院) by saying that the restaurant extension was open-fronted and had plastic sheets as walls. Therefore it was not legally an “indoor area”. There was no “no smoking” sign and there were ashtrays on the tables to allow customers to smoke.

The Appeal(上诉成功)

Judge Tong on appeal held that the purpose of the plastic curtains of the extension area was to shelter the customers from wind and rain. Therefore, it was not the intention of the Ordinance to classify these outdoor areas as the extension of an indoor area. Mr. Ho was acquitted.

The Government was not pleased with the decision of the Judge Tong and appealed to the Court of Final Appeal. The question of whether the premises have to be enclosed at least up to 50% of the total area of all sides in order to constitute ‘indoor’ area was raised for consideration by the Court of Final Appeal.

Definition of “Indoor” under Section 2 of The Smoking (Public Health) Ordinance (Cap. 371)

‘Indoor(室内)’ means –

- a) having a ceiling or roof, or a cover that functions (whether temporarily or permanently) as a ceiling or roof; and
- b) enclosed (whether temporarily or permanently) at least up to 50% of the total area on all sides(四面的总面积之百份之五十), except for any window, door, or any closeable opening that functions as a window or door.”

Court of Final Appeal (终审法院推翻上诉结果)

The Court of Final Appeal reviewed the Magistrate’s ruling and disagreed with Judge Tong. They affirmed the Magistrate’s ruling that when more than 50 per cent of the total area of the extension's sides were enclosed, the space was legally regarded as an indoor area.

After a long and detailed analysis, the Court of Final Appeal held that the wording under Section 2 shall be interpreted as:

- a) having a ceiling or roof, or a cover that functions (whether temporarily or permanently) as a ceiling or roof; and
- b) enclosed (whether temporarily or permanently) at least ... 50% of the total area on all sides”.

In other words, (a) it does not require each and every side has to be covered up to 50%. But so far as the totality of the area of all 4 sides can be covered up to 50%, it will cause the smoking space to become “indoor space”. This is a lower standard of proof (较易举证标准). The argument that a higher standard of proof shall be adopted i.e. either irrespective of the total area of the 4 sides covered, each and every 4 sides have to be covered up to at least 50% (每面要档盖至 50%) was not accepted by the Court of Final Appeal. The Court of Final Appeal’s opinion might be bad news for the smokers. However, for the non-smokers, the easier test adopted by the Court of Final Appeal for the definition of “indoor space” will discourage many smokers from smoking in the outdoor enclosed areas of restaurants.

Nothing shall constitute legal advice to any person by Messrs. Maurice WM Lee Solicitors (Tel: (852) 2537 5833) (Website: www.wmleehk.com)

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