

If 50pc of total premises is enclosed, it is indoors

Air cleared on grey area for smokers

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An estimated 180 stalled prosecutions for breaches of the anti-smoking law will be able to go ahead after the highest court overturned a lower court's definition of what constitutes an indoor area.

The cases have been on hold since a Court of First Instance judge allowed an appeal by a hawket-control officer who had been fined for smoking in a plastic-enclosed extension of a Sham Tseng cafe.

Lawyers for Ho Yau-yin argued successfully that under the anti-smoking law an indoor area was one with each of its walls at least 50 per cent enclosed.

But the Court of Final Appeal yesterday accepted the prosecution's argument that an indoor area is any space with its total areas at least 50 per cent enclosed.

The court will give reasons for the decision at a later date.

The Department of Health welcomed the ruling.

The interpretation from the Court of Final Appeal is in line with the spirit of the legislation

Catering lawmaker
Tommy Cheung Yu-yin

"The ruling has provided the legal basis for continued enforcement of the smoking ban at indoor places in accordance with the provisions of the Smoking (Public Health) Ordinance," a spokesman said, adding that the Tobacco Control Office would proceed with the adjourned cases.

But Hong Kong Bar and Karaoke Rights Advocacy executive secretary Anita To Mia-yu said the reinterpreted definition of indoor area was still ambiguous and more disputes would arise.

Ho was convicted by a magistrate for holding a lit cigarette in the extension of Fu Kee cafeteria in Sham Tseng, which was enclosed by a plas-

tic curtain but outside the main business area.

Ho appealed to the Court of First Instance, which acquitted him after finding insufficient evidence to convict him.

At the same time, the judge, Mr Justice Louis Tong Po-sun, certified that the question of what constitutes an indoor area under the Smoking (Public Health) Ordinance could be argued in the top court.

According to the ordinance, "indoor" means the space is "enclosed [whether temporarily or permanently] at least up to 50 per cent of the total area on all sides, except for any window or door".

Yesterday, the prosecution argued that the 50 per cent requirement applied to the total area of the sides, rather than that of each and every side.

Had the legislation been intended to have the latter meaning, it would have specified "each side" or "each end and every side", Robert Lee Shiu-keung, SC, for the prosecution, said.

He said this interpretation was in line with the legislative intent.

Despite having overturned Tong's ruling, Chief Justice Andrew Li Kwok-mang, who heard the case with four other judges, said the court would not restore Ho's conviction.

Catering lawmaker Tommy Cheung Yu-yin welcomed the ruling.

"The interpretation from the Court of Final Appeal is in line with the spirit of the legislation," Cheung said. "The definition is consistent with what we have been telling the trade."

He called on caterers not to put ashtrays on tables placed in areas now interpreted as indoor.

He suggested traders roll up plastic curtaining enclosing outdoor areas to avoid falling into the grey zone of the law.

Chin Chun-wing, vice-chairman of the Bar and Club Association, said the trade was unlikely to be affected by the reinterpretation of "indoor" because bar premises rarely had an extended area.

The appeal was heard before Li, Mr Justice Kymal Beahary, Mr Justice Patrick Chan Siu-oi, Mr Justice Roberto Ribeiro and Mr Justice Barry Mortimer.



A smoker outside Fu Kee cafeteria in Sham Tseng. Photo: Ricky Chung