



Summary of Judicial Decision

**Leung Chun Kwong (“Applicant”) v Secretary for the Civil Service (“Secretary”)
and Commissioner of Inland Revenue (“Commissioner”)
CACV 126/2017; [2018] HKCA 318**

Decision : **Secretary’s appeal allowed and
Applicant’s cross-appeal dismissed
(under application for leave to appeal)**

Date of Hearing : **11-12 December 2017**

Date of Judgment/Decision : **1 June 2018**

Background

1. The Applicant is, and at all material times was, a civil servant with a contract of employment with the Hong Kong Government which is subject to Civil Service Regulations (“CSRs”). The relevant provisions in the CSRs provide certain employment benefits (e.g. medical and dental benefits) to a civil servant’s spouse. In 2014, the Applicant entered into a same-sex marriage in New Zealand where such marriage was legally recognized.
2. The Secretary did not recognize the Applicant’s same-sex marriage for the purpose of providing the relevant employment benefits to his same-sex marriage partner on the ground that his same-sex marriage was not a marriage within the meaning of Hong Kong law, and thus his same-sex marriage partner was not a spouse of the Applicant entitling him to spousal benefits under the CSRs (“the Benefits Decision”).
3. In 2015, in submitting the tax return for the year of assessment 2014/15, the Applicant elected for joint assessment with his same-sex marriage partner. The Commissioner refused his election on the ground that the Applicant and his same-sex marriage partner were not husband and wife for the purposes of the Inland Revenue Ordinance (Cap. 112) (“IRO”) and thus the Applicant was not entitled to elect for joint assessment (“Tax Decision”).
4. The Applicant applied for judicial review challenging both decisions on, amongst others, constitutional grounds in that the decisions are discriminatory against him based on his sexual orientation and in breach of his right to equality under Article 25 of the Basic Law (“BL 25”).
5. By the judgment of 28 April 2017, the Court of First Instance (“CFI”) allowed the Applicant’s application for judicial review in respect of the Benefits Decision and held that the Benefits Decision unlawfully discriminated against the Applicant based on his sexual orientation. By the same judgment, CFI dismissed the Applicant’s application for judicial review in respect of the Tax Decision and held that the Tax Decision was correct on the proper construction of the IRO. (full text of the CFI judgment at http://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=109273&QS=%2B&TP=JU)



6. The Secretary appealed to the Court of Appeal (“CA”), and the Applicant cross-appealed, against the respective parts of CFI’s judgment that were unfavourable to them. By the judgment of 1 June 2018, CA allowed the Secretary’s appeal and dismissed the Applicant’s cross-appeal.
7. The Applicant on 7 August 2018 took out an application to the Court of Appeal for leave to appeal to the Court of Final Appeal.

Issues in dispute

8. The key issues in dispute are:-
 - (i) Whether the Tax Decision is contrary to the provisions of the IRO on the proper construction of the IRO in respect of the meaning of “marriage” in section 2(1) of the IRO.
 - (ii) Whether the Benefits Decision and the Tax Decision are unconstitutional and discriminatory in violation of BL 25 as they are based on marital status and distinguish same-sex and heterosexual marriages.

Department of Justice's Summary of the Court's rulings

(full text of the CA judgment at http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=115432&currpage=T)

9. On issue (i), CA held that on a proper construction of the IRO and when the relevant provisions of the IRO are considered together, “marriage” in section 2(1) of the IRO refers only to a heterosexual marriage and the right to elect joint assessment under section 10 is only available to a husband and a wife as parties to the same marriage but not parties under a same-sex marriage. (paragraphs 71-80)
10. On issue (ii), CA started with the propositions that marriage is a social and legal institution worthy of full protection by the law and that in Hong Kong, marriage means heterosexual marriage only and this is constitutionally guaranteed under BL 37. (paragraphs 2-9, 21-23, 87-93)
11. CA held that it is not plain and obvious that the spousal benefits and the joint assessment of a married couple are the core rights and obligations unique to marriage, and thus both the Benefits Decision and the Tax Decision need to be subject to justification analysis. (paragraphs 111 and 116)
12. CA held that both the Benefits Decision and the Tax Decision satisfy the justification analysis for the following reasons:-
 - (i) First, protecting and not undermining the status of marriage in light of the prevailing views of the community on marriage (i.e. the prevailing socio-moral views are to regard heterosexual marriage as the only acceptable form of marriage) is plainly a legitimate aim. (paragraphs 110 and 125)



- (ii) Second, given the local legal landscape and circumstances including the prevailing views of the community on marriage, using marital status to differentiate the treatments for spousal benefits and joint assessment is rationally connected to the aim of protecting marriage in the societal context of Hong Kong. (paragraph 126)
 - (iii) Third, CA adopts the more stringent standard of “no more than necessary” to scrutinize both the Benefits Decision and the Tax Decision as an individual’s fundamental right to equality is engaged on suspect ground of sexual orientation. In applying the said standard, CA held that restricting the spousal benefits and the right to elect joint assessment to married couples (and not extending them to homosexual couples) is no more than necessary to protect the status of marriage as understood and accepted in the local context. (paragraphs 127-128)
 - (iv) Fourth, CA held that the inroads that the Applicant might suffer because of the Benefits Decision and Tax Decision are reasonably balanced out by the immense public interest involved in protecting the status of marriage, bearing in mind the current legal landscape and local circumstances including the community’s prevailing views on marriage. (paragraph 129)
13. In conclusion, CA held that upholding the status of marriage is a sufficient and very weighty justification for both the Benefits Decision and the Tax Decision, and that both decisions satisfy the justification analysis and no indirect discrimination against the Applicant on his sexual orientation arose. (paragraph 130)

Civil Division
Department of Justice

August 2018