



Summary of Judicial Decision

**Leung Kwok Hung (“the Applicant”) v
Commissioner of Correctional Services (“the Respondent”)
CACV 34/2017; [2018] HKCA 225**

Decision : **Appeal allowed
(under application for leave to appeal)**
Date of Hearing : **3 and 4 January 2018**
Date of Judgment/Decision : **30 April 2018**

Background

1. The Applicant, commonly known as “Long Hair” for his long hair style, was imprisoned at the Lai Chi Kok Reception Centre in 2014, after his conviction on a number of criminal charges. Whilst in prison, his hair was cut short pursuant to the Standing Order 41-05 (“SO 41-05”) which was issued by the Respondent pursuant to the power conferred under the Prison Rules, Cap. 234A, and which requires the hair of all male convicted prisoners to be cut short. However, under SO 41-05, female convicted prisoners are not subject to such requirement to have their hair cut.
2. The Applicant applied for judicial review challenging the lawfulness of SO 41-05 and the decision to have his hair cut (“Decision”). The two main grounds of review were that both SO 41-05 and the Decision (i) constituted direct discrimination under the Sex Discrimination Ordinance, Cap. 480 (“SDO”), and (ii) infringed the Applicant’s right to equality protected by Article 25 of the Basic Law (“BL 25”). By sections 5(1)(a) and 6(1) of the SDO, a person discriminates against a man if on the ground of his sex, the person treats him less favourably than he treats or would treat a woman.
3. By the Court of First Instance (“CFI”)’s judgment of 17 January 2017, CFI allowed the judicial review and held that both SO 41-05 and the Decision constituted direct sex discrimination and were unlawful under the SDO as the hair cut requirement was a less favourable treatment given by the Respondent to male prisoners when compared to female prisoners and such treatment was made on the ground of sex. By way of obiter dicta, CFI also held that both SO 41-05 and the Decision violated BL 25 and were unlawful. (full text of the CFI judgment at http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=107701)
4. The Respondent appealed to the Court of Appeal (“CA”) against the CFI’s judgment. By its judgment of 30 April 2018, CA allowed the Respondent’s appeal.
5. The Applicant on 28 May 2018 took out an application to the Court of Appeal for leave to appeal to the Court of Final Appeal.



Issues in dispute

6. Whether the hair length restriction for male prisoners (but not for female prisoners' hair) as set out in SO 41-05 constituted direct discrimination under the SDO.
7. Whether the aforesaid hair length restriction infringed the Applicant's right to equality protected by BL 25.

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

(full text of the CA's judgement at http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=114840)

8. CA first referred to section 10 of the SDO, which provides that “[a] comparison of the cases of persons of different sex under section 5(1).....shall be such that the relevant circumstances in the one case are the same, or not materially different, in the other”. CA then identified the relevant circumstances for the purpose of comparison between male and female prisoners on the facts of this case. The relevant circumstances include that the male and female prisoners affected by the haircut requirements in issue are, for the purpose of fostering custodial discipline which involves de-emphasising some aspects of individuality, subjected to custodial requirements including requirements on physical appearance, in order to achieve reasonable uniformity and conformity amongst the inmates. (paragraph 6)
9. On a correct application of section 10 of the SDO and based on the relevant circumstances as identified, CA held that reasonable restrictions for hair length can be set by reference to the respective conventional standards for appearance for male and female prisoners so as to conform to a particular appearance for the purpose of fostering custodial discipline, and that these restrictions have to be examined in a package or global approach for determining whether the restrictions amount to a “less favourable” treatment. (paragraphs 17, 52 & 53)
10. In respect of the conventional standards on hair length, CA noted that, on the evidence, the conventional hairstyle of men in Hong Kong is a short hairstyle while the conventional hairstyle of women in Hong Kong may either be long or short. (paragraph 9)
11. In respect of the package approach, CA highlighted the need to examine all restrictions as an overall package and held that it is not correct to single out hair length requirement without paying regard to other elements in the restrictions on appearance on inmates. For example, female inmates are not allowed to keep cosmetic makeup except for specified lipsticks. Such restriction is more relevant for female inmates given the prevalence of use of makeup for women as compared to men in our society. Thus, taking other restrictions on appearance into account, it cannot be said that a more stringent



set of restrictions are imposed on female inmates. By the same reasoning, while hair length restriction for male inmates appears to be stricter than that for female inmates, taking into account the fact that the conventional standards for hair length for men and women are different in our society and that this restriction is a restraint imposed on inmates by reference to conventional standards in the society for purpose of conformity for achieving custodial discipline, there is no less favourable treatment between male and female inmates. (paragraphs 53, 54, 56 & 76)

12. To conclude, CA held that, by reason of section 10 of SDO, in comparing the treatment meted out to the Applicant with those provided for female inmates, the correct approach is to assess if there is a more stringent treatment on the former in terms of adherence to conventional standard of appearance for custodial discipline. CA held that, in this light, the Applicant had not been subject to less favourable treatment and a case of direct discrimination under the SDO cannot be established. (paragraphs 56, 92 & 94)
13. In arriving at the finding that the Applicant had not been subjected to less favourable treatment, CA rejected the Applicant's argument that conventional standards of appearance are a kind of stereotyping, which the CA explained as discrimination of people in terms of their ability or role to be played solely by reasons of their gender without proper regard to the variations of character and ability within each sex which are greater and more significant than the differences between the sexes. CA rejected the Applicant's argument for *inter alia* reasons that the hair length restriction was set by reference to the conventional standards for men and women in our society, and was not based on generalization on skill or ability or role played by male and female inmates. (paragraphs 57-77)
14. Since CA held that there is no direct discrimination under the SDO for reason that there is no less favourable treatment, the challenge based on BL 25 must also fail. By way of obiter dicta, CA held that the hair length requirement under SO 41-05 satisfies the proportionality test in that:- (i) the maintenance of custodial discipline is a legitimate aim, (ii) there is a rational connection between the hair length restriction and the maintenance of custodial discipline by setting a standard of conformity, (iii) the hair length requirement is not more than necessary in achieving the purpose of maintaining custodial discipline, and (iv) there is no basis to suggest the detrimental impact of the restriction outweighs the social benefit gained. (paragraphs 95-116)