



## Summary of Judicial Decision

Q and Tse Henry Edward (“Applicants”) v Commissioner of Registration (“Commissioner”)

CACV 183-184/2019; [2022] HKCA 172

**Decision:** The Applicants’ appeals against the Court of First Instance (“CFI”)’s dismissal of their judicial review were dismissed by the Court of Appeal (“CA”) with costs order *nisi* to the Commissioner

**Date of Hearing:** 13-14 September 2021

**Date of Judgment:** 26 January 2022

### Background

1. The Applicants are two female-to-male (“FtM”) transgender persons who had not undergone full sex reassignment surgery (“SRS”). They each challenged:-
  - (a) the Commissioner’s policy that medical proof of (i) removal of the uterus and ovaries and (ii) construction of some form of a penis is required in order to amend the sex entry on a FtM transgender person’s Hong Kong Permanent Identity Card (“HKIC”) (“Policy”); and
  - (b) the Commissioner’s decisions refusing to amend the sex entry of each of the Applicants’ HKICs from female to male on the ground that each of them had not completed full SRS as required under the Policy (“Decisions”).
2. The Applicants argued that the Policy and the Decisions:-
  - (a) were an arbitrary and disproportionate infringement of their right to privacy under Article 14 of the Hong Kong Bill of Rights (“HKBOR”);
  - (b) infringed their right not to be subjected to cruel, inhuman or degrading treatment in breach of Article 3 of HKBOR; and
  - (c) were discriminatory and constitutes indirect discrimination under section 5(1)(b) of the Sex Discrimination Ordinance (Cap. 480) (“SDO”), and is therefore unlawful under section 38 of SDO.
3. On 1.2.2019, the CFI dismissed their applications for judicial review with costs to the Commissioner.
4. On 13-14.9.2021, the CA heard the Applicants’ appeals. On 26.1.2022, the CA handed down its judgment (“Judgment”) which unanimously dismissed the appeals with an order *nisi* that the Commissioner shall have the costs of the



appeals, to be taxed if not agreed, with a certificate for two counsel. The Applicants' own costs are to be taxed in accordance with the Legal Aid Regulations.

### Issues in dispute

5. **Issue 1:** Whether the Policy involved a disproportionate infringement of the Applicants' right to privacy under Article 14 of the HKBOR.

**Issue 2:** Whether the Policy amounted to cruel, inhuman or degrading treatment in contravention of Article 3 of the HKBOR.

**Issue 3:** Whether the Policy constituted indirect discrimination under section 5(1)(b) of SDO and was therefore unlawful.

### Department of Justice's Summary of the Court's Rulings

(Full text of the Decision at:

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=142010&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=142010&QS=%2B&TP=JU))

6. **On Issue 1**, the CA held that the right to privacy under Article 14 of the HKBOR was engaged, that the right to privacy was not absolute and may be subject to lawful restrictions that satisfy the four-step proportionality test, and that the Policy satisfied each of the four steps of the proportionality test laid down in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372: §38-40 of the Judgment:

#### Step 1 – legitimate aim

- (a) It was beyond dispute that the Policy pursued a legitimate aim when considered in the statutory context of the registration scheme under the Registration of Persons Ordinance (Cap. 177) and Registration of Persons Regulations (Cap. 177A): §§42-46 of the Judgment.
- (b) The Policy plainly aimed at providing a fair, clear, consistent, certain and objective administrative guideline to:
  - (i) inform all applicants to change sex entry how to make good their application for a change of the sex entry on the HKICs; and
  - (ii) enable a registration officer to determine the correctness of the applicant's changed sex, as a new particular furnished, so that a replacement HKIC may be issued: §46 of the Judgment.

#### Step 2 – rational connection

- (c) The Applicants no longer took issue that the Policy was rationally connected with the abovementioned legitimate aim: §47 of the Judgment.



Step 3 – proportionality

- (d) It was axiomatic that when core values relating to personal or human characteristics in terms of gender identity and physical integrity were engaged, a social policy must be subject to the court’s vigilant scrutiny by the more stringent standard of “no more than necessary”. This was applicable to the Policy: §50 of the Judgment.
- (e) The Policy requiring full SRS satisfied the “no more than necessary” scrutiny and was proportionate to its legitimate aim:
- (i) In order to achieve the legitimate aim of the Policy, the criterion to be adopted must provide a clear, definite, consistent and objective yardstick to determine if the applicant had achieved clear resemblance to the new sex in terms of biological appearance and characteristics and could not admit any room for ambiguity in this regard.
  - (ii) The Policy is not a legal gender recognition scheme. It is an administrative measure which only concerns the correctness of the changed sex as a newly furnished personal particular. That being its function, the Policy does not engage the broader and controversial considerations pertaining to gender recognition generally. As such, the schemes of gender recognition in other jurisdictions, as submitted by the Applicants, do not assist to inform the proportionality of the Policy. Nor would these gender recognition schemes achieve the legitimate aim of the Policy as effectively as a full SRS because different medical professionals may well adopt different standards in making the certification: §§55-69 of the Judgment.
  - (iii) Bearing in mind how HKICs were used in Hong Kong, in formulating the Policy the Commissioner was entitled to take into account the practical difficulties that would be caused by if the external physical appearance of the HKIC holder was incongruent with the sex entry on the HKIC: §72 of the Judgment.

Step 4 – reasonable balance

- (f) A reasonable balance had been struck by the Policy between the general public interests and the inroads into the Applicants’ privacy interest, bearing in mind the Policy furthered the fundamental purpose of the statutory regime for registration of persons by ensuring that the new sex entry approved was correct, while the Applicants might perhaps be able to find



themselves relieved from their predicaments to some limited extent: §§83-87 of the Judgment.

7. On **Issue 2**, when considered in the context of the Policy which was found to be legitimate, it could not be argued that a full SRS amounted to an inhuman or degrading treatment within the meaning of Article 3 of the HKBOR: §§104-107 of the Judgment. For the same reasons, Article 3 of the HKBOR is not engaged: §119 of the Judgment.
  
8. On **Issue 3**, there was also no issue that the Policy constituted indirect discrimination under section 5(1)(b) of the SDO. The Applicants failed to satisfy the essential elements under section 5(1)(b) of the SDO to establish indirect discrimination, i.e. there was nothing in the evidence that could support the proposition that the proportion of the FtM transgender persons who could successfully complete the full SRS was “considerably less” than that of the male-to-female transgender persons who could comply with it, and there was also no evidence that the application of the full SRS was to their detriment as they could not comply with it: §§127-139 of the Judgment.

**Civil Division**

**Department of Justice**

**26 January 2022**