



Summary of Judicial Decision

Sham Tsz Kit (“the Applicant”) v Secretary for Justice (“SJ”)

CACV 557/2020; [2022] HKCA 1247

Decision: Appeal dismissed with costs order *nisi* to SJ

Date of Hearing: 21 July 2022

Date of Judgment: 24 August 2022

Background

1. The Applicant (a Hong Kong permanent resident and a homosexual) made a judicial review (“JR”) application challenging the constitutionality of the laws of Hong Kong insofar as they did not recognize same-sex marriage as a legally valid marriage¹. The Applicant alleged that the aforesaid laws violated -
 - (1) his right to equality, or protection against discrimination on the ground of his sexual orientation, under Article 25 of the Basic Law (“BL 25”) and Article 22 of the Hong Kong Bill of Rights (“HKBOR 22”); and
 - (2) his right to privacy under Article 14 of HKBOR (“HKBOR 14”).
2. On 18 September 2020, the Court of First Instance (“CFI”) dismissed the JR application.
3. On 21 July 2022, the Court of Appeal (“CA”) heard the Applicant’s appeal. On 24 August 2022, CA handed down a unanimous judgment dismissing the appeal with costs order *nisi* to SJ.

Issues in dispute

4. The issues in dispute are:
 - (1) The application of the principle of *lex specialis* to this case and whether BL 25, HKBOR 22 and HKBOR 14 are engaged in this case;
 - (2) Whether there is a positive duty imposed on the Government under HKBOR 14 to provide for an alternative framework for the recognition of same-sex unions; and
 - (3) Whether the Applicant’s discrimination challenge can succeed.

¹ For instance, section 40 of the Marriage Ordinance (Cap. 181).



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

(Full text of the Decision at:

https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2020/CACV000557_2020.doc)

On (1)

5. BL37 provides that the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law. The Applicant's core case was that although BL 37 enshrined the institution of marriage for heterosexual couples, it did not preclude same-sex couples to have access to marriage. The correctness of the Applicant's contention thus depended on the interpretation of BL 37 and the rights relied on. (paras. 14 & 22)

6. It is trite that the courts adopt a purposive and contextual interpretation of the Basic Law. In the constitutional context, CA found that reading BL 37 in congruence with HKBOR 19(2) strongly suggested that the freedom to marriage was granted to heterosexual couples only. CA also found that the legal and historical contexts supported the interpretation that BL 37 only provided access to the institution of marriage to heterosexual couples as at the time when BL37 was drafted all the relevant statutory provisions defined or referred to marriage as a voluntary union for life of one man and one woman to the exclusion of all others. (paras. 23-32)

7. While CA accepted that fundamental rights in BL should be generously interpreted so that individuals were given the full measure of their protection, a proper interpretation of the fundamental rights also required them to be read together with other relevant provisions of BL as a coherent, internally consistent whole. In so reading, if there is a specific provision on a particular subject matter constituting a *lex specialis*, it will prevail over some other general provisions. (paras. 35-36)

8. CA held that BL 37 was undoubtedly the *lex specialis* on the right to marry, which preferred heterosexual marriage and must correspondingly qualified and limited the rights on equality and privacy relied on by the Applicant. BL 25, HKBOR 22 and HKBOR 14, being general provisions and did not stipulate a right to marry, must take account of BL 37 and could not be developed to circumvent the express preference for heterosexual marriage in BL 37. To suggest otherwise would render the preference over heterosexual marriage in BL 37 redundant. (paras. 36-39)



9. For the above reasons, CA rejected the Applicant's case to claim access to marriage or its equivalent based on BL 25 and HKBOR 22, and HKBOR 14. Those provisions were not engaged and the question of justification did not arise. (para. 51)

On (2)

10. For the Applicant's alternative case that there was a positive duty imposed on the Government under HKBOR 14 to provide for an alternative framework for the recognition of same-sex unions equivalent to marriage such as civil partnerships, CA held that a proper interpretation of HKBOR 14 did not impose such duty. HKBOR 14 was thus not engaged and no justification arose. (para. 68)

11. As for the Applicant's case that there should be recognition of foreign same-sex marriage, CA held that BL 37 granted access to marriage in Hong Kong for couples married locally and overseas as well. If the same recognition was afforded to same-sex couples married overseas, they would be able to circumvent the preference enshrined in BL 37. (paras. 70-72)

On (3)

12. For completeness, CA fully agreed with CFI's reasoning in dismissing the Applicant's discrimination challenge, i.e. applying the conflict of law rules the Applicant's same-sex marriage lacked essential validity and could not be recognized as a valid marriage under Hong Kong law. The Applicant's contention was also inconsistent with the Court of Final Appeal's ruling in previous cases, and an attempt to apply the proportionality test in the absence and regardless of any specific subject matter and its relevant context was untenable. (para. 78)

Civil Division

Department of Justice

24 August 2022