



Summary of Judicial Decision

Ng Hon Lam Edgar & Li Yik Ho¹ v Secretary for Justice (“SJ”)

CACV 558/2020, [2023] HKCA 1224

Decision : **SJ’s appeal dismissed with costs to the Applicant**
Date of Hearing : **13 December 2022**
Date of Judgment : **24 October 2023**

Background

1. The Applicant (a Hong Kong permanent resident and a homosexual) made a judicial review (“JR”) application challenging marriage provisions (“Marriage Provisions”) under sections 2 & 3 of the Intestates’ Estates Ordinance (Cap 73)(“IEO”) and section 2 of the Inheritance (Provision for Family and Dependants) Ordinance (Cap 481)(“IPO”). In gist, the Applicant challenged the definitions of “valid marriage”, “spouse”, “husband” and “wife” in those provisions to the extent that they did not give recognition to the spouses in foreign same-sex marriages (“foreign same-sex marriages”).
2. Under section 2(1) of the IEO, “husband” and “wife” are defined to mean (unless the context otherwise requires), in relation to a person, “a husband or wife of that person by a valid marriage”. The definition of “valid marriage” under both the IEO and IPO only covers an opposite-sex marriage, but not same-sex marriage. Under section 3 of the IEO, “valid marriage” includes “a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed.” The IPO makes provision for empowering the court to make orders for the making out of the estate of a deceased person of provision for certain members of that person’s family and dependants of that person which includes the wife or husband of the deceased.
3. On 18 September 2020, the Court of First Instance (“CFI”) allowed the JR application on the ground that the Marriage Provisions are discriminatory and unconstitutional for being contrary to the equality provision under Article 25 of

¹ Mr Ng Hon Lam Edgar passed away on 7 December 2020, Mr Li Yik Ho was made a party in substitution for Mr Ng for the purpose of carrying on these proceedings.



the Basic Law and Articles 1(1) and 22 of the Hong Kong Bill of Rights based on sexual orientation.

4. On 13 December 2022, the Court of Appeal (“CA”) heard the SJ’s appeal. On 24 October 2023, CA handed down a unanimous judgment dismissing the SJ’s appeal.

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

(Full text of the Court’s judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=155764&currpage=T)

Issues in dispute

5. SJ appealed against the CFI’s judgments on the following 3 grounds:-
 - (i) Whether same-sex married couples and opposite-sex married couples are in a comparable position in the context of the IEO and IPO, such that the differential treatment requires justification; (“**The Comparability and Differential Treatment Grounds**”);
 - (ii) Whether the relevant differential treatment under the Marriage Provisions pursues legitimate aims, and whether those aims are rationally connected to the differential treatment (“**The Legitimate Aims and Rational Connection Grounds**”); and
 - (iii) Whether the differential treatment are proportionate means of achieving the legitimate aims (“**The Proportionality Grounds**”).

The Comparability and Differential Treatment Grounds

6. CA agreed with CFI’s findings that for the purposes of the IEO and IPO, there was differential treatment between same-sex married couples and opposite-sex married couples, and sexual orientation was a prohibited ground for giving differential treatment. The issue of differential treatment is context dependent. There is no dispute that the same-sex marriage of the Applicant is a valid marriage in the UK and it has the characteristics of publicity and exclusivity which distinguish a heterosexual marriage (para 10).



7. The CA rejected the Government's argument that the intestacy scheme under the IEO and IPO is "rooted in" and to reflect the legal obligation to maintain their partners during their lifetime which is imposed on opposite-sex married couples only. The CA found that based on an objective reading of the statutory definitions in the IEO and IPO, the meaning of "valid marriage" under section 3(d) of the IEO and section 2(1) of the IPO only requires "a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed" (paras. 11, 67). Insofar as opposite-sex couple who is married overseas is concerned, under the definitions of "valid marriage" of the IEO and IPO, it would not be necessary for the couple to show that the relevant foreign law also imposes lifelong obligation upon married spouses to maintain the others. This demonstrates that inter vivos legal obligations of maintenance cannot be the proper context in which the IEO and IPO schemes are "rooted" (para. 68).
8. The purpose of section 4(1) of the IEO is to give effect to the "presumed intention" of the intestate as to who should be entitled to share in his estate after his death (para. 69) and such duty to provide for his dependents is moral but not legal duty imposed on the deceased (paras. 69 and 70). The Government's argument is inconsistent with the fact that the statutory schemes also include other classes of eligible beneficiaries (such as parents and siblings) whom the deceased had no legal obligations to maintain in his life time (paras. 65, 67, 71).
9. The CA upheld CFI's finding that the possibility of a same-sex married couple to make a will is not a relevant factor to the question of comparability since the freedom to make a will applies equally to same-sex spouses and opposite-sex spouses (para. 82).
10. The CA rejected the Government's argument that significant weight shall be given to the Government's own view as to what are the important features in the comparison exercise and held that the margin of discretion might be applied in the context of proportionality, while the question of comparability is a matter for the court to determine having regard to the relevant context (para. 83).

The Legitimate Aims and Rational Connection Grounds



11. Having found that the exclusion of same-sex married couples under the IEO and IPO constituted differential treatment, the CA then went on to consider the lawfulness of the same by applying the 4-step justification test.
12. The CA held that the CFI was correct in holding that there is no rational connection between the differential treatment under IEO and IPO and the Marriage Aim² and the Family Aim³. The Government argued that there are certain core rights and obligations that are attached and unique to opposite sex marriage to give it a special status. CA rejected such argument for the following reasons: 1) it is a circular argument that a person is discriminated because he is not in an opposite-sex marriage, 2) what amount to such core rights are debatable and uncertain, and 3) such approach is not supported by authorities (paras. 96, 100 and 103).
13. The CA further found that the differential treatment by excluding same-sex marriage under the IEO and IPO is to pursue the Coherence Aim⁴ is not borne out by the marriages recognised under the IEO and IPO themselves, since the IEO and IPO admit and accept marriages as valid which are not so recognised under matrimonial statutes in Hong Kong (paras. 106 and 108).

The Proportionality Grounds

14. On the proportionality grounds, having upheld the CFI's conclusion on the comparability and rational connection test, the CA found it not necessary to deal with these grounds as they are irrelevant and academic. The CA also found it inappropriate to deal with these grounds in vacuum and had thus only dealt with this issue briefly (para. 114).

² To support and uphold the integrity of the traditional institution of marriage in Hong Kong, being the voluntary union of one man and one woman to the exclusion of all others, by specially providing (amongst other public entitlements and benefits) inheritance rights between spouses to validly married men and women ("**the Marriage Aim**").

³ To encourage opposite-sexual unmarried couples to marry so as to ensure that their spouses will be afforded spousal status or priority under inheritance law ("**the Family Aim**").

⁴ To maintain and optimize the overall coherence, consistency and workability of the extensive and interlocking schemes of Hong Kong legislation that rest upon or otherwise involve the institution of marriage as recognised under domestic law and BL37 ("**the Coherence Aim**").



15. The CA upheld the CFI's adoption of high intensity of scrutiny and agreed that the impugned measure is not a proportionate measure to achieve any of the three aims. The CA rejected SJ's argument that there is only limited interference to the Applicant's rights since the present case concerns the situation of having no will and same-sex married couples are completely denied the entitlements relevant to the differential treatment when compared with their opposite-sex counterparts. Given the complete denial of the relevant entitlements under the IEO and IPO by reason of the differential treatment, it is plainly an unacceptably harsh burden on same-sex couples lawfully married overseas which cannot be justified by the overall benefits said to be achieved by the three aims (paras. 121, 122 and 124).

16. CA also held that there is no substance in the SJ's submissions about giving margin of appreciation to the legislature's choice, as there is no evidence to show that it had taken into consideration the rights of the spouses to same sex-marriage at the time of considering the enactments (para. 125). The proportionality grounds were rejected.

17. The SJ has failed in all the grounds of appeal and the appeal was dismissed with costs to the Applicant.

Civil Division

Department of Justice

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