



### Summary of Judicial Decision

#### QT v Director of Immigration (“Director”)

FACV 1/2018; [2018] HKCFA 28

**Decision** : The Director’s Appeal dismissed  
**Date of Hearing** : 4 June 2018  
**Date of Judgment/Decision** : 4 July 2018

#### Background

1. The Applicant was a British female national who had entered into a civil partnership in the United Kingdom with her same-sex partner. The Applicant challenged the Director’s decision of refusing to grant her a dependant visa to stay in Hong Kong as the “spouse” of her same-sex partner who had been granted an employment visa to work in Hong Kong (“the Decision”). The Director refused the Applicant’s dependant visa application on the ground that under the dependant policy (“the Policy”), “spouse” meant a party to a marriage between a man and a woman as recognized under the Hong Kong law.
2. The Applicant’s challenge by way of judicial review was dismissed at the Court of First Instance (“CFI”). The CFI held that the difference in treatment was justified because the Applicant (who was considered as “unmarried” since same-sex marriage/civil partnership is not recognized in Hong Kong) and married persons were in a different position. In the immigration context, the Director was entitled to draw a bright line on the basis of marriage when balancing the needs of (1) attracting foreign talents to Hong Kong and (2) maintaining effective and stringent immigration control. (full text of the CFI’s judgment at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=103107&QS=%28%7BQ%7D+%25parties%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=103107&QS=%28%7BQ%7D+%25parties%29&TP=JU))
3. The Court of Appeal (“CA”) allowed the Applicant’s appeal and overturned the CFI’s judgment. The CA held that it was open to the Applicant and her partner to compare themselves to a married heterosexual couple in the context of immigration, which fell outside the “core rights and obligations” unique to a marriage. The CA also found that those same-sex couples whose relationship was legalized in the form of a civil partnership or same-sex marriage could similarly prove their relationship like married heterosexual couples and thus it was not rational to exclude them from the Policy by reason of administrative workability and convenience. The Director failed to justify the less favourable treatment to same-sex couples under the Policy and thus it amounted to indirect discrimination based on sexual orientation. (full text of the CA’s judgment at [https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=111901&QS=%28%7BQ%7D+%25parties%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=111901&QS=%28%7BQ%7D+%25parties%29&TP=JU))



4. The Director's appeal to the Court of Final Appeal ("CFA") was heard on 4 June 2018.

### **Issues in dispute**

5. Given that same-sex marriage or civil partnership is not legally recognized in Hong Kong, whether this is an absolute bar to discrimination claim on sexual orientation when the difference in treatment is based on marital status in all contexts?
6. Whether immigration falls within the "core rights and obligations" unique to a marriage (and thus no justification for the difference in treatment is required)?
7. What is the standard of scrutiny to be applied by the Court and whether the Director has justified the difference in treatment under the Policy?

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

(full text of the CFA's judgment at [https://legalref.judiciary.hk/lrs/common/ju/ju\\_frame.jsp?DIS=116049&currpage=T](https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=116049&currpage=T); press summary issued by the Judiciary at [https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2018/FACV000001A\\_2018\\_files/FACV000001A\\_2018ES.htm](https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2018/FACV000001A_2018_files/FACV000001A_2018ES.htm))

8. The CFA restated the principles that the Director has very wide powers of immigration control under Article 154 of the Basic Law and section 11 of the Immigration Ordinance (Cap. 115); however, when implementing the Policy, the Director has to exercise the powers in accordance with the principle of equality, and for the purpose for which they are given, as well as fairly and rationally, reflecting the rule of law. (paragraphs 18-19)
9. This case did not involve any claim that same-sex couples have a right to marry under the Hong Kong law. Marriage in Hong Kong is heterosexual and monogamous and is not a status open to couples of the same sexes. (paragraphs 25-26)
10. The CFA rejected the Director's primary argument that differential treatment between same-sex civil partners and a married couple under the Policy required no justification. The CFA observed that using the challenged differentiating criterion of marriage as its own justification cannot be permitted in view of the circularity in this argument. The CFA also observed that the Director's assertion that an obvious difference exists between marriage and a civil partnership rests on shaky foundations and is untenable as a basis for precluding scrutiny of the Policy's justification. (paragraphs 38-52)
11. The CFA rejected the CA's approach that certain "core rights and obligations" unique to marriage exist such that differential treatment between married couples and unmarried couples (including same-sex couples) in those areas required no justification. The CFA considered such approach circular,



subjective and gave rise to fruitless debate as to what would or would not fall within the “core”. The CFA however made it clear that a person’s marital status may be relevant as a condition for the allocation of rights and privileges, and the real question was whether the difference in treatment based on marital status could be justified as fair and rational. (paragraphs 62-76)

12. The Director’s second argument based on policy justification, i.e. that the Policy was justified because it served the legitimate aims of encouraging talents to work in Hong Kong and at the same time maintaining strict immigration control by drawing a bright line based on marital status which was legally certain, administratively workable and convenient, was also rejected by the CFA. While it was accepted that these were legitimate aims, the CFA agreed with the CA that the Policy was not rationally connected to the said legitimate aims. The Policy was counter-productive in attracting foreign talents (who could be straight or gay) as the ability to bring in dependants was an important issue for persons deciding whether to move to Hong Kong. Nor did the Policy promote the legitimate aim of strict immigration control by excluding persons who were bona fide same-sex dependants of the sponsors granted with employment visas. The Director’s aim of facilitating administrative workability and convenience by drawing a bright line was also considered irrational, as the Applicant and her same-sex partner could just conveniently produce their civil partnership certificate. (paragraphs 90-99)
13. The CFA found that the appropriate standard of review would be case-specific and in the present case would be the standard of reasonable necessity. However, the CFA considered it unnecessary to consider whether the Policy went beyond reasonable necessity as it had found that the Policy was not rationally connected to the Director’s legitimate aims. (paragraphs 100-109)

(press release of the Government in relation to the CFA’s judgment at <http://www.info.gov.hk/gia/general/201807/04/P2018070400823.htm> )

**Civil Division**  
**Department of Justice**

**July 2018**