

Summary of Judicial Decision

Sham Tsz Kit (the “Appellant”) v Secretary for Justice (“SJ”) FACV 14/2022; [2023] HKCFA 28

Decision: Appellant’s appeal on Question 1 (same-sex marriages) and Question 3 (recognition of foreign same-sex marriages) unanimously dismissed;

Appellant’s appeal on Question 2 (recognition of same-sex relationships) allowed by a majority, with costs order *nisi* to the Appellant

Date of Hearing: 28 and 29 June 2023

Date of Judgment: 5 September 2023

Background

1. The Appellant, a Hong Kong permanent resident and homosexual, entered into a same-sex marriage with his partner in New York in 2013. In the absence of any Hong Kong law for such marriages to be entered into or for such marriages contracted abroad to be recognised, the Appellant brought judicial review proceedings which were dismissed by the Court of First Instance and the Court of Appeal. Leave to appeal to the Court of Final Appeal (“CFA”) was granted by the Court of Appeal on the following three questions, namely:
 - (i) whether he has a constitutional right to same-sex marriage under Article 25 of the Basic Law (“BL25”) and Article 22 of the Hong Kong Bill of Rights (“BOR22”) (“**Question 1**”);
 - (ii) alternatively, whether the absence of any alternative means of legal recognition of same-sex relationship constitutes a violation of BOR14 and/or BL25 and BOR22 (“**Question 2**”); and
 - (iii) whether the non-recognition of foreign same-sex marriage constitutes a violation of BL25 and BOR22 (“**Question 3**”).

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=154774&QS=%2B%7C%28FACV%2C14%2F2022%29&TP=JU)

Disposition

2. CFA unanimously dismissed Questions 1 and 3 and by majority allowed the appeal on Question 2.

3. In relation to Question 2, subject to receiving further submissions from the parties, CFA by a majority granted a declaration (which may be modified in the light of such further submissions) that the failure of the Government to fulfil its positive obligation to establish an alternative framework for legal recognition of same-sex partnerships and to provide for appropriate rights and obligations attendant on such recognition violated the Appellant's BOR14 rights. The said declaration is to be suspended for a period of 2 years from the date of the final order to be made (para 260).

On Question 1

4. All members of CFA agreed that the freedom of marriage of Hong Kong residents constitutionally protected and guaranteed under Article 37 of BL ("**BL37**") and Article 19(2) of BOR ("**BOR19(2)**") is confined to heterosexual marriage only. BL37, when read together with BOR19(2), was the *lex specialis* (*general provision that might apply to any case must give way to a specific provision which applies to the case at hand*) on the right to marry. Equality protection under BL25 and BOR22 were general provision and could not be understood as going beyond what was specifically provided for in the specific provision of the right to marry. It was not permissible to interpret the equality rights under BL25 and BOR22 as conferring a constitutional right to same-sex marriage (para 107).

On Question 3

5. All members of the CFA agreed that the non-recognition of the Appellant's foreign same-sex marriage was the consequence of the application of the common law conflict of laws rule in Hong Kong that capacity to enter into

marriage was a matter of essential validity which was determined by reference to the law of each party's ante-nuptial domicile (para 121).

6. No one domiciled in Hong Kong has capacity to enter into a same-sex marriage, since marriage is confined to opposite-sex couples. An assertion that equality rights under BL25 and BOR22 compelled recognition of the Appellant's foreign same sex marriage amounted to a challenge to the Appellant's lack of capacity to enter into a same-sex marriage under BL37 and BOR19(2), which failed on the basis of the *lex specialis* principle (para 122).

On Question 2

7. By a majority (Ribeiro PJ and Fok PJ delivered a joint judgment with which Keane NPJ agreed), CFA accepted the existence of the need experienced by same-sex couples for access to an alternative framework conferring legal recognition of their relationship in order to meet basic social requirements and to provide them with a sense of legitimacy, dispelling any sense that they belong to an inferior class of persons whose relationship is undeserving of recognition. The lack of means to acquire the legal recognition available to heterosexual couples was potentially demeaning of same-sex couples. Accordingly, the absence of legal framework for recognition of the Appellant's same-sex relationship constituted an interference with his to privacy rights under BOR14 (paras 142-144).
8. CFA (by a majority) rejected Government's argument that the establishment of alternative legal framework was excluded by operation of *lex specialis* or that the establishment would undermine the unique status of the institution of marriage as it was not the Appellant's case to confer the same rights as those enjoyed by married couples. Instead the Appellant's complaint concerned a failure to provide "an alternative means of legal recognition of same-sex partnership" (para 151). CFA (by a majority) also rejected the arguments that no positive obligation to provide an alternative scheme for the legal recognition of a same-sex couple's relationship can be based on BOR14 (para. 172)
9. CFA (by a majority) accepted that the Government enjoyed a flexible margin of discretion in deciding the content of the rights and obligations to be

associated with the scheme of legal recognition to be devised. This included a “core” of rights necessary for establishing a legal framework for recognising and defining the main incidents of a same-sex relationship to give effective legal protection to that relationship (paras 180-181).

10. Chief Justice Cheung delivered a separate judgment giving his reasons for agreeing with Ribeiro and Fok, PJJ on Questions 1 and 3 but differing from them on Question 2. Chief Justice noted that non-recognition of same-sex relationship brings about social inconvenience, legal discrepancies and indeed hardship. But in the absence of any interference (other than the non-recognition itself), all this goes only to highlight the prohibitory nature of the protection under BOR14. That is the focus of protection on non-interference with privacy, rather than a duty on the part of the State to facilitate and ensure the full enjoyment of privacy, absent any interference, by the enactment of bespoke legislation on recognition and provision of “core rights” (para. 63).
11. For his part, Chief Justice is not sure if the imposition of a rigid, constitutional duty on the Government and the legislature, regardless of their views, to positively enact laws to recognise same-sex relationship is the right direction to take for the development of the law on protection of privacy under BOR14 in Hong Kong. Chief Justice is not prepared to hold that the non-recognition of same-sex partnership in Hong Kong amounts by itself to interference of privacy under Article 14 of the Hong Kong Bill of Rights (para 67).
12. Lam PJ also delivered a separate judgment on Question 2. His Lordship accepted that although mere non-recognition of same-sex relationship does not constitute arbitrary or unlawful interference under BOR14, the repeated imposition of need or requirement on same sex couple to reveal private information in order to substantiate a claim that they are in such relationship is an arbitrary interference which the Government has a duty to protect against (para 229). However, his Lordship has great reservation about the Court providing guidance on the way forward by drawing a distinction between “core rights” and “supplementary rights (para 233) since (i) such concept is derived from Strasbourg jurisprudence which cannot be directly transplanted in Hong Kong (para. 234); (ii) the end result is that the new regime would in substance become indistinguishable from marriage; (iii) the form of official recognition and the substantive rights incidental to such

recognition are essentially matters of social policy and should primarily be determined by the Government under a political process (para 244); (iv) there has not been matured and well-developed arguments before CFA on the essential rights incidental to an official recognition of a same sex union (para 249).

Civil Division
Department of Justice
5 September 2023