



## Summary of Judgment

Secretary for Justice (“SJ”) v  
Li Yik Ho, in substitution for Ng Hon Lam Edgar, deceased (“Respondent”)  
FACV No. 4 of 2024, [2024] HKCFA 30

**Decision** : Appeal unanimously dismissed  
**Date of Hearing** : 8 October 2024  
**Date of Decision** : 26 November 2024  
**Judges** : Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice Stock NPJ

### Background

1. This appeal concerns whether the exclusion of spouses in same-sex marriages from certain provisions in Intestates’ Estates Ordinance (Cap. 73) (“**IEO**”) and Inheritance (Provision for Family and Dependants) Ordinance (Cap. 481) (“**IPO**”) amounts to unlawful discrimination and is unconstitutional.
2. The late Mr. Ng Hon Lam Edgar (“**Mr. Ng**”, the original Respondent) married the Respondent in the United Kingdom in 2017. In April 2018, Mr Ng purchased a flat under the Housing Authority’s Home Ownership Scheme.
3. Section 4 of the IEO creates a scheme of statutory trusts in favour of various persons (including the surviving husband or wife by a valid marriage) whom it is presumed the intestate would wish to share in his estate after his death.. Further, section 7 of the IEO also provides for a right of the surviving husband or wife of an intestate to acquire the premises in which he/she was residing at the time of the intestate’s death.
4. Section 4 of the IPO provides that the court may make an order giving reasonable financial provision in favour of an applicant if it is satisfied that the disposition of the deceased’s estate by his will or the law relating to his intestacy, or both, is not such as to make reasonable financial provision for the applicant. The classes of persons eligible to apply for such provision are listed under section 3(1) of the IPO (including wife and husband of the deceased by a valid marriage).



5. It was common ground that, as a matter of statutory construction, “*valid marriage*” under the IEO and IPO covered heterosexual marriages, but not valid foreign same-sex marriages, and the surviving spouse of a same-sex marriage cannot qualify as a “*husband*” or “*wife*” respectively under the IEO and the IPO for the purposes of entitlements under those two ordinances.
6. In June 2019, Mr. Ng wrote to the SJ requesting clarification as to whether same-sex marriages performed according to the laws of foreign jurisdictions would be recognised as marriages for the purposes of probate, inheritance and intestacy. SJ replied in August 2019 declining to provide this clarification.
7. Mr. Ng consequently commenced judicial review proceedings against the SJ, challenging the constitutionality of sections 2 and 3 of the IEO and section 2 of the IPO on the ground that these provisions amounted to unjustified differential treatment on the prohibited ground of sexual orientation in breach of the principle of equality before the law guaranteed by Article 25 of the Basic Law (“**BL25**”) and Articles 1(1) and 22 of the Hong Kong Bill of Rights (“**BOR1(1)**” and “**BOR22**” respectively).
8. On 18 September 2020, the Court of First Instance (“**CFI**”) allowed the JR application on the ground that sections 2 and 3 of the IEO and section 2 of the IPO are discriminatory and unconstitutional, contrary to the equality provision under BL25 and BOR1(1) and BOR22 based on sexual orientation.
9. SJ appealed to the Court of Appeal, which unanimously dismissed the appeal on 24 October 2023 and upheld the CFI’s findings. After obtaining leave to appeal from the Court of Appeal, SJ appealed to the Court of Final Appeal (“**CFA**”). On 26 November 2024, CFA unanimously dismissed SJ’s appeal.

### **Key issues**

10. On 26 February 2024, leave to appeal to the CFA was granted to SJ by the Court of Appeal on three questions of law:



- (a) **Question 1:** Is the status of marriage a distinguishing characteristic in the context of the Marriage Provisions, rendering same-sex married couples and opposite-sex married couples not relevantly comparable in this context, given the interrelationship between the laws of inheritance and matrimony, which also impose expectations and legal obligations that apply to married persons only, namely the Lifetime Marital Maintenance Duty?
- (b) **Question 2:** Is the legitimate aim of having consistent and coherent definitions of "*valid marriage*" across legislative schemes which touch on the subject of marriage rationally connected to the difference in treatment between same-sex married couples and opposite-sex married couples, taking into account the Government and the Legislature's prerogative (and now duty following the judgment of the Court of Final Appeal in ***Sham Tsz Kit v Secretary for Justice*** [2023] HKCFA 28) to review Hong Kong's social, policy and legislative context for the purposes of establishing an alternative framework for legal recognition of same-sex partnerships.
- (c) **Question 3:** If the answer to Question 2 above is "yes", whether in all the circumstances the non-inclusion of same-sex married couples in the Marriage Provisions is (a) proportionate; and (b) implements a reasonable balance between societal benefits and individual rights, given inter alia the comparatively limited interference with rights by reason of the availability of alternative means for same-sex married couples to exercise their rights outside of the intestacy scheme under the IEO and IPO.
11. SJ contended that these questions should all be answered in the affirmative whereas the Respondent contended that they should be answered in the negative.



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

(Full text of the Court's judgment at

[https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2024/FACV000004A\\_2024.docx](https://legalref.judiciary.hk/doc/judg/word/vetted/other/en/2024/FACV000004A_2024.docx) )

12. Mr Justice Ribeiro PJ and Mr Justice Fok PJ delivered a joint judgment with which Mr Justice Stock NPJ agreed. Chief Justice Cheung and Mr Justice Lam PJ each delivered a separate judgment agreeing with Mr Justice Ribeiro PJ and Mr Justice Fok PJ.

***On Question 1***

13. Question 1 concerns the issue of comparability, being Stage 2 of the five-stage approach of constitutional challenge described in *HKSAR v Ng Ngoi Yee Margaret* [2024] HKCFA 24. The starting point was that whether treatment is relevantly different such as to require justification is always a matter that is dependent on context. In the context of the IEO and IPO, the preferential treatment accorded to the surviving spouse of the deceased stemmed from their close inter-personal relationship with the deceased constituted by marriage. (§§ 21, 26-29)

14. CFA held that a valid foreign same-sex marriage, such as that between Mr. Ng and the Respondent, went beyond a mere relationship of cohabitation, since it was a public undertaking regulated by statute and contained the characteristics of publicity and exclusivity similar to a heterosexual marriage. Further, there is no obvious reason to regard a same-sex couple in a valid foreign marriage as having any less relevant a close inter-personal relationship as a married heterosexual couple. (§§ 29-31)

15. CFA rejected SJ's arguments to the contrary and maintained that same-sex couples lawfully married overseas were comparable to married heterosexual couples for the purposes of the IEO and IPO (§§ 32, 63-65):

(a) It is circular for SJ to argue that only heterosexual marriage was afforded constitutional protection by the Basic Law and therefore was different from a homosexual marriage, as this line of argument relied on the very ground for that differential treatment as its justification. Given the context of the



IEO and IPO identified by the CFA, treating a married same-sex couple recognised as being analogous to a married opposite-sex couple for the purposes of the IEO and IPO does not entail recognition of the same-sex couple as having the same status as that of being married under Hong Kong law. (§§ 34-38)

- (b) CFA rejected SJ's arguments that definitions of valid marriage under the Marriage Ordinance, Cap. 181 ("**MO**") and Marriage Reform Ordinance, Cap. 178 should be approached and understood as a coherent package. This is because the definitions of valid marriage in the IEO and IPO differ from those adopted in these matrimonial legislation. (§§ 40-43)
- (c) The argument that only opposite-sex couples had a duty to maintain each other during their lifetime failed because it is also a circular argument relying on the impugned differential treatment as its justification. The IEO and IPO both provide for beneficiaries other than those to whom a deceased owed any legal duty of maintenance, hence the entitlement to the benefits under the IEO and IPO did not depend on the existence of such a duty. (§§ 44-52)
- (d) CFA further rejected the argument that the Government and Legislature should be afforded a wide margin of discretion in deciding whether two parties were indeed comparable. It held that the question of comparability was a question of law for the court, objectively assessed, not a matter of legislative or policy choice. (§§ 57-62)

### ***On Question 2***

- 16. SJ identified the legitimate aim of the differential treatment as that of having consistent and coherent definitions of "valid marriage" across legislative schemes which touch on the subject of marriage, in which a "valid marriage" is consistently defined as heterosexual, monogamous and formal. Such coherence would be undermined if the impugned provisions of the IEO and IPO were to include the survivor of a same-sex marriage by remedial interpretation. (§§ 66-77)
- 17. CFA held that there is no coherent definition of "valid marriage" under the IEO and IPO and other matrimonial Ordinances. The IEO and IPO definitions differ from those adopted in the matrimonial Ordinances by embracing foreign marriages which are not "valid marriages" under Hong Kong law. The IPO also includes "good faith void marriages" obviously not valid under the MO. (§§ 79-87)



18. Looking at the statutory purposes of IPO and IEO, these Ordinances concern persons who qualify as “spouse” for a distribution under the IEO and for reasonable provision under the IPO. Their statutory purposes are different from the purpose of the MO, which confers the legal status of husband and wife, and does not justify the exclusion of surviving spouses of foreign same-sex marriages from statutory entitlement as spouses. (§§ 88-91)
19. CFA also surveyed various pieces of legislation touching upon marital and family life generally, and concluded that legislative policy dictates who should be included as a party to a marriage or to a recognised cohabitation relationship for the particular purposes of each Ordinance. Therefore, definition of “valid marriage” is to be understood in line with their respective statutory purposes under different statutes. It follows that the alleged coherence did not exist on the facts. (§§ 92-104)
20. Accordingly, the Court concluded that the legitimate aim of protecting the purported definitional and conceptual coherence said to exist across various legislation was not established. It followed that the differential treatment challenged by the Respondent was not rationally connected with any purported legitimate aim. The answer to Question 2 is no. (§§ 123-125)

### ***On Question 3***

21. Since CFA held that no legitimate aim has been made out and answered Question 2 in the negative, Question 3 does not arise. (§§ 126-127)

### ***Decision***

22. CFA concluded that, since the Government has failed to justify the differential treatment, the impugned provisions are discriminatory and unconstitutional. The CFA also endorsed the remedial interpretation provided by the CFI, namely, that:



“1. *There be a declaration that, consistently with Article 25 of the Basic Law and Articles 1 and 22 of the Hong Kong Bill of Rights:*

a. *The existing limb (d) of the term ‘valid marriage’ in section 3 of the [IEO] and section 2(1) of the [IPO] shall be read as:*

*‘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, including any marriage where the persons are of the same sex and such marriage between them would have been a valid marriage under this Ordinance but for the fact only that they are persons of the same sex’; and*

b. *For the purposes of the IEO and IPO, references to:*

i. *‘husband and wife’ shall be read as ‘a married person and his or her spouse’;*

ii. *‘husband or wife’ shall be read as ‘a married person or his or her spouse’; and*

iii. *‘husband’ and ‘wife’ in relation to a person, shall be read as ‘a spouse of that person by a valid marriage.’” (§§ 128-130)*

23. The Court unanimously dismissed SJ’s appeal, with an order *nisi* that SJ should bear the costs of and occasioned by this appeal. (§§ 131, 143)

**Civil Division**

**Department of Justice**

**November 2024**