

## Summary of Judgment

Leung Kwok Hung also known as “Long Hair” (“Appellant”)

v

Commissioner of Correctional Services (“Commissioner”)

FACV 8/2019; [2020] HKCFA 37

Decision : Appellant’s appeal allowed  
Date of Hearing : 28 October 2020  
Date of Decision : 27 November 2020

### Background

1. The Appellant is a political figure widely known for his long hair. In 2014, he was sentenced to four weeks imprisonment.
2. Upon the Appellant’s imprisonment, his hair was cut short (“**Decision**”) pursuant to Standing Order 41-05 (“**SO 41-05**”) which is issued by the Commissioner pursuant to the Prison Rules (Cap 234A). SO 41-05 provides that:-

#### **“SO 41-05 Hair of Prisoner 囚犯的頭髮**

1. *The hair of all male convicted prisoners will be kept cut sufficiently close, but not close clipped, for the purpose of health and cleanliness unless the prisoner himself requests it.*

*為保健康及清潔，所有已男子[sic]定罪囚犯的頭髮須盡量剪短，但不用剪陸軍裝，除非囚犯本身要求如此。*

2. *Upon request, female prisoners will have their hair cut especially before discharge or production in court. Except as recommended by MO, a female prisoner’s hair shall not be cut shorter than the style on admission without her consent.*

*若女子囚犯申請剪髮，須為其作出安排，特別是在獲釋前或到法庭應訊前。未經囚犯同意，不可把其頭髮剪至較進入院所時的髮型更短。但如醫生建議這樣做，則屬例外。”*

3. By way of judicial review, the Appellant challenged the lawfulness of SO 41-05 and the Decision on the basis that they constituted direct discrimination on the ground of sex under the Sex Discrimination Ordinance (Cap. 480) (“**SDO**”) or Article 25 of the Basic

Law (“BL 25”). By the Court of First Instance (“CFI”)’s judgment of 17 January 2017, CFI allowed the judicial review on both the aforesaid grounds under SDO and BL 25.

4. The Commissioner’s appeal was allowed by the Court of Appeal (“CA”) on 30 April 2018. The CA held that SO 41-05 formed part of the Commissioner’s policy to foster custodial discipline by imposing requirement for reasonable uniformity and conformity in physical appearance amongst both male and female prisoners, and that both male and female prisoners were subjected to the same requirement on hair length as determined by reference to the conventional hairstyles of males and females in the society. Thus, there was no unfavourable treatment to male prisoners.
5. The Appellant appealed against the CA judgment, and the appeal was heard before the Court of Final Appeal (“CFA”) on 28 October 2020.

### **Issues in dispute**

6. The two questions of law certified by the Appeal Committee are:-

Whether SO 41-05 issued by the Commissioner requiring all male prisoners but not female prisoners to have their hair cut “sufficiently close”:

- (a) constitutes direct discrimination under the SDO and is therefore unlawful; and/or
- (b) is inconsistent with BL 25 and is therefore unconstitutional?

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

(Full text of the judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=132118&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132118&QS=%2B&TP=JU)

Press summary issued by the Judiciary at

[https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2019/FACV000008\\_2019\\_files/FACV000008\\_2019ES.htm](https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2019/FACV000008_2019_files/FACV000008_2019ES.htm) )

### **1<sup>st</sup> Certified Question: Direct Sex Discrimination under the SDO**

7. The CFA applied the 4-step approach in *R (European Roma Rights) v Prague Immigration Officer* [2004] UKHL 55, [2005] 2 AC 1 to the facts of the present case in determining whether direct sex discrimination has been established (§15):

- a. Whether there is a difference in treatment between a male and a female prisoner in respect of the hair cutting requirement.

- b. Whether the relevant circumstances between a male and a female prisoner in respect of hair cutting requirement in the prison context are not materially different such that they are in comparable positions.
  - c. Whether a male prisoner is treated less favourably than a female prisoner insofar as hair cutting requirement is concerned.
  - d. Whether the differential treatment is on the basis of sex.
8. There is no controversy between the Appellant and the Commissioner regarding the requirements in para. 7a, 7b and 7d, i.e. the answers to the three questions are all in the affirmative.
9. On para. 7c, i.e. whether there is “less favourable treatment” of male prisoners on account of the denial of choice to them, the CFA found that SO 41-05 on its face suggests that male prisoners are treated differently and less favourably to their female counterparts on account of the absence of choice faced by the male prisoners. The burden is thus passed to the Commissioner to say why this is not so (§40).
10. The Commissioner argued that SO 41-05 served to ensure custodial discipline through the imposition of reasonable uniformity and conformity in appearance among prisoners, and argued that when determining discrimination, one has to take into account the whole context in a packaged approach (§21, 25 & 28).
11. While the CFA acknowledged that there are cases in which the purported discriminator can refer to some underlying objective, policy or reason to demonstrate that the differential treatment in question does not amount to less favourable treatment, the alleged discriminator must demonstrate that the difference in treatment is logically and reasonably connected to the underlying objective, policy or reason (§19, 20). On the facts of the present appeal, the CFA accepted that custodial discipline is a legitimate factor to be considered (§48) but found it difficult to see how a difference in treatment regarding the length of hair between male and female prisoners based on asserted conventional standards has any reasonable connection with custodial discipline (§49). In the absence of a reasonable connection, the CFA held that the Commissioner does not really begin to explain the difference in treatment and why there has not been less favourable treatment (§50).
12. The Commissioner further argued the difference in treatment between male and female prisoners under SO 41-05 simply reflects the respective conventional standards of appearance of male and female in society. While the CFA accepted that there may be some situations where resort to societal or conventional standards may be relevant consideration in considering the aspect of less favourable treatment (§§22 & 23), the CFA held that the evidence in the present case far from establishes this

contention and held that the Commissioner had failed to establish on evidence the conventional standards he relied on (§§51 & 52).

13. For the foregoing reasons, the CFA rejected the Commissioner's arguments and held that there was less favourable treatment for the Appellant when compared with female prisoners. Accordingly, the CFA found that all four requirements in the aforesaid 4-step approach were satisfied, and there has been discrimination on the basis of sex in violation of section 5(1)(a) of the SDO (§55).

14. The Appellant raised the issue of the appropriateness of relying on conventional standards for the purpose of defeating an argument of less favourable treatment. The CFA noted the difficulties and the potential nuanced arguments involved in resolving this issue. Given it was unnecessary on the facts of the present appeal to resolve this, the CFA left open this issue (§36 & 37).

2<sup>nd</sup> Certified Question: Constitutional Issue under BL25

15. Given its conclusion of the 1<sup>st</sup> certified question, the CFA found it unnecessary to deal with this issue. However, the CFA observed that, on the facts of the present case, the outcome would not be different under BL 25 (§56).

Outcome

16. For the foregoing reasons, the CFA allowed the Appellant's appeal. Directions were given for the parties to file further written submissions on relief and costs.

**Civil Division  
Department of Justice  
27 November 2020**