



Summary of Judicial Decision

Q and Tse Henry Edward (“Appellants”) v Commissioner of Registration (“Commissioner”)

FACV 8-9/2022; [2023] HKCFA 4

Decision: Appeal allowed with costs order *nisi* to the Appellants

Date of Hearing: 4 January 2023

Date of Judgment: 6 February 2023

Background

1. The Appellants are two female-to-male (“FtM”) transgender persons who were diagnosed as suffering from gender dysphoria but had not undergone full sex reassignment surgery (“SRS”). They each challenged:-
 - (a) the Commissioner’s policy that medical proof of
 - (i) removal of the uterus and ovaries; and
 - (ii) construction of some form of a penis is required in order to amend the sex entry on a FtM transgender person’s Hong Kong Permanent Identity Card (“HKIC”) (“Policy”); and
 - (b) the Commissioner’s decisions refusing to amend the sex entry of each of the Appellants’ HKICs from female to male on the ground that each of them had not completed full SRS as required under the Policy (“Decisions”).
2. Before the Court of Final Appeal (“CFA”), the Appellants argued that the Policy and the Decisions constituted an unlawful interference with their constitutional rights to privacy under Article 14 of the Hong Kong Bill of Rights (“HKBOR”).
3. On 4 January 2023, CFA heard the appeals with judgment (“Judgment”) handed down on 6 February 2023 which unanimously allowed the appeals with an order nisi that the Commissioner shall pay the costs of the appeals to the Appellants.

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?](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=150361&QS=%24%28FACV%2C8%2F2022%29&TP=JU)

[DIS=150361&QS=%24%28FACV%2C8%2F2022%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=150361&QS=%24%28FACV%2C8%2F2022%29&TP=JU)

[https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=150362&QS=%24%28FACV%2C8%2F2022%29&TP=JU)

[DIS=150362&QS=%24%28FACV%2C8%2F2022%29&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=150362&QS=%24%28FACV%2C8%2F2022%29&TP=JU))

4. Contentions initially made by the Appellants under Article 3 of HKBOR as well as under the Sex Discrimination Ordinance (Cap. 480) are no longer pursued, so CFA



only focused on Article 14 of HKBOR.

5. CFA first held that it was appropriate to apply the "no more than reasonably necessary" standard in assessing the proportionality of the Policy since it concerned core values relating to intimate personal characteristics which engaged a narrower standard of scrutiny (paras. 58-62).
6. CFA noted that the Policy adopts as the criterion for alternation of the gender marker, completion of surgery to remove the uterus and ovaries and to construct "a penis or some form of a penis". This makes amendment to the gender marker conditional on undergoing the most invasive surgical intervention in the range of treatments for gender dysphoria – treatment which may be medically unnecessary for many transgender persons (including the Appellants). As the evidence indicates, some transgender persons feel pressured to undergo such surgery just to get a replacement ID card in order to avoid the frequent experience of discrimination, humiliation, violation of their dignity and invasion of their privacy. Such pressure is objectionable in principle. CFA is of the view that adoption of such a criterion weights significantly against the Policy in assessing its proportionality (paras. 65-67).
7. Using the standard of "no more than reasonably necessary", the Policy was considered disproportionate in its encroachment upon the Appellants' right to privacy under Article 14 of HKBOR. CFA did not accept the following three justifications advanced by the Commissioner.
 - (a) On the justification of "a full SRS is the only workable, objective and verifiable criterion to enable a registration officer to determine the application", CFA ruled that the availability of a medical exemption under the existing Policy as well as examples of different policies adopted in other jurisdictions showed that other criteria were plainly workable without causing administrative difficulty (paras. 72-75). Should a criterion other than full SRS were to be adopted, any possibility of questionable medical certification could be addressed by the Commissioner stipulating what constituted acceptable certification (para. 78).
 - (b) On the justification of "practical administrative problems due to incongruence between the external physical appearance of the holder and the gender marker would arise if some other line was drawn", CFA dealt with the examples raised by the Commissioner and held that the possible examples will not pose much difficulty on administration (para 82-85). It further held that that kind of incongruence which most commonly caused



problems arose out of the discordance between the gender marker and a transgender person's outward appearance (i.e. external incongruence), instead of that in respect of the genital area. In the great majority of cases, leaving the gender marker unamended simply because a transgender person had not undergone full SRS produced greater confusion or embarrassment, and rendered the gender marker's identification function deficient (paras. 86-92). CFA acknowledged that there were areas of society where genuine and difficult issues arose concerning the appropriate treatment of transgender persons, but having SRS as a requirement to change of ID card gender marker is irrelevant to the resolution of such difficulties (paras. 93-96).

- (c) On the justification of “hormonal and psychiatric treatments that precede full SRS are not absolutely irreversible”, giving rise to a risk that a “FtM pre-operative transgender person, whose sex entry on the identity card has been changed to male, stops hormonal treatment, recovers fertility, becomes pregnant, and gives birth”, CFA found that the occurrence of such pregnancy was extremely rare. Therefore, it ruled that it would be wholly disproportionate to regard the exceedingly small risk of reversal of FtM transition leading to pregnancy as a justification for the Policy (para. 102).
- 8. Though technically unnecessary, CFA took the liberty to further consider the fourth step of the proportionality analysis. CFA considered that the societal benefits of the Policy are in many respects illusory and are at best relatively slim. The Policy was further considered to impose an unacceptably harsh burden on the individuals concerned and did not reflect a reasonable balance with the societal benefits of the Policy (para. 107).
- 9. CFA noted that there are various models and approaches that might be considered for re-formulating the Policy in a manner consistent with the rights protected under Article 14 of the HKBOR (para. 110).

Civil Division

Department of Justice

6 February 2023