



Summary of Judicial Decision

MK v Government of HKSAR HCAL 1077/2018; [2019] HKCFI 2518

Decision : **Application for judicial review dismissed**
Date of Hearing : **28, 29 & 30 May 2019**
Date of Judgment/Decision : **18 October 2019**

Background

1. On 11 June 2018, the Applicant (a Hong Kong permanent resident and a lesbian) filed an application for leave to apply for judicial review challenging the laws of Hong Kong insofar as they do not allow same-sex couples to marry and fail to provide any alternative means of legal recognition of same-sex partnership (such as civil union or registered partnership) as violating: -
 - (1) her right to privacy under Article 14 of the Hong Kong Bill of Rights (“**HKBOR**”); and
 - (2) her right to equality, or protection against discrimination on the ground of her sexual orientation, under Article 25 of the Basic Law (“**BL**”) and Article 22 of the HKBOR.
2. Leave to apply for judicial review on the aforesaid grounds was granted by the Court of First Instance (“**CFI**”) on paper on 13 June 2018. After giving a Notice of Intention to Amend Form 86, the Applicant sought leave to further argue, *inter alia*, that the lack of legal recognition of same-sex relationship in Hong Kong violates:-
 - (1) her right to marriage under Article 37 of the BL; and
 - (2) her right to freedom of conscience and religion under Article 32 of the BL and Article 15 of the HKBOR.
3. The substantive hearing of the judicial review and the amendment application were heard together on 28, 29 & 30 May 2019 before the CFI. On 18 October 2019, the CFI:-
 - (1) allowed the application to amend the Form 86; and
 - (2) dismissed the application for judicial review.



Issues in dispute

4. The two principal issues identified by the CFI are:-
 - (1) whether the denial of the right to marriage to same-sex couples under Hong Kong law constituted a violation of their constitutional rights; and
 - (2) whether the Government's failure to provide a legal framework for the recognition of same-sex relationships such as civil unions, registered partnerships or other legally recognised status for same-sex couples as an alternative to marriage also constituted a violation of their constitutional rights.

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

(Full text of the CFI's judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=124943&QS=%2B&TP=JU)

5. The CFI noted that Hong Kong law has never recognised or permitted same-sex marriage. The element of "one man and one woman" has been an essential part of the statutory definition of marriage in Hong Kong since it was first adopted in the Marriage Ordinance (Cap. 181) in 1932 (paragraphs 11-13).
6. The right to marry under BL 37 had no application to same-sex couples. At the time of promulgation of BL "marriage" was clearly understood in the traditional sense of being a union between a man and a woman. It followed that the expression of "marriage" in BL 37 was clearly a reference to heterosexual marriage. It was also clear that HKBOR 19 only protected the right of heterosexual couples to marry, and the fundamental right provided under BL should be read together with the HKBOR as a coherent whole. While fundamental rights ought to be interpreted generously, such principle was subject to the qualification that it could not lead to a construction which the instrument was not capable of bearing (paragraphs 14-21).
7. The CFI further held that while in principle legislation may be given an updated interpretation in appropriate circumstances, there was no sufficiently strong or compelling evidence to demonstrate that the changing or contemporary social needs and circumstances in Hong Kong were such as would require an updated interpretation of the word "marriage" in BL 37 to include a same-sex marriage (paragraphs 22-24).



8. The CFI accepted the Government's argument that, if BL 37 and/or HKBOR 19, which specifically relate to the right of marriage, did not give same-sex couples the right to marry, such right could not be derived from other general, non-specific provisions in the BL or the HKBOR (paragraphs 32-38). Having reached such conclusion, the CFI considered unnecessary to consider separately the scope of the various constitutionally guaranteed rights under BL 25 and 32, and BOR 1, 14, 15 and 22 relied upon by the Applicant (paragraph 44).

9. As regards the challenge against the lack of alternative legal framework for recognition of same-sex relationship, the CFI did not accept the Applicant's contention that the Government was under a positive legal obligation to provide an alternative legal framework giving same-sex couples the same rights and benefits enjoyed by opposite-sex married couples for the following reasons:-
 - (1) If the Government was under no legal obligation to provide same-sex couples with the rights and benefits through the institution of marriage, it would be wrong in principle for the court to achieve such result through the use of another label or institution.
 - (2) It would also be wrong in principle for the court to declare generally that the Government was under a positive obligation to do so without examining whether any particular right or benefit ought to be available to same-sex couples.
 - (3) Whether there should be such legal framework is quintessentially a matter for legislation.
 - (4) In any event, the right to privacy provided under HKBOR 14 was negative in nature ("No one shall be subjected to arbitrary or unlawful interference with his privacy..."). The CFI was unable to see how the absence of legislation to give legal recognition or protection of the status of same-sex relationship could be said to amount to "arbitrary or unlawful interference".

(paragraphs 46-54)

Civil Division
Department of Justice

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