



**Summary of Judicial Decision**

**Balaoro, Marietta S. v The Secretary for Justice**

**HCAL 1188/2019; [2020] HKCFI 348**

**Decision** : **Application for leave for judicial review dismissed**  
**Date of Hearing** : **22 October 2019**  
**Date of Judgment** : **4 March 2020**

**Background**

1. On 3 May 2019, the Applicant filed an application for leave to apply for judicial review seeking a declaration that section 30 of the Marriage Ordinance (Cap 181) (the “**MO**”) does not prohibit performance of “same-sex religious marriage ceremonies”; and to the extent that it prohibits performance of such ceremonies, the provision is unconstitutional for breaching his right to freedom of religion and right to equality under Articles 25, 32, 39 and 141 of the Basic Law and Articles 1, 14, 15, 22 and 23 of the Hong Kong Bill of Rights.
2. The Applicant is a Philippine national working in Hong Kong as a foreign domestic helper and claims to be an ordained pastor of a church named the LGBTs Church. He claims that he has conducted in the past, and intends to conduct in the future, “same-sex religious marriage ceremonies” for his parishioners. Due to his alleged fear of being prosecuted under section 30 of the MO, the Applicant had written to seek the Director of Public Prosecution (“**DPP**”)’s assurance that he would not be prosecuted under section 30 of the MO for performing “same-sex religious marriage ceremonies”. DPP refused to accede to such request.
3. By his Notice of Intention to Amend Form 86 filed on 18 September 2019, the Applicant further challenged the decision of DPP not to provide assurance or guidance as to the prosecution of the Applicant for performance of “same-sex religious marriage ceremonies”.
4. On 3 October 2019, the Applicant’s legal representatives lodged his Skeleton, arguing in the reverse that, the performance of “same-sex religious marriage ceremonies” are prohibited by section 30 of the MO, and urged the court to grant leave to his constitutional challenge.
5. The leave hearing of the judicial review was held on 22 October 2019 before the CFI. At the hearing, the Applicant did not pursue the constitutional challenge.
6. On 4 March 2020, the CFI dismissed the application for leave to apply for judicial review.



### **Issues in dispute**

7. The two principal issues argued before the CFI are:-
- (1) Whether the Applicant is entitled to a declaration that the performance of “same-sex religious marriage ceremonies” does not contravene section 30 of the MO; and
  - (2) Whether DPP is under an obligation to provide assurance or guidance to the Applicant as to the prosecution of the Applicant for the performance of “same-sex religious marriage ceremonies”.

### **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=126958&QS=%2B&TP=JU&currpage=T](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126958&QS=%2B&TP=JU&currpage=T) )

8. The CFI held that the intended application for judicial review is not reasonably arguable, and has no realistic prospect of success. The application for leave was dismissed. Extension of time to apply for leave was also refused.
9. There is no dispute between the parties that performance of “same-sex religious marriage ceremonies” according to the Applicant’s religious belief would not contravene section 30 of the MO. For the purpose of section 30 of the MO, “marriage” means “the voluntary union for life of one man and one woman to the exclusion of all others”. Thus, these ceremonies cannot, by definition, be “marriages” for the purpose of section 30 (paragraphs 28-31).
10. It is not the general function of the civil court to give any advisory opinion, or prior assurance to the Applicant that his past or proposed conduct would not give rise to any criminal liability unless in exceptional circumstances. The present case did not warrant the Court to take an exceptional course as there was no concern on the interest of justice or a live practical question (paragraphs 32-37).
11. As to the challenge against the DPP, it was correct, as a matter of law, for the DPP to decline the Applicant’s request for assurance that he would not be prosecuted for performing “same-sex religious marriage ceremonies”. It was no part of the DPP’s functions to provide legal services to private individuals, or proffer advice to them as to whether or not certain past or proposed conduct constituted or would constitute a criminal offence. (paragraphs 40-42).
12. Given the ruling at paragraphs 9 to 11 above, CFI found it unnecessary to rule on the issue of whether the Applicant is a “minister” for the purpose of MO (paragraph 43).
13. The Applicant was ordered to pay costs because of the substantial delay in



## **Department of Justice**

The Government of the Hong Kong Special Administrative Region

making the application, which was essentially for his own benefit, and that the Secretary for Justice attended the hearing upon the Court's direction and provided substantial and helpful assistance (paragraph 47-48).

**Civil Division**

**Department of Justice**

**March 2020**