



Summary of Judicial Decision

Q, R and Tse Henry Edward v Commissioner of Registration

HCAL 229/2015, 154 & 189/2017; [2019] HKCFI 295

Decision : **Application for leave to apply for judicial review allowed; and
Application for judicial review dismissed**

Date of Hearing : **9, 10 & 11 January 2018**

Date of Judgment/Decision : **1 February 2019**

Background

1. Q, R and Tse Henry Edward (each of them as “Applicant”, and collectively as “Applicants”) were three female-to-male (“FtM”) transsexuals who had not undergone full sex reassignment surgery (“SRS”). They each challenged:-
 - (a) the policy of the Commissioner of Registration (“Commissioner”) 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 transsexual’s Hong Kong Permanent Identity Card (“HKIC”) (“SRS Policy”); and
 - (b) the decisions of the Commissioner refusing to amend the sex entry on each of their HKICs from female to male (“Decision” concerning each Applicant, and collectively “Decisions”) on the ground that each of them had not completed full SRS as required under the SRS Policy.
 2. The Applicants argued that the Decisions and the SRS Policy:-
 - (a) were inconsistent with their right to privacy;
 - (b) infringed their right not to be subjected to cruel, inhuman or degrading treatment; and
 - (c) were discriminatory.
 3. The three cases were heard together at a rolled up hearing of the Court of First Instance. On 1 February 2019, the Court:
 - (a) allowed the Applicants’ applications for leave to apply for judicial review; and
 - (b) dismissed the Applicants’ applications for judicial review with costs to the Commissioner.
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Issues in dispute

4. Whether the requirement to undergo full SRS (“SRS Requirement”) under the SRS Policy involved a disproportionate and unnecessary breach of the Applicants’ right to privacy under Article 14 of the Hong Kong Bill of Rights (“HKBOR”) and Article 17 of the International Covenant on Civil and Political Rights (“ICCPR”);
5. Whether the SRS Requirement amounted to cruel, inhuman or degrading treatment in contravention of Article 3 of the HKBOR and Article 7 of the ICCPR;
6. Whether the SRS Policy constituted indirect discrimination under s.5(1)(b) of the Sexual Discrimination Ordinance (Cap. 480) (“SDO”) and was therefore unlawful under section 38(1) of the SDO, and if so, whether the differential treatment was nevertheless justified.

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

(Full text of the CFJ’s judgement at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=119924&QS=%2B&TP=JU)

7. There was no issue of infringement of the Applicants’ right to privacy under Article 14 of the HKBOR. While it was accepted that the SRS Requirement restricted the Applicants’ right to privacy protected under Article 14 of the HKBOR, specifically, their right to gender identity and right to physical integrity, the restrictions were justified. Change of the sex entry on HKIC had wider public interest and did not only concern private right of the transgender persons. The Commissioner had to engage in a balancing exercise against the competing private and public interests, and it was legitimate for the Commissioner to establish a clear objective administrative guideline for the registration officers to decide whether an application for change of gender on the HKIC was to be accepted (“legitimate aim”). The SRS Requirement was clearly rationally connected to the legitimate aim (paragraphs 17-29).
8. The Commissioner was entitled to a narrow margin of appreciation when a fundamental and essential human right (right to physical integrity) was engaged. Any restriction and infringement of this right must be scrutinized vigilantly by the Court (paragraphs 43-49).
9. Unless and until the society as a whole would be readily equipped with the mentality and facilities that could be catered for pre-operative transgender persons who have their chosen gender stated in the identification documents and papers, the SRS Requirement would be the only workable model to achieve the legitimate aim, as medical guidelines on whether and when a transgender person would be fully transitioned to the chosen gender were effectively subjective / self-determining (paragraphs 53-63).



10. Given the significant and wide impact on public interests, the Court was satisfied that a reasonable balance was struck by the SRS Policy between the benefits of the SRS Requirement and the inroads made to the Applicants' right (paragraph 77).
11. The SRS Policy therefore satisfied the proportionality test.
12. There was also no issue of coerced consent and there was no infringement of the right not to be subjected to cruel, inhuman or degrading treatment under Article 3 of the HKBOR. The Applicants (and other transgender persons) could be regarded as having given a voluntary, valid and informed consent when they decided to undergo full SRS even if they only chose to do so in order to change the sex entry on their HKICs, because the transgender persons would be fully informed of the health and medical risks associated with the procedure, would have all the time he needed to make a final decision, and could decide against undergoing the procedure (paragraphs 93-103).
13. There was also no issue that the SRS Policy constituted indirect discrimination under section 5(1)(b) of the SDO. The Applicants failed to satisfy the essential elements under section 5(1)(b) of the SDO to establish indirect discrimination, i.e. there was nothing in the evidence that could support the proposition that the proportion of the FtM transsexuals who could successfully complete the full SRS was "considerably less" than that of the male-to-female transsexuals who could comply with it, and there was also no evidence that the application of the SRS Requirement was to their detriment as they could not comply with it (paragraphs 109-114).

Civil Division

Department of Justice

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