



Summary of Judicial Decision

Sham Tsz Kit v Secretary for Justice HCAL 2682/2018; [2020] HKCFI 2411

Decision : **Application for judicial review dismissed**
Date of Hearing : **29 May 2020**
Date of Judgment/Decision : **18 September 2020**

Background

1. On 26 November 2018, the Applicant (a Hong Kong permanent resident and a homosexual) applied to judicially review the laws of Hong Kong insofar as they did not allow same-sex couples to marry ("**1st JR Ground**"), or they failed to provide any alternative means of legal recognition of same-sex partnership (such as civil union or registered partnership) ("**2nd JR Ground**"), or they failed to recognize same-sex marriage entered into outside Hong Kong ("**3rd JR Ground**"). The Applicant complained that there was violation of:-
 - (1) his right to equality, or protection against discrimination on the ground of his sexual orientation, under Article 25 of the Basic Law ("**BL**") and Article 22 of the Hong Kong Bill of Rights ("**HKBOR**"); and
 - (2) his right to privacy under Article 14 of the HKBOR.
2. On 3 January 2019, the Court of First Instance ("**CFI**") granted leave to apply for judicial review, but stayed the proceedings pending the outcome of a similar application for judicial review in *MK v Government of HKSAR* (HCAL 1077/2018; [2019] HKCFI 2518) ("**MK**").
3. On 18 October 2019, the CFI handed down a judgment dismissing the application in *MK*, holding that (i) the denial of the right to marriage to same-sex couples under the laws of Hong Kong did not constitute any violation of their constitutional rights, and (ii) the Government was under no positive legal obligation to provide an alternative legal framework of recognition of same-sex relationships. On 22 November 2019, the CFI made an order lifting the stay of proceedings insofar as it applied to the 3rd JR Ground.
4. On 18 May 2020, the Applicant's legal representatives in the Applicant's skeleton submissions invited the Court to lift the stay of proceedings in relation to the 1st and 2nd JR Grounds and dismissed those Grounds for the reasons set out in *MK*.
5. On 29 May 2020, the CFI heard the substantive hearing of the judicial review in



respect of the 3rd JR Ground. On 18 September 2020, the CFI dismissed the application for judicial review.

Issues in dispute

6. The issues are:-

- (1) Whether the laws of Hong Kong, insofar as they did not recognize foreign same-sex marriages, constituted a violation of the right to equality protected by Article 25 of the BL (“**BL 25**”) or Article 22 of the HKBOR (“**HKBOR 22**”); and
- (2) Whether the CFI should lift the stay in relation to the 1st and 2nd JR Grounds and dismiss those grounds for the reasons set out in *MK* as proposed by the Applicant.

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=130883&QS=%2B&TP=JU)

7. The CFI rejected the Applicant’s single argument that the laws of Hong Kong which recognized foreign opposite-sex marriages but did not recognize foreign same-sex marriages, constituted differential treatment on the ground of sexual orientation.
8. The CFI noted that the Hong Kong courts generally would apply the conflict of laws rules under the common law to determine whether a foreign marriage would be recognized as a valid marriage in this jurisdiction. As held in *Wong Zhong Lan-Xiang v Frank Wong*, HCAP 900002/1995 (18 April 2002), at §48 per Deputy High Court Judge Andrew Cheung (as he then was), a foreign marriage would be recognized as a valid marriage if it satisfied both the requirements of (i) formal validity in accordance with the law of the place where the marriage was celebrated, and (ii) essential validity in accordance with the law of each party’s antenuptial domicile, unless its recognition would be repugnant to the conscience of the Hong Kong court or public policy in Hong Kong. (paragraphs 14-15)
9. The CFI held that the Applicant’s same-sex marriage lacked essential validity and could not be recognized as a valid marriage under the Hong Kong law, because Hong Kong marriage law did not permit marriage between persons of the same sex, and neither the BL nor the HKBOR provided for or protected the right of same-sex couples to marry in Hong Kong. (paragraph 16)



10. The CFI did not accept that foreign opposite-sex marriages would be the relevant comparators to the Applicant's situation. The CFI explained that:-
 - (1) whether opposite-sex couples married overseas and same-sex couples married overseas were in an analogous or comparable position was a context-specific question, which depended on the subject matter under consideration and its relevant context, and could not be answered in a vacuum;
 - (2) there could not be a general rule applicable in all circumstances that opposite-sex married couples and same-sex married couples should be regarded as being in an analogous or comparable position as purported by the Applicant; and
 - (3) the question of whether the reason for the differential treatment was based on a prohibited ground was likewise fact-specific.(paragraphs 18-23)

11. The CFI also rejected the Applicant's approach of using the four-step justification test to establish the general proposition that the non-recognition of foreign same-sex marriages under Hong Kong law was inconsistent with the right to equality protected by BL 25 and HKBOR 22, on the ground that each of the four questions under the justification test required the court to analyze the relevant facts and context before an answer could be given to the question. (paragraphs 24-26)

12. For the above reasons, the CFI did not support the Applicant's contention that foreign same-sex marriages would be entitled to be given equal recognition as foreign opposite-sex marriages under Hong Kong law, regardless of the subject matter under consideration and its relevant context, and rejected the 3rd JR Ground. (paragraphs 26-27)

13. The CFI also lifted the stay of proceedings insofar as the 1st and 2nd JR Grounds were concerned and rejected those grounds of judicial review, and dismissed the present judicial review application with costs to the Respondent. (paragraphs 28-29)

Civil Division
Department of Justice

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