



Summary of Judicial Decision

Ng Hon Lam Edgar v Secretary for Justice

HCAL 3525/2019; [2020] HKCFI 2412

Decision : Both application for leave for judicial review and application for judicial review allowed
Date of Hearing : 27 May 2020
Date of Judgment : 18 September 2020

Background

1. On 27 November 2019, the Applicant applied to judicially review the constitutionality of the marriage provisions under sections 2 & 3 of the Intestates' Estates Ordinance (Cap 73) ("IEO") and section 2 of the Inheritance (Provision for Family and Dependents) Ordinance (Cap 481) ("IPO"). In gist, the Applicant challenged the definitions of "valid marriage", "spouse", "husband" and "wife" in those provisions to the extent that they did not give recognition to the same-sex marriage / civil partnership entered into by persons in another jurisdiction ("**foreign same-sex marriage**" / "**foreign same-sex civil partnership**"). The application for judicial review was grounded on the right to equality, the right to respect for private and family life and the right to property under Articles 6, 25 and 105 of the Basic Law and Articles 1, 14 and 22 of the Hong Kong Bill of Rights.
2. The Applicant was a Hong Kong permanent resident who had entered into a foreign same-sex marriage in London with his same-sex partner. The Applicant was concerned that if he died intestate, his properties might not be passed to his same-sex partner under the IEO. Under the IEO, it provided that the surviving spouse had priority to personal chattels and residuary estate of an intestate and the right to acquire the premises in which he was residing at the time of the intestate's death.
3. Prior to bringing this application, the Applicant had written to the Department of Justice ("**DoJ**") seeking clarification, *inter alia*, that foreign same-sex marriage would be recognized as marriage for the purpose of probate, inheritance and intestacy. The DoJ replied that no clarification or confirmation would be provided as the role of the DoJ was not to provide legal advice to private individuals or their solicitors.
4. The Court of First Instance ("**CFI**") conducted a rolled-up hearing on 27 May 2020. On 18 September 2020, the CFI allowed the judicial review.



Issues in dispute

5. The issues argued before the CFI were:-

- (1) Whether the Applicant was in a comparable position to heterosexual married couples for the purposes of the IEO and IPO;
- (2) Whether the exclusion of same-sex married couples from legal entitlements and benefits under the IEO and IPO constituted unlawful discrimination on the ground of sexual orientation; and
- (3) Whether the Applicant had standing with regard to the recognition of foreign civil partnership under IEO and IPO.

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=130884&QS=%2B&TP=JU)

6. For the purposes of the IEO and IPO, there was differential treatment between same-sex married couples and opposite-sex married couples, and sexual orientation was a prohibited ground for giving differential treatment. The CFI found that the Applicant succeeded in establishing that he was treated differently to a person in a comparable position (i.e. heterosexual married couple) and the reason for the differential treatment was based on prohibited ground (i.e. sexual orientation)(paras 15, 25, 33, 37 & 38).
7. One of the Government's arguments was that same-sex married couples were not in a comparable position to heterosexual married couples because the matrimonial law in Hong Kong accorded special status to heterosexual married couples. The CFI rejected that as a circular argument (para 37(1)).
8. The CFI rejected the Government's argument that same-sex married couples and heterosexual married couples were not in a comparable position for the purposes of the IEO and IPO because only heterosexual married couples (and not same-sex married couples) were legally obliged to maintain their partners during their lifetime. The CFI found that the IEO and IPO did not confine the classes of eligible beneficiaries to those whom the deceased were under a legal obligation to maintain during his lifetime. For example, the CFI considered that one of the purposes of the IPO is to benefit persons whom the deceased had no legal but only a moral obligation to maintain (para 37(2)).
9. The CFI found that the fact that same-sex married couples could avoid differential treatment by making a will was not relevant to whether they were in a comparable position to that of heterosexual married couples. It was relevant to the question of whether the differential treatment would result in an unacceptably harsh burden on same-sex married couples (i.e. the 4th step of the justification test) (para 37(3)).



10. Having found that the exclusion of same-sex married couples under the IEO and IPO constituted differential treatment, the CFI then went on to consider the lawfulness of the same by applying the 4-step justification test:
 - (1) **1st step - Legitimate aim:** the CFI accepted that the aim of supporting and upholding the integrity of the traditional institution of marriage in Hong Kong (“**the Marriage Aim**”) was a legitimate aim, and the Applicant accepted that encouraging heterosexual unmarried couples to marry to ensure that their spouses would be afforded spousal status or priority under inheritance law (“**the Family Aim**”) was a legitimate aim. For the aim of maintaining and optimizing the overall coherence, consistency and workability of the Hong Kong legislation that rested upon the institution of marriage (“**the Coherence Aim**”), the CFI considered that it was merely a different formulation of the Marriage Aim (para 41).
 - (2) **2nd step - Rational Connection:** the CFI found that it was illogical to suggest that the denial of benefits under the IEO or IPO to same-sex married couples would promote the Marriage Aim, Family Aim or Coherence Aim. There was also no basis to suggest that any person would be encouraged to enter into a heterosexual marriage, or the traditional institution of marriage would be undermined, or the workability of the overall scheme of Hong Kong legislation which rested upon the traditional institution of marriage would be adversely and substantially affected by giving same-sex married couples the same benefits under the IEO or IPO as accorded to heterosexual married couples. The differential treatment was thus not rationally connected to the legitimate aims (paras 44 & 45).
 - (3) **3rd step - Proportionality:** Having found that the differential treatment did not pass the 2nd step of the justification test, the CFI did not find it necessary to consider the 3rd step. Had it been necessary to do so, the CFI would have found that the appropriate standard of review should be towards the higher end of the intensity of review in the continuous spectrum of reasonableness as the differential treatment was based on sexual orientation. The CFI would have found that the differential treatment could not pass the 3rd step (i.e. not proportionate means of achieving the legitimate aims) (paras 46 & 47).
 - (4) **4th step - Fair balance between societal interest and individual rights:** While also not necessary to consider the 4th step, the CFI remarked that whether the differential treatment could pass the 4th step (i.e. whether it would result in an unacceptably harsh burden on same-sex married couples) was more debatable (para 47).
11. Having found for the Applicant on the ground of unlawful discrimination, the CFI did not find it to be necessary to consider the Applicant’s grounds of review on the right to respect for private and family life and the right to property. In



any event, CFI considered that those grounds did not add anything of substance to the ground of unlawful discrimination (para 50).

12. The CFI found that the Applicant had no standing to ask for a declaration that, for the purpose of the IEO and IPO, references to “marriage” should be read to include foreign civil partnership. It would also be inappropriate for the CFI to deal with the position of foreign civil partnership generally in the absence of evidence on the legal relationship and incidence arising from a civil partnership and civil union in any given country, and how such legal relationship and incidence may differ in different countries which permitted those forms of partnership or union to be formed (para 51).

Civil Division

Department of Justice

18 September 2020