QT v Director of Immigration

FACV No. 1 of 2018 (4 July 2018)[1]

CFA

Background

QT ("the Applicant") is a British national. She is homosexual and met her partner, SS, who has dual South African and British nationality, in 2004. In May 2011, the Applicant and SS entered into a same-sex civil partnership in England under the UK's Civil Partnership Act 2004.

SS was offered employment in Hong Kong and granted an employment visa under the General Employment Policy ("GEP") to come and work in Hong Kong. In September 2011, the couple entered Hong Kong, SS on the strength of her employment visa and the Applicant as a visitor.

There is an immigration policy in Hong Kong under which a person may apply to take up residence or remain in Hong Kong as a dependant of an eligible sponsor ("the Policy"). For persons entering Hong Kong to take up employment under the GEP, the spouse and/or unmarried dependant children under the age of 18 of the sponsor are eligible to apply as a dependant of the sponsor under the Policy. An application for admission of a dependant may be favourably considered if:

(i) there is reasonable proof of a genuine relationship between the applicant and the sponsor;

(ii) there is no known record to the detriment of the applicant; and

(iii) the sponsor is able to support the applicant's living at a standard well above the subsistence level and provide him/her with suitable accommodation in the HKSAR.

It was not disputed that the Applicant and SS met those three requirements.

After making unsuccessful applications for a dependant visa and also for an employment visa in her own right, on 29 January 2014, the Applicant submitted the application for a dependant visa, which led to the judicial review proceedings.

On 18 June 2014, the Director of Immigration ("the Director") refused the Applicant's application. The Director found the Applicant ineligible to be considered for the dependant visa given that she was "outside the existing policy" which was to admit a spouse as a dependant only if he or she was a party to a monogamous marriage consisting of one male and one female.

The CFI decision

In October 2014, the Applicant commenced judicial review proceedings seeking to quash the Director's decision refusing her dependant visa application. The Applicant argued, *inter-alia*, that the Director's decision was unreasonable in the public law sense as it was discriminatory against her on sexual orientation grounds that were not justified.

The Director contended that the differential treatment under the Policy pursued the legitimate aim of striking a balance between (i) maintaining

[1] Reported at (2018) 21 HKCFAR 324.

Hong Kong's continued ability to attract people with the right talent and skills to come to Hong Kong to work; and (ii) the need for a system of effective, strict and stringent immigration control. The Director argued that he was entitled to adopt a bright line based on marital status as defined by Hong Kong's matrimonial law for the sake of legal certainty and administrative workability and convenience.

In the CFI, Au J held that the Director was entitled to draw a bright line between married and unmarried persons in the context of immigration control, the two categories of persons were sufficiently different to justify the difference in treatment under the Policy and that neither the Policy nor the Director's decision discriminated the Applicant on the basis of sexual orientation. The Applicant's application for judicial review was thus dismissed.

The CA decision

The Applicant appealed against the CFI's decision to the CA, and the CA unanimously allowed the appeal. While the CA was of the view that certain "core rights and obligations unique to a relationship of marriage" existed so that differential treatment based on those core rights could not be regarded as discriminatory and thus no justification was required, it considered that the right involved in the present case was not one of those "core rights" and thus justification was required for the differential treatment. It was held that the ground of sexual orientation discrimination was determinative of the outcome of the appeal. The CA held that whilst the aim of striking the balance between attracting talent and immigration control was legitimate, the Director's eligibility requirement, restricted to heterosexual married persons and excluding same-sex married persons or civil partners, was not rationally connected to that aim. Accordingly, it was concluded that the Director failed to justify the discriminatory treatment. The Director appealed against the CA's decision to the CFA.

Application to intervene

In March 2018, shortly before the hearing of the appeal at the CFA, 15 financial institutions ("the Banks"), 16 law firms ("the Law Firms"), and Amnesty International Limited ("Amnesty") applied for permission to intervene in the appeal in order to file written submissions in support of the CA's judgment. The Banks' and the Law Firms' applications were made on the basis that their perspective would provide the court with a more rounded picture of the practical effects of the Policy. In particular, they wished to draw to the court's attention the fact that the Policy had the effect of limiting the pool of foreign employees from which employers might wish to select and that this would adversely affect their interests as well as the wider interests of Hong Kong. As for the Amnesty, it sought to intervene on the basis of its knowledge and expertise on international

human rights in order to provide the Court with an independent analysis of the legal issues and hence a more rounded picture than the Court would otherwise obtain.

The Appeal Committee was prepared to accept that the Policy had a practical limiting effect which was not purely speculative or theoretical. However, the perspective of the Banks and the Law Firms was evident without their intervention. On the other hand, the effect of the Policy on the Director's aim of encouraging talented people to live and work in Hong Kong was addressed by the Applicant. For the Amnesty's application, the Appeal Committee did not consider its submissions advanced any materially different arguments to those already made by the Applicant. All applications to intervene were refused accordingly.[2]

Decision of the CFA

The applicable principles

The CFA stated in the judgment that the Director had wide powers of immigration control over HKSAR under BL 154 and the Immigration Ordinance (Cap. 115) pursuant to which the Policy operated. However, the Director rightly accepted that in implementing the Policy, he was constrained to exercise his powers in accordance with the principle of equality (i.e. treating like cases alike and unlike cases differently).

The CFA stated that in order to be within the scope of the statutory grant of discretionary power, the rule of law required that such powers to be exercised fairly and rationally and the principle of equality was an important aspect of such rationality. The CFA further stated that violation of the principle of equality might sustain an application for judicial review on the ground of *Wednesbury* unreasonableness.

While the Applicant also alleged infringement of her constitutional equality rights, her claim was primarily and sufficiently framed as one for judicial review on the basis that refusing her a dependant visa by application of the Policy amounted to unlawful discrimination, which was irrational and unreasonable in a *Wednesbury* sense.

The CFA noted that the case did not involve any claim that same-sex couples had a right to marry under Hong Kong law. The CFA further noted that in *W v Registrar of Marriages*,[3] it was recognized that a valid marriage under Hong Kong law is heterosexual and monogamous and such status is not open to couples of the same sex.

In considering the nature of the discrimination alleged by the Applicant, the CFA illustrated three recognized categories of discrimination as follows:

(i) Like cases are not being treated alike where the complainant is receiving treatment which is unfavourable when compared with treatment given to persons in "relevantly similar situations".

(ii) Unlike cases are being treated alike where the complainant disadvantageously receives the same treatment as persons in significantly different situations.

(iii) Indirect discrimination where the measure complained of appears neutral on its face but is significantly prejudicial to the complainant in its effect.

[2] *QT v Director of Immigration (Leave to Intervene)* (2018) 21 HKCFAR 150.

[3] (2013) 16 HKCFAR 112.

The issues

There were two main contested issues in the case: (i) whether there had been any discriminatory treatment on the Applicant at all; and (ii) if so, whether such discriminatory treatment could be justified.

The Director's first argument: whether justification was required

The Director's first argument was that the Policy required no justification as the status of marriage was plainly special and different from the status conferred by a civil partnership so that the respective dependants obviously occupied unlike positions which he was entitled to treat differently without having to go through any justification exercise. It was argued that the difference in status between the Applicant and a married spouse was itself a justification and that "marriage" was a special status providing a proper basis for treating married couples differently.

The CFA rejected this argument for three reasons. Firstly, the CFA considered the argument circular as it put forward the challenged differentiating criterion as its own justification. Secondly, the CFA found that the Director's assertion that an obvious difference existed between marriage and a civil partnership untenable. The CFA found that marriage and civil partnership were each a status recognized under English law, and although civil partnership was not called marriage, in almost every other respect it was indistinguishable from the status of marriage in English law. It was hard to see any basis for the Director concluding that they were obviously different comparators. Thirdly, the CFA found that the authorities cited by the Director did not support an approach which eschewed the need for justification simply on the basis of an asserted difference in marital status. The CFA stated that it was true that in some cases it might be appropriate to confine certain benefits to married persons, but this would generally be on the basis that the difference in treatment could be justified on fact-specific grounds.

The CA and the need for justification

The CFA found the CA's approach of "core rights and obligations" circular and giving rise to the fruitless debate as to what does or does not fall within the "core". The CFA held that in every alleged case of discrimination, the correct approach was to see if the difference in treatment could be justified.

The CFA clarified that it was not to suggest that a person's marital status was irrelevant as a condition for the allocation of rights and privileges. Instead, such status might in some circumstances be highly important or even decisive. However, the relevance and weight to be attributed to marital status was to be taken into account in considering whether a particular difference in treatment was justified as fair and rational, and that a person's marital condition could not determine presumptively that discrimination did not exist.

The Director's second argument: with justification

The Director accepted that, if held to be discriminatory, the differential treatment required justification. The Director argued that the differential treatment was justified and since the challenge concerned the Government's social and economic policy, the court should not interfere unless satisfied that the Policy was manifestly without reasonable foundation.

The proportionality concepts for scrutinizing incursions made into constitutionally protected rights constitute the justification test. As Li CJ explained in *Secretary for Justice v Yau Yuk Lung*[4] at para. 20:

"In order for differential treatment to be justified, it must be shown that:

(1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.

(2) The difference in treatment must be rationally connected to the legitimate aim.

(3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim."

Although the case proceeded as a claim for judicial review, it was accepted that the proportionality concepts developed in constitutional law, including the fourth step developed in *Hysan Development Co Ltd v Town Planning Board*,[5] namely whether a reasonable balance has been struck between the societal benefits of the encroachment on the one hand and the inroads made into the constitutionally protected rights of the individual on the other, were equally applicable to deciding whether the differential treatment entailed by the Policy was justified or whether it might be impugned as *Wednesbury* unreasonable. The provisions of BL 25 and Article 22 of BoR were thus indirectly relevant.

The legitimate aims

The Director stated that the twin aims of the Policy were (i) the encouragement of persons with needed skills and talent to join the local workforce, accompanied by their dependants; while at the same time (ii) maintaining strict immigration control. A subsidiary aim was stated to be that of being able to draw a "bright line" between those who did and those who did not qualify for dependant visas, thereby promoting legal certainty and administrative workability and convenience. The Applicant accepted that these were legitimate aims.

Rational connection

The CFA held that there was no rational connection between the Policy and the stated aims. The Policy ran counter to the aim of encouraging talent to join the Hong Kong workforce since a person who had the talent or skills deemed needed or desirable could be straight or gay. The CFA found that it was similarly hard to see how the Policy's exclusion, on grounds of sexual orientation, of persons who were bona fide same-sex dependants of sponsors granted employment visas promoted the legitimate aim of strict immigration control.

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4 (2007) 10 HKCFAR 335.

5 (2016) 19 HKCFAR 372.

The CFA further found that the differential treatment of the Applicant on the basis of administrative convenience was also irrational given that the Applicant and SS could just as conveniently produce their civil partnership certificate as a heterosexual married couple could produce their marriage certificate. The CFA stated that the rationality in question was not about the convenience of drawing of bright lines but about the rationality of the demarcation.

As the CFA found the Policy could not be justified as a measure rationally connected to the avowed "talent" and "immigration control" objectives, it was not saved by the "bright line" aim. The CFA concluded, in agreement with the CA, that the Policy was not rationally connected with the avowed legitimate aims.

The standard of review

While the CFA considered that it was unnecessary to proceed to consider the applicable standard of review, given that the issue on the applicable standard of review had been fully argued, the CFA found it helpful to discuss the standard in the judgment.

The CFA held that where a person was subjected to differential treatment on any of the suspect grounds, including sexual orientation, the Government's margin of discretion was much narrowed and the court would subject the impugned measure to "particularly severe scrutiny", i.e. it would require the Government to provide "very weighty reasons" or "particularly convincing and weighty reasons" to justify the challenged difference in treatment, applying the standard of reasonable necessity.

The CFA stated that the appropriate standard of review was case-specific and the Court would, if necessary, have examined whether the Policy went beyond what was reasonably necessary to attain the avowed legitimate aims.

Conclusion

In conclusion, the CFA held that there was no absolute bar to a claim of discrimination on account of sexual orientation when the differential treatment was based on marital status. The CFA did not accept that differential treatment required no justification if based on marital status and if said to involve core rights and obligations unique to marriage. The CFA found that the Director had not justified the differential treatment in the case and unanimously dismissed the appeal.

Interush Limited and Another v The Commissioner of Police and Others

CACV 230/2015 (17 January 2019)[1]

CA

Background

In November 2013, the Applicants were under investigation for promoting an alleged pyramid scheme contrary to the Pyramid Schemes Prohibition Ordinance (Cap. 617). Shortly around this time, Hang Seng Bank filed a "Suspicious Transaction Report" with the Joint Financial Intelligence Unit to discharge its duty under s. 25 of the Organized and Serious Crimes Ordinance (Cap. 455) ("OSCO").

Upon investigation, the Police had, on suspicion of proceeds of crime, issued a set of "Letter of No Consent" to the banks which held the Applicants' property, pursuant to s. 25A of OSCO. In December 2014, the Applicants applied for judicial review challenging the constitutionality of ss. 25 and 25A of OSCO[2] on the grounds that these provisions infringed BL 6 and/or BL 105 which protect the right of property, and BL 35 and/or Article 10 of BoR which protect access to court. The Applicants alleged, among other things, that s. 25 of OSCO interfered with the use or disposal of the Applicants' property. The Applicants further alleged that the Police's decision to refuse consent was unlawful and unreasonable as such refusal was not subject to any prescribed time limit, and there was no provision under the statutory scheme for any application to the court for effective remedy.

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1 Reported at [2019] 1 HKLRD 892.

2 S. 25(1) provides that:

"(1) Subject to section 25A, a person commits an offence if, knowing or having reasonable grounds to believe that any property in whole or in part directly or indirectly represents any person's proceeds of an indictable offence, he deals with that property."

S. 25A(1), (2) and (7) provides that:

"(1)Where a person knows or suspects that any property—

(a)in whole or in part directly or indirectly represents any person's proceeds of;

(b)was used in connection with; or

(c)is intended to be used in connection with,

an indictable offence, he shall as soon as it is reasonable for him to do so disclose that knowledge or suspicion, together with any matter on which that knowledge or suspicion is based, to an authorized officer.

(2)If a person who has made a disclosure referred to in subsection (1) does any act in contravention of section 25(1) (whether before or after such disclosure), and the disclosure relates to that act, he does not commit an offence under that section if—

(a)that disclosure is made before he does that act and he does that act with the consent of an authorized officer; or

(b)that disclosure is made—

(i) after he does that act;

(ii) on his initiative; and

(iii) as soon as it is reasonable for him to make it.

...

(7)A person who contravenes subsection (1) commits an offence and is liable on conviction to a fine at level 5 and to imprisonment for 3 months."

The Applicants' challenges were rejected by the CFI on the grounds that BL 6 and BL 105[3] were not engaged and BL 35[4] and Article 10 of BoR[5] were not contravened, the Force Procedures Manual ("Manual"), that is, the internal guidelines of the Police, were sufficient safeguard and the Applicants could sue the financial institutions or challenge the Police's decision by judicial review.

The Applicants appealed to the CA against the CFI's judgment in October 2015.

Issues

The issues in dispute were:

(A) the systemic challenge:

(1) whether the constitutional right to property under BL 6 & BL 105 are engaged;

(2) whether the consent regime is "prescribed by law";

(3) whether the infringement of property rights is justified under the proportionality test; and

(B) the fact-specific challenge that the Respondents acted unconstitutionally (or otherwise unfairly and unreasonably) against the Applicants by using the consent regime to bypass the procedural safeguards for restraint order application.

(A) The systemic challenge

(1) whether property rights were engaged

The Applicants' arguments

The Applicants argued that the CFI erred in holding that the withholding of consent under s. 25A did not freeze funds because (i) it was the substantive

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3 BL 6 provides that:

"The HKSAR shall protect the right of private ownership of property in accordance with law."

BL 105 provides that:

"The Hong Kong Special Administrative Region shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property.

Such compensation shall correspond to the real value of the property concerned at the time and shall be freely convertible and paid without undue delay.

The ownership of enterprises and the investments from outside the Region shall be protected by law."

4 BL 35 provides that:

"Hong Kong residents shall have the right to confidential legal advice, access to the courts, choice of lawyers for timely protection of their lawful rights and interests or for representation in the courts, and to judicial remedies.

Hong Kong residents shall have the right to institute legal proceedings in the courts against the acts of the executive authorities and their personnel."

5 Article 10 of BoR provides that:

"All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children."

offence under s. 25(1) of OSCO which deterred banks from dealing with the funds, and (ii) proof of the offence under s. 25(1) did not depend on issuance of a "no consent letter". The CFI further erred in holding that the no consent letters did not operate to freeze funds because the banks acted "on their own initiative". The Applicants argued that the Guernsey Court's judgment in *The Chief Officer, Customs & Excise, Immigration & Nationality Service v Garnet Investments Ltd* (*"Garnet"*) (unreported Guernsey Judgment 19/2011, 6 July 2011) recognized the chilling effect of potential criminal liability under the no-consent regime.

The Applicants distilled from the case law four relevant factors on whether property rights were engaged:

(1) The Court is concerned with substance, not form.

(2) A statutory provision's effect on constitutional right should not be viewed in isolation but in light of its interaction with other parts of the statute.

(3) Where a provision's precise scope is uncertain, individuals may in reality be deterred from acting within their strict rights even if on a detailed legal analysis - the conduct falls outside its scope. This "chilling effect" should be taken into account in constitutional review.

(4) Human rights protections may still be engaged where interference involves private third party acts. At the least, public authorities are under a duty not to assist or threaten third parties to engage in acts amounting to interference with fundamental rights if carried out directly by the authority itself. That the third party took the initiative in its act is no defence.

All four factors were adopted by the CA but the Court held that s. 25, whether by itself or in combination with s. 25A, did not engage property rights. S. 25 merely set out the creation of the

offence of dealing with property known or believed to be the proceeds of an indictable offence. However, s. 25A was different. The analysis of the Court of Appeal of Guernsey ("Guernsey CA") in *Garnet* was adopted by the CA.

In *Garnet*, the Guernsey CA dealt with Garnet Investments Limited ("Garnet Investment")'s application for judicial review of a decision of the Financial Intelligence Service ("FIS") which refused to consent to instructions given by Garnet Investment in relation to its bank accounts at BNP. The wording of the relevant provisions of the Guernsey statute was quite similar to OSCO dealing with the offence of money laundering and the no-consent regime.

The Guernsey CA identified the purpose of the consent regime as: (1) providing a strong incentive to persons who were suspicious of funds to report those suspicions before any transaction was

effected; and (2) giving the police the operational freedom to grant relief from criminal liability in circumstances where it was considered to be in the interests of law enforcement so to do. The Guernsey CA held that funds reported to the police or the FIS for the purpose of seeking consent were in effect frozen, not by any refusal of consent, but by the ordinary operation of the criminal law. The freezing power was granted by a restraint order under the Guernsey statute rather than owing to a lack of consent. It was highly unlikely that the consent provisions in the Guernsey statutes were intended to confer unregulated freezing powers on the police. The Guernsey CA ruled that it was not the FIS that was denying Garnet Investment access to its property, it was the impact of the width of the criminal law and its chilling effect upon the person holding the fund, namely BNP.

The Guernsey CA held that Article 1 of the first Protocol of the European Convention of Human Rights ("A1P1")[6] was engaged. The term "possession" was not limited to tangible assets but included other rights with an economic value. The money standing to the credit of a customer in the bank had an economic value. There was no deprivation of the possession since Garnet Investment had not been put in the position of having no means whatsoever of dealing with its property, namely, the right to demand payment under the banking contract. However, the temporary seizure of property in criminal proceedings constituted a control of use under A1P1. As such, the question of proportionality arose and having considered the situation of Guernsey, the Guernsey CA concluded that the case did not disclose a lack of proportionality between the overall aim of the States of Guernsey to tackle money laundering and the inability of Garnet Investment to have access to its funds for the time being.

Despite the different wording of A1P1 and BL 105, the CA held that the overall intention of the

[6] A1P1 provides that:

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

provisions is the same, namely, the protection of an individual in the use of his property. Deprivation of the property must be subject to law. In Hong Kong, a property owner has the right to compensation for unlawful deprivation of his property. Property covers both tangible assets and rights which have an economic value. The right under the contract between the banker and his customer undoubtedly has an economic value and the word "property" includes a chose in action. The Applicants' money in the banks was in the form of a chose in action. Based on the analysis of *Garnet*, the CA accepted that the "Letter of No Consent" did not by itself freeze the accounts of the Applicants but this letter had affected the Applicants' use of their money in the bank accounts. Where consent was withheld, the banks would invariably refuse to make the payment. The result was that the account was "informally frozen" for so long as the banks had the relevant suspicion and the Police did not consent: *Chief Officer of Jersey Police v Minwalla* [2007] JRC 137, [18]. The practical impact of the criminal law on the banks was that the Applicants' right to make use of their money deposited with the banks would be affected.

The CA rejected the Respondents' submission that property rights were not engaged because of the assumption of risks by the Applicants when they entered into a commercial transactions with their banks which was subject to the provisions of OSCO regarding suspicion of money laundry.

The CA agreed with the CFA in *Hysan Development Co Ltd v Town Planning Board*[7] that the phrase "in accordance with law" in BL 6 and BL 105 should not be read as qualifying the protection conferred by the two provisions. Far from diminishing the protection of those articles, the phrase confers the added protection of legal certainty. Applying the rationale in *Hysan*, the CA rejected the assumption of risk argument advanced by the Respondents.

(2) whether the consent regime was "prescribed by law"

The CA held that if the "prescribed by law" issue, i.e. the consent regime under OSCO fell foul of such requirements of being adequately accessible and sufficiently precise to enable individuals to regulate and foresee the consequence of their conduct, had been raised in the court below, the Respondents was clearly entitled to adduce evidence to justify why the legislative and executive authorities chose to deal with the consent regime in its current form, in particular why details of the operation were only provided in an internal manual not accessible to the public. However, as this issue had not been raised in the court below, the CA agreed with the Respondents that the Applicants should not be allowed to rely on this issue for the first time in the CA.

(3) whether the infringement of property rights was justified under the proportionality test

Four-stage approach

In considering the proportionality of the provisions of OSCO, the CA followed the four-stage analysis adopted by the CFA in *Hysan*. The four stages include:

(1) whether the impugned measure pursues a legitimate aim;

(2) if so, whether it is rationally connected with advancing that aim;

(3) whether the measure is no more than necessary for that purpose; and

(4) whether a reasonable balance had been struck between the societal benefits of the impugned measure and the individual's constitutional rights

[7] (2016) 19 HKCFAR 372.

intruded upon, asking in particular whether pursuit of the societal interest resulted in an unacceptably harsh burden on the individual.

Two standards are used at the third stage: (i) whether the impugned measure is "no more than necessary" to achieve the legitimate aim in question, and (ii) whether the measure is "manifestly without reasonable foundation". The "no more than necessary" standard must be understood to be a test of reasonable necessity, but not strict necessity. Under this test, if the Court is satisfied that a significantly less intrusive and equally effective measure is available, the impugned measure may be disallowed.

The "manifestly without reasonable foundation" standard, on the other hand, is being closely related to the concept of "margin of appreciation" in the jurisprudence of the European Court of Human Rights. This standard has been used at both supra national level and at domestic level where the court recognizes the original decision-maker is better placed to decide the legitimacy of the societal aims of the impugned measure and the means to achieve such aims. In the present case, the CA held that the second standard should be adopted in the third stage of the proportionality inquiry.

Consideration of the proportionality test

(1) Legitimate purpose and rational connection

The Applicants accepted that in respect of the first and second stages of the analysis, namely legitimate purpose and rational connection, the power to withhold consent to deal with suspected proceeds of crime without risk of potential criminal liability under ss. 25 and 25A of OSCO are rationally connected to the legitimate aim of deterring criminal activity by restricting access to the proceeds of crime.

(2) Whether the procedures in the Manual were so vague as to fall foul of the proportionality requirement

The CA rejected the absence of "temporal limit" argument and lack of guideline argument of the Applicants for the following reasons:

(a) The starting point is that there is an implied duty of all persons exercising public power such as the Police to act reasonably. Reasonable suspicion activates the right to arrest or to investigate and such an assessment can only be challenged on the basis that it is *Wednesbury* unreasonable.

(b) In Hong Kong criminal law, there is no time frame imposed for the investigation of any criminal offence. S. 26 of the Magistrates Ordinance (Cap. 227), of course, requires all summary offences to be charged within six months of the date of the offence. However, that default provision is itself extended in a number of ordinances in relation to mere summary offences, where the underlying investigatory issues can be more complicated or involve international or Mainland elements.

(c) There is no time limit at common law for the prosecution of any indictable offence subject to the power of the Court to stay proceedings by reason that a fair trial could not take place because of delay.

(d) S. 70 of the Interpretation and General Clauses Ordinance (Cap. 1) provides:

"Where no time is prescribed or allowed within which any thing shall be done, such thing shall be done without unreasonable delay, and as often as due occasion arises."

The decision making process under the Manual must be subject to this express legislative provision.

(e) The time and the method taken by the Police to investigate depend on the complexity of the case and the way in which the person under investigation responds to Police enquiries.

(f) The level of precision required of a law must depend on the subject matter of the law in question.

(g) There are long established authorities that where the statute imposes an obligation on a public body to take a particular step, the general rule is that delay is controlled by the application of established public law principles (which include the *Wednesbury* test) and not by the Court reading in time limits: *Engineers' and Managers' Association v Advisory Conciliation and Arbitration Service* [1980] 1 WLR 302 at 318 (*"Engineers' and Managers' Association"*); *R v Secretary of State for the Environment ex p Birmingham CC* (1987) 27 RVR 53 at 55 and *R v Children and Family Court Advisory and Support Service* [2003] EWHC 235 Admin at [91(3)].

For the above reasons, the CA rejected the argument that the procedural steps in the Manual were so uncertain that they fell foul of the proportionality requirement.

(3) Alternative measures?

The Applicants argued that the consent regime was disproportionate as there were less intrusive alternatives available. The Applicants' arguments were as follows:

(a) The consent regime severely affects fundamental rights. The indefinite freezing of accounts can critically damage individuals and businesses. There is no right to compensation. Different courts have characterized the power to withhold consent indefinitely as draconian and capable of causing great hardship: *Squirrel v National Westminster Bank* [2006] 1 WLR 637, [7]; *R (UMBS Online Ltd) v Serious Organized Crime Agency* [2007] Bus LR 1317, [8]; *Chief Officer of Jersey Police v Minwalla* [2007] JRC 137, [9]; *Gichuru v Walbrook Trustees (Jersey) Ltd* [2008] JRC 68, [12].

(b) The systemic risk of grave injustice from withholding consent cannot be effectively ameliorated by case-specific judicial review. Individuals cannot obtain sufficient information

about the Police's suspicions to initiate an effective challenge. It is difficult for individuals to obtain relief even if wholly innocent of wrongdoing. So long as the Police can show that it was not *Wednesbury* unreasonable for them to suspect the funds are proceeds of crime, judicial review is unlikely. Further, it may take a year or more before judicial review proceedings are finally resolved and by then the aggrieved individuals will have suffered damages, and in many cases irreversibly.

(c) Likewise, a private law action against the bank for breach of contract is not a satisfactory solution to the constitutional problem. It is very difficult for individuals to obtain relief even if wholly innocent. The Courts imply into the banking contract a term that the bank is entitled to refuse to process payment instructions if it suspects that the transaction involves the proceeds of crime and the public authority does not grant consent. Individual customers can only succeed if bad faith can be proved or if doubt can be cast on the bank's subjective suspicions. The individual customer is also in an invidious position as he may incriminate himself by giving evidence on the source of the funds. A private law action is also likely to take years to resolve.

(d) The right to seek compensation under s. 29 of OSCO is also inadequate to protect the rights of innocent individuals. The Court can only award compensation where there is serious default on the part of persons concerned in the investigation or prosecution and the individual customer has suffered loss as a result of the restraint order. There is no right to compensation for "informal freezing" of the property.

(e) The Applicants argued that ss. 328 and 335 of the UK Proceeds of Crime Act 2002 and s. 43 of Bermudan Proceeds of Crime Act 1997 limit the period for which consent may be withheld. These provisions strike a "precise", "workable" and "reasonable" balance between the aim of deterring criminal activity and the rights of the innocent: *K Ltd v National Westminster Bank* [2007] 1 WLR 311, paragraph 22.

(f) Jurisdictions such as Canada, Australia and New Zealand do not vest authorities with power to withhold consent to deal with customer funds.

(g) The Respondents' evidence did not explain why the significantly less intrusive alternatives mentioned above could not be adopted.

(h) The Jersey courts expressly invited the legislature to amend the analogous consent regime in the Proceeds of Crime (Jersey) Act 1999 by imposing time limits on the power to withhold consent: *Gichuru v Walbrook Trustees (Jersey) Ltd* [2008] JRC 68, [36-38].

The CA rejected the Applicants' arguments. The Court noted that a breach of the restraint order was a criminal offence under ss. 15(1) and 16 of OSCO. The restraint order regime under OSCO contained procedural safeguards such as a time limit and the right to be heard which could mitigate the harm caused by the freezing of assets. The CA, however, considered that the comparison of the consent regime with the restraint order regime was not appropriate. The purpose and the standard of the two regimes were different.

The consent regime only operated at the investigation stage while the restraint order regime only operated at the prosecution stage. The standard of the granting of a "letter of no consent" was based on a reasonable suspicion while the standard in relation to the restraint order regime was based on "reasonable cause to believe". The consent regime did not freeze the bank account but the freezing was done by the bank itself. The decision to apply for a restraint order was made by a prosecutor. The availability of the restraint order regime at a later stage did not point towards a consent regime at an earlier stage being disproportionate, when investigations were ongoing.

The CA further considered that comparison with the anti-money laundering provisions in other countries was not appropriate. It was not helpful to

refer to those provisions without an understanding of the vast landscape of powers available to those jurisdictions with anti-money laundering and anti-terrorist financing measures. In any event, a margin of discretion should be accorded to the legislative and executive branches who were the originators of the impugned measure as they were better placed to assess the appropriate means to advance the legitimate aim espoused.

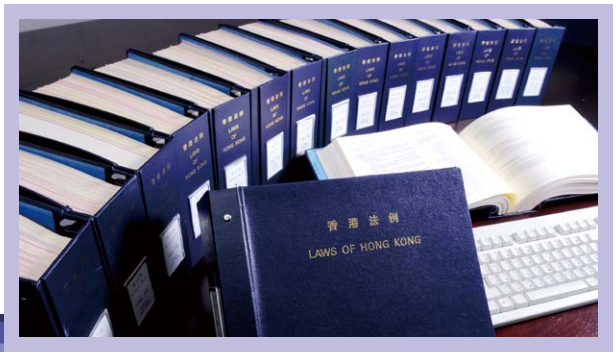
B) Fact-specific challenge

The Applicants' fact-specific challenges on the continuing withholding of consent and the delay in applying for a restraint order were rejected. The CA adopted the formulation in *Engineers' and Managers' Association* case and concluded that in the present case, no bad faith had been alleged and the complexity of the issues with cross-border elements involved had to be considered.

Access to Court

The CA held that the rights under BL 35 and Article 10 of BoR had not been engaged because of the judicial remedies available to the Applicants by way of judicial review and civil claims against the banks.

By judgment of 17 January 2019, the CA dismissed the Applicants' appeal.



Comilang and Others v Director of Immigration

FACV 9 & 10/2018 (4 April 2019)[1]

CFA

Background

These appeals were brought by members of two families. In each case, the 1st Appellant was a foreign national with no right to land or remain in Hong Kong. They were the mothers of the other Appellants, who were minors ("the other Appellants"). The other Appellants were either Hong Kong permanent residents or Hong Kong residents. The mothers applied for an extension of stay in Hong Kong to take care of the other Appellants. The Director of Immigration ("the Director") refused the 1st Appellants' applications.

The Appellants challenged the Director's decisions by way of judicial review, on the basis that the Director failed to take into account a series of rights under the Basic Law, the ICCPR as incorporated under BoR, the ICESCR, the Convention on the Rights of the Child ("CRC") and the best interests of the child principle at common law (collectively "the Asserted Rights").

The mothers contended that they were entitled to assert those rights directly on their own behalf. The minor children also asserted the relevant rights on their own behalf, contending that the rights conferred an entitlement to have their mothers granted permission to stay in Hong Kong to take care of them, or at least that the Director was legally obliged to take the Asserted Rights into account in deciding whether to grant the extensions of stay sought by their mothers.

Decisions below

In January 2016, the CFI dismissed the judicial review. It held that the Director had no obligation to take into account the Asserted Rights in making the relevant decisions.

The CA dismissed the Appellants' appeals in March 2018. It held that none of the Asserted Rights were engaged and that the immigration reservation reflected in s. 11 of the Hong Kong Bill of Rights Ordinance (Cap. 383) ("HKBORO"),[2] which enjoys constitutional status under BL 39, would prevent the application of the Asserted Rights. Leave to bring the appeal to the CFA was granted by the Appeal Committee which held that the questions of law involved in the appeal were of the requisite general or public importance.

Issues

The CFA had to decide the following questions:-

(i) whether the Director is obliged as a matter of law to take into account the parent-and-child family's enjoyment of applicable fundamental rights while living in Hong Kong; and

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1 Reported at (2019) 22 HKCFAR 59.

2 S. 11 of HKBORO provides that:

"As regards persons not having the right to enter and remain in Hong Kong, this Ordinance does not affect any immigration legislation governing entry into, stay in and departure from Hong Kong, or the application of any such legislation."

HKBORO

(ii) whether s. 11 of HKBORO exempts the Director from considering the Basic Law rights of a child member of the family when decisions are made in respect of a non-Hong Kong resident family member.

Constitutional status of s. 11 of HKBORO

The Court affirmed the constitutional status of s. 11 of HKBORO. It mirrors and gives effect to the immigration reservation made by the United Kingdom Government when it ratified the ICCPR and extended the same to Hong Kong in 1976. The CFA noted that our courts have consistently held that by enacting HKBORO, the fundamental rights guaranteed by BoR have, by virtue of BL 39, been incorporated as part of the Basic Law and given constitutional effect. In giving effect to the immigration reservation as part of the implementation process mandated by BL 39,[3] s. 11 lays down a specific exception limiting the scope of BoR rights incorporated in the Basic Law. S. 11 excludes from the scope of the provisions of BoR given constitutional effect by BL 39, immigration legislation governing entry into, stay in and departure from Hong Kong and the application of such legislation. S. 11, read together with s. 5 of HKBORO, does not operate to exclude the protection of Article 3 of BoR which confers an absolute right against torture and cruel, inhuman or degrading treatment or punishment. The CFA held that the scheme of constitutional rights laid down by the Basic Law, both in its Chapter III and in BoR incorporated via BL 39, must be interpreted as a coherent whole, consistently with s. 11. The CFA referred to the Court's decision in *Ghulam Rbani v Secretary for Justice*,[4] a case involving detention of a non-resident person by the exercise of the Director's powers to regulate termination of his stay in Hong Kong. It was held that s. 11 excluded such person's reliance on Article 5(1) of BoR.[5]

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[3] BL 39 provides that:

"The provisions of the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and international labour conventions as applied to Hong Kong shall remain in force and shall be implemented through the laws of the Hong Kong Special Administrative Region.

The rights and freedoms enjoyed by Hong Kong residents shall not be restricted unless as prescribed by law. Such restrictions shall not contravene the provisions of the preceding paragraph of this Article."

[4] (2014) 17 HKCFAR 138.

[5] Article 5(1) of BoR provides that:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

The Appellant in *Rbani* relied also on similar rights under BL 28[6] which protects freedom of the person and prohibits arbitrary or unlawful detention via his reliance on BL 41.[7] However, the CFA held that the rights conferred on non-residents by BL 41 "in accordance with law" were to be understood as constitutional rights operating as a coherent scheme consistently with the immigration reservation. The Court pointed out that it would not be coherent for s. 11, given constitutional force by BL 39, to exclude non-residents from relying on Article 5(1) of BoR (as it clearly does) while construing BL 41 to permit such non-residents to rely on similar rights under BL 28 in the same excepted immigration context. Moreover, s. 11 is not confined to rights in BoR but extends to cognate rights in the Basic Law, requiring them to be interpreted consistently with s. 11 as laying down a coherent scheme in the specified immigration context.

The rights asserted by the mothers

S. 11 of HKBORO excluded reliance by the mothers on BoR rights. The CFA held that as a matter of clear language, the specific exception of relevant provisions of BoR provided by s. 11 plainly applied to the Appellant mothers. They were persons not having the right to enter and remain in Hong Kong and the Director's decisions under challenge were made pursuant to the application of immigration legislation governing entry into, stay in and departure from Hong Kong. Likewise, since the Appellant mothers were not Hong Kong residents but only had visitor status here, their rights under Chapter III of the Basic Law were rights enjoyed pursuant to BL 41 and the scope and effect of those rights was qualified by s. 11 which operated at the constitutional level. The rights claimed by the mothers under BL 37[8] through BL 41 were constitutionally subject, via BL 39, to the s. 11 exceptions. There was no indication that the drafters of the Basic Law intended to give greater rights to challenge immigration decisions than were available under BoR prior to the coming into effect of the Basic Law on 1 July 1997.

The CFA further held that s. 2(5) of HKBORO[9] did not assist the 1st Appellants' case. What s. 2(5) does is to prevent BoR from derogating from any relevant "fundamental rights recognized or existing in Hong Kong". Properly construed, s. 2(5) operates on the footing that such "recognized or existing rights" are rights which are qualified by s. 11 given constitutional status by BL 39 in the specified immigration context.

The rights asserted by the children

Regarding the rights asserted by the other Appellants (namely, the minor children), as with the mothers, s. 11 of HKBORO also barred their reliance on BoR rights. The exception in s. 11 does not focus on who has the fundamental rights but rather on

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6 BL 28 provides that:

"The freedom of the person of Hong Kong residents shall be inviolable.

No Hong Kong resident shall be subjected to arbitrary or unlawful arrest, detention or imprisonment. Arbitrary or unlawful search of the body of any resident or deprivation or restriction of the freedom of the person shall be prohibited. Torture of any resident or arbitrary or unlawful deprivation of the life of any resident shall be prohibited."

7 BL 41 provides that:

"Persons in the Hong Kong Special Administrative Region other than Hong Kong residents shall, in accordance with law, enjoy the rights and freedoms of Hong Kong residents prescribed in this Chapter."

8 BL 37 provides that:

"The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law."

9 S. 2(5) of HKBORO provides that:

"There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in Hong Kong pursuant to law, conventions, regulations or custom on the pretext that the Bill of Rights does not recognize such rights or that it recognizes them to a lesser extent."

the content of the decision itself and to whom the decision specifically relates. The CFA accepted the Director's submission that it would frustrate the evident purpose of s. 11 and BL 39 if a person who had no right to enter and remain was able to circumvent that position by relying on someone else's rights. The need for a coherent approach was especially cogent given the recognized necessity for strict and effective immigration control that had long been the policy adopted in Hong Kong. The minor children contended that even if they were excluded from relying on rights under BoR, they could nevertheless rely on independent family rights arising under the Basic Law. They contended that those Basic Law rights were not subject to the s. 11 exception. The CFA rejected this argument and reiterated that provisions of the Basic Law were to be construed in the light of their context and purpose.[10] The Basic Law rights relied upon by the other Appellants must be construed as a coherent whole together with BL 39 and s. 11 which was given constitutional status. Although s. 11 in terms only applied textually to the rights set out in HKBORO, by necessary implication, it also limited the application of cognate rights in the Basic Law, whether they were invoked directly or in connection with the enjoyment of another right (such as BL 24, see below).

The CFA opined that there was a clear link between s. 11 of HKBORO and BL 154(2)[11] as reflected in the constitutional jurisprudence of the Court. The provisions were read together in *Ubamaka v Secretary for Security*.[12] In *GA v Director of*

[10] *Ng Ka Ling* v *Director of Immigration* (1999) 2 HKCFAR 4 at pp. 28-29 and *Vallejos* v *Commissioner of Registration* (2013) 16 HKCFAR 45 at [76]-[77].

[11] BL 154(2) provides that the HKSARG may apply immigration controls on entry into, stay in and departure from the HKSAR by persons from foreign states and regions.

[12] (2012) 15 HKCFAR 743.

Immigration,[13] Ma CJ held that it was clear from s. 11 that it was dealing with immigration control on entry into, stay in and departure from Hong Kong "as reflected in art.154(2) of the Basic Law". And Ma CJ further held that:

> "The intention of art.154(2) of the Basic Law and the Reservation, both of which are couched in general terms, must have been, one would have thought, for the purpose for enabling effective immigration control to be exercised."

The linkage between BL 154(2) and s. 11 demonstrated that, save for non-derogable rights, the drafters of the Basic Law thought it appropriate to exclude all other rights, be they in BoR or the Basic Law, in the context of a decision relating to entry into, stay in or departure from Hong Kong by someone without the right to enter and remain.

The family rights under BL 37 were no greater than the rights conferred to under Articles 14, 19 and 20 of BoR. That being the case, given the constitutional status of s. 11 through BL 39, it was untenable to contend that BL 37, viewed as part of a coherent scheme of rights, was not subject to the immigration reservation.

BL 24

As to the argument that the refusal of entry of the 1st Appellants had the effect of interfering with the right of abode of the children under BL 24[14] (which has no equivalent in BoR) because they would have to leave Hong Kong in order to be cared for by their mothers. The Court commented that whilst cast as an argument based on BL 24, the Appellants' case depended in reality on an asserted family unity right necessarily incidental to the enjoyment of the right of abode. The challenge was to the Director's exercise of his powers of immigration control covered by s. 11 on the footing that they had a right not to have their family relationship disrupted, the practical consequence of which was said to be the endangering of their children's BL 24 right to permanent residence. However, as stated above, the CFA noted that, by necessary implication, s. 11 limited the application of such rights in BoR and cognate rights in the Basic Law. The other Appellants' attempt to hermetically seal BL 24 from

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[13] (2014) 17 HKCFAR 60.

[14] BL 24 provides that:

"Residents of the Hong Kong Special Administrative Region ("Hong Kong residents") shall include permanent residents and non-permanent residents.

The permanent residents of the Hong Kong Special Administrative Region shall be:

...

(4) Persons not of Chinese nationality who have entered Hong Kong with valid travel documents, have ordinarily resided in Hong Kong for a continuous period of not less than seven years and have taken Hong Kong as their place of permanent residence before or after the establishment of the Hong Kong Special Administrative Region;

(5) Persons under 21 years of age born in Hong Kong of those residents listed in category (4) before or after the establishment of the Hong Kong Special Administrative Region; ...

The above-mentioned residents shall have the right of abode in the Hong Kong Special Administrative Region and shall be qualified to obtain, in accordance with the laws of the Region, permanent identity cards which state their right of abode.

The non-permanent residents of the Hong Kong Special Administrative Region shall be persons who are qualified to obtain Hong Kong identity cards in accordance with the laws of the Region but have no right of abode."

BoR and the rest of the Basic Law, including BL 37, BL 39 and BL 154(2) must fail.

Other rights relied upon by the Appellants

The Court also rejected the Appellants' reliance on other rights arising under (i) the ICESCR, (ii) the CRC, and (iii) the common law principle of the best interests of the child:

(a) The ICESCR is an international treaty and under the common law dualist principle is not self-executing. Unless and until made part of Hong Kong domestic law by legislation, its provisions do not confer or impose any rights or obligations on individual citizens. The Court held that this principle has been clearly stated and applied in *Ubamaka v Secretary for Security* and in *GA v Director of Immigration*. On the application of that principle, the Appellants simply could not rely on the ICESCR unless they could show that its provisions had been incorporated into domestic legislation. The Appellants further contended that Article 10 of ICESCR[15] was domesticated through BL 37, Articles 19 and 20 of BoR. Even so, as explained above, the Court held that those rights, properly construed, were subject to the immigration reservation in s. 11 and therefore reliance on Article 10 of ICESCR could not give the Appellants any greater rights than under those provisions so construed.

(b) The CRC is also an unincorporated international convention. Even if Article 3 of CRC[16] has been implemented through BL 37 or provisions of BoR, those rights are all subject

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[15] Article 10 of ICESCR provides that:

"The States Parties to the present Covenant recognize that:

1. The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children. ..."

[16] Article 3 of CRC provides that:

"(1) In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

(2) States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures."

to s. 11. In any event, the Government of the PRC, when notifying the Secretary-General of the United Nations that the CRC would apply to the HKSAR, declared that:

"The Government of the People's Republic of China reserves, for the Hong Kong Special Administrative Region, the right to apply such legislation, in so far as it relates to the entry into, stay in and departure from the Hong Kong Special Administrative Region of those who do not have the right under the laws of the Hong Kong Special Administrative Region to enter and remain in the Hong Kong Special Administrative Region, and to the acquisition and possession of residentship as it may deem necessary from time to time."

The Court considered that the above Reservation would clearly preclude reliance on Article 3 of CRC to defeat the application of immigration legislation to the decision to refuse to permit the Appellant mothers to remain in the HKSAR.

(c) The Appellants also relied on the common law principle of the best interests of the child in support of their case that the Director had a duty to take the position of the children into account when making immigration decisions in respect of their mothers. However, the CFA held that the common law principle of the best interests of the child was one which operated in the context of custody and wardship issues. It had no application in the present immigration context. In the opinion of the CFA, there were no comparable common law rights available to the Appellants in the present case.

Conclusion

For the above reasons, the CFA unanimously dismissed the appeals. The Court concluded that the Director was not duty bound to take into account the Asserted Rights relied upon when exercising his discretion to refuse permission to stay to the Appellant mothers since such rights were disengaged by s. 11 of HKBORO.

Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue

FACV 8 / 2018 (6 June 2019)[1]

CFA

The appeal concerned equality under the law. It arose in the context of a claim of a same-sex couple married overseas to entitlement to spousal medical and dental benefits under the Civil Service Regulations ("CSRs") and to opt for joint assessment of salaries tax under the Inland Revenue Ordinance (Cap. 112) ("IRO"). The appeal did not cover the question whether same-sex couples have a right to marry under Hong Kong law. The Appellant claimed that he had been unlawfully discriminated against on the ground of his sexual orientation.

Background

The Appellant has been serving the HKSARG as an immigration officer since 2003. His contract of employment with the Government is subject to the CSRs. The relevant provisions in the CSRs[2] provide certain employment benefits (e.g. medical and dental benefits) to a civil servant's spouse ("Spousal Benefits"). In April 2014, the Appellant entered into a same-sex marriage in New Zealand where same-sex marriage was legal. In anticipation of his marriage, the Appellant wrote to the Civil Service Bureau to inquire if he was required to update his marital status pursuant to CSR 513. He was informed that his intended marriage would not constitute a change in marital status for the purposes of the CSR.

Following his same-sex marriage, the Appellant complained to the Secretary for the Civil Service ("Secretary") that he had been denied the right to update his marital status and his same-sex spouse was denied access to the Spousal Benefits. The Secretary replied in December 2014 that the Appellant's same-sex marriage was not a marriage within the meaning of Hong Kong law, and thus his same-sex spouse was not a spouse of the Appellant entitling him to Spousal Benefits under the CSRs ("the Benefits Decision").

Under s. 10 of IRO, the salaries tax of spouses is to be paid separately unless they elect to be jointly assessed. In 2015, the Appellant elected for joint assessment with his same-sex spouse in submitting the tax return for the year of assessment 2014/15. The Commissioner of Inland Revenue

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1 Reported at (2019) 22 HKCFAR 127.

2 Under the CSRs, a civil servant is entitled to the provision by the Government of various medical and dental benefits. These benefits are extended to a civil servant's family, as defined in CSR 900(2), including his "spouse". CSR 513 requires a civil servant:

"to inform his Department immediately of ... any change in his marital status, including marriage, divorce, or the death of his wife ...".

("Commissioner") refused his election on the ground that the Appellant and his same-sex spouse were not husband and wife for the purposes of IRO[3] and thus the Appellant was not entitled to elect for joint assessment ("the Tax Decision").

Decisions below

The Appellant challenged the Benefits Decision and the Tax Decision by way of judicial review proceedings. He argued that both decisions unlawfully discriminated against him on the ground of his sexual orientation and infringed his right to equality under BL 25. By the judgment of 28 April 2017,[4] the CFI allowed the Appellant's application for judicial review in respect of the Benefits Decision and held that the Benefits Decision unlawfully discriminated against the Appellant based on his sexual orientation. The CFI, however, dismissed the Appellant's application for judicial review in respect of the Tax Decision and held that the Tax Decision was correct on the proper construction of IRO.

The Secretary appealed to the CA, and the Appellant cross-appealed, against the respective parts of CFI's judgment that were unfavorable to him. By the judgment of 1 June 2018, the CA allowed the Secretary's appeal and dismissed the Appellant's cross-appeal.[5] The CA held that although both the Benefits Decision and Tax Decision might constitute indirect discrimination against same-sex married couples on the ground of sexual orientation, both decisions satisfied the justification analysis, i.e. using marital status to differentiate the treatment for Spousal Benefits and joint assessment was rationally connected to the legitimate aim of protecting heterosexual marriage in the societal context of Hong Kong, and the restriction was no more than necessary to achieving the said legitimate aim.

The Appellant further appealed to the CFA. The CA granted the Appellant leave to appeal to the CFA in respect of the following questions of great, general or public importance:

Question 1:

(a) Is the legitimate aim of protecting and/or not undermining the concept and/or institution of marriage, being the voluntary union for life of one man and one woman to the exclusion of all others, as understood in and under the laws of Hong Kong, rationally connected to the difference in treatment, between a person who is a party to such a marriage and a person who is a party to a same-sex marriage entered into outside Hong Kong according to the law of the place in which it was entered, for the purpose of conferral of spousal benefits under the CSRs;

(b) Are the local legal landscape and societal circumstances including prevailing socio-moral values of society on marriage relevant to the issue of proportionality and/or justification; and

(c) Has the Secretary justified the difference in treatment?

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[3] On 9 June 2015, the Commissioner replied to the Appellant stating that a same-sex marriage was not regarded as valid for the purposes of IRO because:

"Although the definition of 'marriage' in section 2(1) [of IRO] does not expressly oust one between persons of the same sex, it does make reference to a marriage between a 'man' and any 'wife'. Under section 2, 'husband' means a married man and 'wife' means a married woman. 'Spouse' is defined under the same section as a husband or wife. Marriage in the context of the [IRO] is thus intended to refer to a heterosexual marriage between a man and a woman. Parties in a same-sex marriage cannot be 'husband/wife' and they would be incapable of having a 'spouse'."

[4] HCAL 258/2015.

[5] [2018] 3 HKLRD 84.

Question 2:

(a) Is the legitimate aim of protecting and/or not undermining the concept and/or institution of marriage, being the voluntary union for life of one man and one woman to the exclusion of all others, as understood in and under the laws of Hong Kong rationally connected to the difference in treatment, between a person who is a party to such a marriage and a person who is a party to a same-sex marriage entered into outside Hong Kong according to the law of the place in which it was entered, for eligibility for joint assessment under s. 10 of IRO;

(b) Are the local legal landscape and societal circumstances including prevailing socio-moral values of society on marriage relevant to the issue of proportionality and/or justification; and

(c) Has the Commissioner justified the difference in treatment?

The Applicable Principles

The CFA stated that the principle of equality before the law was enshrined in the Basic Law[6] and BoR,[7] and the court referred to its recent decision in *QT v Director of Immigration*[8] ("*QT*") that unlawful discrimination was "fundamentally unacceptable". The CFA acknowledged that there were three forms of differential treatment, which might be described as discriminatory. In summary, those were: (i) direct discrimination where like cases were

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6 BL 25 provides:

"All Hong Kong residents shall be equal before the law."

7 Article 1(1) of BoR provides:

"The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

Article 22 of BoR provides:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

8 (2018) 21 HKCFAR 324.

not treated alike; (ii) direct discrimination where unlike cases were treated in the same way; and (iii) indirect discrimination where an ostensibly neutral criterion was applied which operated to the significant prejudice of a particular group.[9] The CFA considered that in every alleged case of discrimination, the correct approach was to determine whether there was differential treatment on a prohibited ground, and if so, to examine whether it could be justified.

Differential treatment and the justification test

The initial step to determine whether there was differential treatment on a prohibited ground essentially involved a comparison exercise as was said in *QT*. In order to determine whether differential treatment was unlawful, the CFA noted that the courts applied the same test used to determine if incursions into constitutionally protected rights were lawful.[10] When applied in the context of an analysis of constitutionality, the test was usually referred to as the "proportionality" test. When applied in the context of determining whether differential treatment was unlawful, that test was usually referred to as the "justification" test. The justification test consists of four steps: (i) does the differential treatment pursue a legitimate aim; (ii) is the differential treatment rationally connected to that legitimate aim; (iii) is the differential treatment no more than necessary to accomplish the legitimate aim; and (iv) has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual's equality rights.

The Respondents' concession of differential treatment

In this appeal, the Respondents did not dispute that the Appellant and his partner had contracted a valid same-sex marriage in New Zealand. The Respondents accepted, for the purpose of the appeal, that a same-sex married couple was in an analogous position to that of a heterosexual married couple. The Respondents also accepted, for the purposes of the appeal, that the denial of Spousal Benefits to a same-sex married couple and their inability to elect for joint tax assessment constituted indirect discrimination against same-sex married couples on the ground of their sexual orientation if not justified. The Court found that a same-sex marriage had the same characteristics of publicity and exclusivity of a heterosexual marriage which distinguished them from a mere relationship.

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[9] *QT* at [31]-[33].

[10] *QT* at [84]-[86].

The Court considered that the Respondents' concession of differential treatment requiring justification was properly made.

Legitimate aim

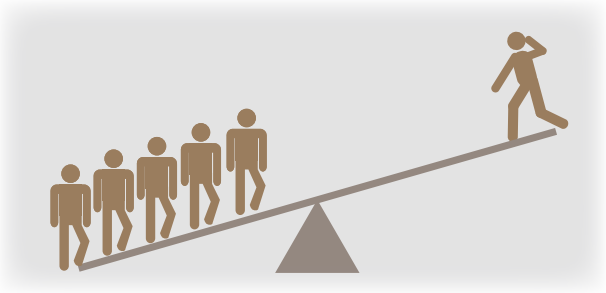
The legitimate aim relied upon by the Respondents was said to be that "of protecting and/or not undermining the concept and/or institution of marriage, being the voluntary union for life of one man and one woman to the exclusion of all others, as understood in and under the laws of Hong Kong".[11] The proposition that the protection of the traditional family constituted by heterosexual marriage was a legitimate aim was supported by a number of authorities,[12] In *Serife Yiğit v Turkey*, (2011) 53 EHRR 25 at [72], the European Court of Human Rights stated:

> "With regard to art.12 of the Convention, the Court has already ruled that marriage is widely accepted as conferring a particular status and particular rights on those who enter it. The protection of marriage constitutes, in principle, an important and legitimate reason which may justify a difference in treatment between married and unmarried couples. Marriage is characterized by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit. Thus, states have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security."

The CFA found that the protection of the institution of marriage in Hong Kong, being heterosexual and monogamous, was a legitimate aim. To that extent, in answer to Questions 1(b) and 2(b) of the certified questions of law, the CFA considered that the protection of the institution of marriage as defined under the laws of Hong Kong was part of "the local legal landscape and societal circumstances" relevant to the issue of justification.

That said, the CFA considered that the prevailing views of the community on marriage were not relevant to identifying a legitimate aim and justification of differential treatment. The CFA pointed out that in Section F.9 of their joint judgment in *W v Registrar of Marriages*,[13] Ma CJ and Ribeiro PJ rejected the absence of a majority consensus as a reason for rejecting a minority's claim as being inimical in principle to fundamental rights. They quoted with approval the extra-judicial comments of the Chief Justice of Ireland, Murray CJ, in the following terms:

> "... The use of consensus as an interpretive tool is inherently problematic, not only because of any perceived inconsistency in the application of the doctrine by the [ECtHR], but fundamentally because the very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy. How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights?"[14]



[11] At [49].

[12] The House of Lord's decision in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 per Lady Hale at [138], see also, *Mata Estevez v Spain*, (Application No. 56501/00, 10 May 2001), ECHR 2001-VI, *Karner v Austria* (2004) 38 EHRR 24 at [40], *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 at [108] and *Kozak v Poland* (2010) 51 EHRR 16 at [98].

[13] (2013) 16 HKCFAR 112.

[14] Ibid at [116].

To the extent that Questions (1)(b) and 2(b) refer to the "prevailing views of the community on marriage", they were simply to be answered in the negative.

Was the differential treatment rationally connected to the legitimate aim?

The CFA opined that the real contest between the parties in the appeal was whether the differential treatment of the Appellant was rationally connected to the said legitimate aim of the protection of the traditional family in the circumstances of the case.

The CFA noted that the relevant context of the appeal was the conferment of financial benefits on spouses in the contexts of employment and taxation. Traditionally, those benefits were not conferred in order to protect the institution of marriage or even to encourage people to marry one another. The CFA further held that it was no part of the Secretary's or the Commissioner's functions that they were responsible for protecting the institution of marriage. In the circumstances, it was necessary to consider how denying the Appellant spousal employment benefits and the right to elect for joint assessment was rationally connected to the legitimate aim of protecting the institution of marriage in Hong Kong.

The CFA found that the Respondents' case faced great difficulty in establishing the rational connection. It could not logically be argued that any person was encouraged to enter into opposite-sex marriage in Hong Kong because a same-sex couple spouse was denied the employment and tax benefits. As Lady Hale said, in *Rodriguez v Minister of Housing*[15] (a Privy Council appeal from Gibraltar):

> "Privileging marriage can of course have the legitimate aim of encouraging opposite-sex couples to enter into the status which the state considers to be the most appropriate and beneficial legal framework within which to conduct their common lives. Privileging civil partnership could have the same legitimate aim for same-sex couples. But, to paraphrase Buxton LJ in the Court of Appeal's decision in *Ghaidan v Mendoza* [2002] EWCA Civ 1533, [2002] 4 All ER 1162 at [21], it is difficult to see how heterosexuals will be encouraged to marry by the knowledge that some associated benefit is being denied to homosexuals. They will not

[15] [2009] UKPC 52.

be saying to one another 'let's get married because we will get this benefit and our gay friends won't'."[16]

The Court did not accept the proposition that heterosexual marriage would be undermined by the extension of the employment and tax benefits to same-sex married couples. Whilst the Court recognized in *QT* (at [76]) that a person's marital status might well be relevant to the allocation of rights and privileges and that "the relevance and weight to be attributed to that status is taken into account in considering whether a particular difference in treatment is justified as fair and rational", the Court held that the appeal was not such a case. Heterosexual marriage was not promoted by the differential treatment in question.

The CFA rejected as circular the CA's analysis that restricting the benefits to heterosexual married couples was justified on the ground that heterosexual marriage was the only form of marriage recognized under Hong Kong law. The CFA held that the analysis was self-justifying and denied equality to persons of different sexual orientation. The rationality of the two Decisions was further undermined by the Secretary's own equal opportunities employment policies and the fact that s. 2(1) of IRO also recognized polygamous marriage in the sense that it extended the definition of "marriage" to that between a man and his principal wife. Nor was administrative difficulty a rational justification for the differential treatment as the Appellant and his same-sex partner could demonstrate their relationship by producing their same-sex marriage certificate.

The CFA found that the differential treatment in question was not rationally connected to the legitimate aim. Given its finding that the restriction of the spousal employment and tax benefits to opposite-sex married couples was not rationally connected to the legitimate aim of protecting the institution of marriage under Hong Kong law, the CFA did not consider it necessary to consider the third and fourth steps of the justification test.

Conclusion

The CFA concluded that the Respondents were unable to justify the differential treatment in the appeal in respect of both the Benefits Decision and the Tax Decision. The CFA answered the certified questions of law as follows:

As to Question 1:

(a) No.

(b) The local legal landscape and societal circumstances were relevant to the issue of proportionality and/or justification but not the prevailing socio-moral values of society on marriage.

(c) No.

As to Question 2:

(a) No.

(b) The local legal landscape and societal circumstances were relevant to the issue of proportionality and/or justification but not the prevailing socio-moral values of society on marriage.

(c) No.

For the above reasons, the CFA allowed the Appellant's appeal.

[16] Ibid at [26].