



Summary of Judicial Decision

Leung Chun Kwong (“Applicant”) v Secretary for the Civil Service (“Secretary”) and Commissioner of Inland Revenue (“Commissioner”) (collectively “Respondents”) FACV8 / 2018; [2019] HKCFA 19

Decision : **Applicant’s appeal allowed**
Date of Hearing : **7 May 2019**
Date of Judgment/Decision : **6 June 2019**
6 September 2019 (relief and costs)

Background

1. The Applicant is, and at all material times was, a civil servant with a contract of employment with the Hong Kong Government which is subject to the Civil Service Regulations (“**CSRs**”). The relevant provisions in the CSRs provide certain employment benefits (e.g. medical and dental benefits) to a civil servant’s spouse (“**Spousal Benefits**”). In 2014, the Applicant entered into a same-sex marriage in New Zealand where such marriage was legally recognized.
2. The Secretary did not recognize the Applicant’s same-sex marriage for the purpose of providing the relevant employment benefits to his same-sex marriage partner on the ground that his same-sex marriage was not a marriage within the meaning of Hong Kong law, and thus his same-sex marriage partner was not a spouse of the Applicant entitling him to spousal benefits under the CSRs (“**the Benefits Decision**”).
3. In 2015, in submitting the tax return for the year of assessment 2014/15, the Applicant elected for joint assessment with his same-sex marriage partner. The Commissioner refused his election on the ground that the Applicant and his same-sex marriage partner were not husband and wife for the purposes of the Inland Revenue Ordinance (Cap. 112) (“**IRO**”) and thus the Applicant was not entitled to elect for joint assessment (“**Tax Decision**”).
4. The Applicant applied for judicial review challenging both decisions on, amongst others, constitutional grounds in that the decisions are discriminatory against him based on his sexual orientation and in breach of his right to equality under Article 25 of the Basic Law (“**BL 25**”).
5. By the judgment of 28 April 2017, the Court of First Instance (“**CFI**”) allowed the Applicant’s application for judicial review in respect of the Benefits Decision and held that the Benefits Decision unlawfully discriminated against the Applicant based on his sexual orientation. By the same judgment, CFI dismissed the Applicant’s application for judicial review in respect of the Tax Decision and held that the Tax Decision was correct on the proper construction of the IRO. (full text of the CFI judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=109273&QS=%2B&TP=JU)



6. The Secretary appealed to the Court of Appeal (“CA”), and the Applicant cross-appealed, against the respective parts of CFI’s judgment that were unfavorable to him. By the judgment of 1 June 2018, CA allowed the Secretary’s appeal and dismissed the Applicant’s cross-appeal. CA held that both the Benefits Decision and the Tax Decision satisfied the justification analysis, i.e. using marital status to differentiate the treatments for Spousal Benefits and joint assessment is 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. (full text of the CA’s judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=115432&QS=%2B&TP=JU)
7. The Applicant further appealed to the Court of Final Appeal (“CFA”). CFA appeal was heard on 7 May 2019.

Issues in dispute

8. Is the legitimate aim of protecting and/or not undermining the institution of marriage, being opposite sex and monogamous marriage as understood under the laws of Hong Kong, rationally connected to the difference in treatment between a person in such a marriage and a person in a same-sex marriage entered into outside Hong Kong for the purpose of conferral of Spousal Benefits under the CSRs and for eligibility for joint assessment under section 10 of the IRO?
9. Are the local legal landscape and societal circumstances, including the prevailing socio-moral values of society on marriage, relevant to the issue of proportionality and/or justification?
10. Have the Secretary and the Commissioner justified the difference in treatment in relation to the conferral of Spousal Benefits and the right to joint assessment respectively?

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

(Full text of the CFA’s judgment at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=122337; the press summary

prepared by CFA at

https://legalref.judiciary.hk/doc/judg/html/vetted/other/en/2018/FACV000008_2018_files/FACV000008_2018ES.htm;

Full text of the CFA’s judgment on relief and costs at

https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=124162)

11. CFA restated that the principle of equality before the law was enshrined in the Basic Law and the Hong Kong Bill of Rights, and unlawful discrimination was fundamentally unacceptable. In every alleged case of discrimination, the correct approach was to determine whether there is differential treatment on a prohibited ground, and if so, to examine whether it could be justified.



(paragraphs 16-22)

12. CFA found that the protection of the institution of marriage in Hong Kong, being heterosexual and monogamous, was a legitimate aim. To that extent, the local legal landscape and societal circumstances were relevant to the issue of justification. The real question was whether the difference in treatment was rationally connected to the said legitimate aim. (paragraphs 58-62) That said, the prevailing views of community on marriage were not relevant to the justification issue since reliance on the absence of a majority consensus as a reason for rejecting minority's claim was inimical in principle to fundamental rights. (paragraphs 55-57)
13. Having concluded that a same-sex married couple was in a relevantly analogous position to an opposite-sex married couple, CFA found that the differential treatment in question was not rationally connected to the legitimate aim. CFA found that traditionally spousal benefits in the context of employment and taxation were not conferred in order to protect the institution of marriage, but were to acknowledge the economic reality of the family unit, and to encourage the recruitment and retention of staff. It was no part of the functions of the Respondents to protect or promote the institution of marriage, and it was not accepted that heterosexual marriage would be undermined by the extension of employment and tax benefits to same-sex married couples. (paragraphs 63-67)
14. CFA rejected as circular CA's analysis that restricting the benefits to heterosexual married couples was justified on the ground that heterosexual marriage is the only form of marriage recognized under Hong Kong law. 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 the IRO also recognised polygamous marriage (as between a man and his principal wife). Nor was administrative difficulty a rational justification for the differential treatment as the Applicant and his same-sex partner could demonstrate their relationship by producing their same-sex marriage certificate. (paragraphs 71-77)
15. Given its finding on the rational connection issue, CFA did not consider it necessary to consider the third and fourth steps of the justification test, i.e. whether differential treatment was no more than necessary to achieve the legitimate aim and whether a reasonable balance was struck. (paragraphs 78-80)



Relief and costs

16. For the Benefits Decision, CFA ordered:
- (i) a declaration that the Benefits Decision was unlawful for constituting discrimination against the Applicant based on sexual orientation;
 - (ii) the Benefits Decision be brought up and quashed; and
 - (iii) a declaration that the Applicant and his same-sex married partner were entitled to the benefits and allowances that the Government provided to heterosexual married civil servants of the same employment terms and conditions of the Applicant and their spouses respectively. (paragraphs 4-5 of the relief judgment)
17. In respect of a previous undertaking given by the Secretary that, *inter alia*, the Civil Service Bureau would reimburse the Applicant in respect of “*any loss of benefits...caused solely by the extension of time... to the final resolution*” of the appeal before CA (“**Undertaking**”), CFA agreed that the Undertaking was spent and of no further effect upon the Secretary successful appeal against CFI’s decision in respect of the Benefits Decision before CA. Nonetheless, CFA observed that, subject to administrative practicalities, fairness and good administration would seem to dictate that the reimbursement of benefits contemplated by the Undertaking would be an appropriate outcome as from the date of CFI’s order. (paragraphs 6-7 of the relief judgment)
18. For the Tax Decision, CFA ordered:
- (i) a declaration that the Tax Decision was unlawful for constituting discrimination against the Applicant based on sexual orientation;
 - (ii) the Tax Decision be brought up and quashed;
 - (iii) the term “marriage” in section 2 of the IRO be read as “any marriage, whether or not so recognized, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so, provided where the persons are of the same sex and such a marriage between them would have been a marriage under the Ordinance [IRO] but for the fact only that they are persons of the same sex, they shall be deemed for the purposes of such a marriage to have the capacity to do so”;
 - (iv) for the purpose of IRO, references to “husband and wife”, “not being a wife living apart” and “either husband or wife” be read as “a married person and his or her spouse”, “not being a spouse living apart from the married person”, and “either the married person or his or her spouse” respectively; and



(v) operation of the remedial interpretation in (iii) and (iv) above be suspended for 6 months from the date of order; and

(vi) a declaration that the Applicant and his same-sex married partner were entitled to elect to joint assessment of salaries tax pursuant to section 10 of the IRO. (paragraphs 8-11 of the relief judgment)

19. For costs, CFA ordered the Respondents to pay the Applicant's costs of these proceedings on the usual party-and-party basis. (paragraph 12-16 of the relief judgment)

Civil Division

Department of Justice

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