



Summary of Judicial Decision

Yeung Chu Wing (“the Applicant”) v Secretary for Justice (“the Respondent”)

& Rainbow Action

HCAL 753/2017; [2019] HKCFI 1431

Decision : Application for judicial review allowed in part
Date of Hearing : 27 September 2018
Date of Judgment/Decision : 30 May 2019

Background

1. In October 2017, the Applicant applied for judicial review seeking declarations that the following seven provisions of the Crimes Ordinance, Cap. 200 (“CO”) are inconsistent with Article 25 of the Basic Law (“BL 25”) and/or Article 22 of the Hong Kong Bill of Rights (“BOR 22”) on equality, and therefore unconstitutional:

- (1) Section 118C – Homosexual buggery with or by man under 16;
- (2) Section 118G – Procuring others to commit homosexual buggery;
- (3) Section 118H – Gross indecency with or by man under 16;
- (4) Section 118I – Gross indecency by man with male mentally incapacitated person;
- (5) Section 118J(1) – Gross indecency by man with man otherwise than in private;
- (6) Section 118K – Procuring gross indecency by man with man; and
- (7) Section 141(c) – Permitting a young boy to resort to or be on premises or vessel for committing an act of gross indecency with a man.

2. The Respondent having considered, among other things, whether there are any comparable offences for heterosexuals or female homosexuals and whether there are similar provisions to protect minors and/or mentally incapacitated persons (“MIPs”) from the same mischiefs, conceded that sections 118G, 118H, 118J(1) and 118K of CO are discriminatory. The Respondent’s position was made known to the Applicant and the Court before the hearing that:

- (1) Sections 118G, 118H, 118K and 118J(1) of CO are inconsistent with BL 25 and/or BOR 22, and that the declarations sought by the Applicant in respect of those provisions ought to be granted by the Court; and
- (2) A remedial interpretation of sections 118C, 118I and 141(c) of CO can and should be made by the CFI to preserve their validity, and the declarations sought by the Applicant in respect of these provisions ought not be granted.

Issues in dispute

3. The main issues in dispute are:



- (1) Whether sections 118C, 118G, 118H, 118I, 118J(1), 118K and 141(c) of CO are inconsistent with BL 25 and/or BOR 22, and therefore unconstitutional; and
- (2) In view of the Respondent's position at §2 above, whether respective remedial interpretations of sections 118C, 118I and 141(c) of CO can and should be made by the CFI in order to preserve its validity.

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

(full text of the CFI's judgment at https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=122165&QS=%2B&TP=JU)

4. The CFI held that sections 118G, 118H, 118J(1) and 118K of CO are only directed towards male homosexuals, with no comparable offence for heterosexuals or female homosexuals, such that these provisions are discriminatory in nature and therefore declared unconstitutional.
 - (1) The CFI applied the reasoning in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 ("*Yau Yuk Lung*") where the Court of Final Appeal held that section 118F(1) of CO (concerning the offence of homosexual buggery otherwise than in private) was discriminatory in only targeting male homosexuals. (paragraphs 14, 16(1))
 - (2) There is a direct discrimination under section 118H of CO, in that a homosexual boy under the age of 16 is treated less favourably for the same/similar act between heterosexuals where the under-16 participant would not be held criminally liable, with no comparable offence for heterosexuals or female homosexuals, such that these provisions are discriminatory. (paragraphs 14, 16(2))
 - (3) The CFI noted that section 118J(1) mirrored section 118F(1) of CO, which had already been struck down in *Yau Yuk Lung*. (paragraphs 14, 16(3))
 - (4) The CFI observed that there is the existence of similar provisions in statute and/or common law that may protect minors and/or MIPs from the same mischiefs under these provisions. (paragraphs 16(2), (3), footnote 10)
5. The CFI accepted the Government's arguments on remedial interpretation. It held that it is the Court's judicial duty to adopt remedial interpretations once satisfied that the interpretations are permitted under the relevant legal principles so as to make a statutory provision constitutionally compliant instead of striking it down, particularly in the present case to ensure the protection of vulnerable persons (minors and MIPs) and public interests as already intended by legislature by enacting the respective provisions. The CFI found, among other things, that the Government's proposed remedial interpretations by the Government are consistent with the fundamental feature of the legislative scheme or its essential principles to the respective provisions, and do not create



- any new offences. (paragraphs 34-38, 41-50, 53-63, 66-69).
6. For section 118C of CO, the CFI observed the Respondent's concession that the provision amounts to differential treatment against male homosexuals to the extent that it criminalises a man aged under 16 for committing buggery with another man whereas the participants under the age of 16 for the same/similar act between heterosexuals would not be held criminally liable. Further, the man who commits buggery with or by a man under 16 is liable to imprisonment for life whereas a man who has unlawful sexual intercourse with a girl under 16 shall be liable to imprisonment for 5 years only. Notwithstanding that, the CFI accepted that this provision may be preserved by applying a remedial interpretation to reduce the maximum sentence, so as to bring it in line with the criminal liability and maximum sentence of same/similar act between heterosexuals. (paragraphs 32-38)
 7. Section 118I of CO was found to only direct at male homosexuals, with no comparable offence for heterosexuals or female homosexuals, such that it is discriminatory. The CFI recognised the provision aimed at protecting male MIPs and that in the event the provision is struck down in its entirety, it would leave no or reduced protection for male MIPs. With reference to legislative materials, it was held that the remedial interpretation in affording protection to both female and male MIPs is consistent with the fundamental feature and principle of the legislative scheme for enacting this provision. So, by way of remedial interpretation, it was declared that the word "man" in section 118I be read expansively to mean "person" so as to afford protection to both male and female MIPs. (paragraphs 39-50)
 8. The CFI found that section 141(c) of CO is discriminatory in only criminalising an owner or occupier who induces or knowingly suffers a boy under 21 to be on the premises or vessel for the purpose of committing an act of gross indecency with a man but not an act of gross indecency with a woman nor an underage girl to be on the premises or vessel for the purpose of committing an act of gross indecency with a man or a woman. It is acknowledged that there is no other comparable provision to afford such protection. The Court agreed with the Government that the proposed remedial interpretation does not go beyond the limitations of remedial interpretation. With reference to legislative materials and to maintain consistency in the wording of section 141 as a whole, the CFI adopted a remedial interpretation by reading "boy" to mean "girl or boy", "a man" be expanded and replaced by "another person", and a further reading down of the age from 21 to 16 to bring it in line with a similar but separate offence under section 146 of CO. (paragraphs 51-62)

Civil Division

Department of Justice

30 May 2019