

香港終審法院

THE HONG KONG COURT OF FINAL APPEAL

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<https://legalref.judiciary.hk/lrs/common/ju/judgment.jsp>

PRESS SUMMARY

Sham Tsz Kit

v

Secretary for Justice

FACV No. 14 of 2022 on appeal from CACV No 557 of 2020

[2023] HKCFA 28

APPELLANT: Sham Tsz Kit

RESPONDENT: Secretary for Justice

JUDGES: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice Keane NPJ

COURTS BELOW: Court of First Instance (Chow J); Court of Appeal (Poon CJHC, Kwan VP and Chu JA)

DECISION: Appeal unanimously dismissed on Questions 1 and 3 and allowed on Question 2 by a majority

JUDGMENT: Mr Justice Ribeiro PJ and Mr Justice Fok PJ delivered a joint judgment on all three questions, with which Mr Justice Keane NPJ agreed. Chief Justice Cheung and Mr Justice Lam PJ each delivered a judgment agreeing with Mr Justice Ribeiro PJ and Mr Justice Fok PJ on Questions 1 and 3 but differing from them on Question 2.

DATES OF HEARING: 28-29 June 2023

DATE OF JUDGMENT: 5 September 2023

REPRESENTATION:

Ms Karon Monaghan KC, Mr Hectar Pun SC and Mr Anson Wong Yu Yat, instructed by Ho Tse Wai & Partners, assigned by the Director of Legal Aid, for the Appellant

Mr Stewart Wong SC, Mr Johnny Ma SC and Mr Jonathan Ng, instructed by the Department of Justice, for the Respondent

SUMMARY:

1. The Appellant is a homosexual and has entered into a stable same-sex relationship with his partner in Hong Kong since 2011. In 2013, they entered into a same-sex marriage in New York. In the absence of any Hong Kong law for such marriages to be entered into or for such marriages contracted abroad to be recognised, the Appellant brought judicial review proceedings for the court’s determination on three questions, namely (i) whether he has a constitutional right to same-sex marriage under Article 25 of the Basic Law (“**BL25**”) and Article 22 of the Hong Kong Bill of Rights (“**BOR22**”) (“**Question 1**”); (ii) alternatively, whether the absence of any alternative means of legal recognition of same-sex relationship constitutes a violation of BOR14 and/or BL25 and BOR 22 (“**Question 2**”); and (iii) whether the non-recognition of foreign same-sex marriage constitutes a violation of BL25 and BOR22 (“**Question 3**”).
2. The Appellant’s application was dismissed by both the Court of First Instance and the Court of Appeal. Leave to appeal to this Court was granted by the Court of Appeal on all three questions.

Questions 1 and 3

3. On Question 1, all members of this Court agreed that the constitutional freedom of marriage guaranteed and protected under BL37 and BOR19(2) is confined to opposite-sex marriage. When considering whether the equality rights under BL25 and BOR22 afford a constitutional right to same-sex marriage, the established principle of *lex specialis* (a general provision that might apply to any case must give way to a specific provision which applies to the case at hand) must be taken into account. This Court held that BL37, when read together with BOR19(2), is the *lex specialis* in relation to the right to marry, which confines that constitutional right to

opposite-sex marriage to the exclusion of same-sex marriage, and it is not permissible to interpret the equality rights under BL25 and BOR22 as conferring a constitutional right to same-sex marriage or to recognition of foreign same-sex marriage.

4. On Question 3, all members of this Court agreed that because under Hong Kong law the Appellant lacked capacity to enter into a same-sex marriage, an assertion that the equality rights under BL25 and BOR22 compel recognition of the Appellant's foreign same sex marriage amounts to a challenge to the Appellant's lack of capacity to enter into a same-sex marriage under BL37 and BOR19(2), which must fail on the basis of the *lex specialis* principle.

Question 2

5. On Question 2, Ribeiro PJ and Fok PJ delivered a joint judgment with which Keane NPJ agreed. Their Lordships have acknowledged the need of same-sex couples for access to an alternative legal framework in order to meet basic social requirements and to have a sense of legitimacy which dispels any sense of them belonging to an inferior class of persons whose committed and stable relationships are undeserving of recognition. Their Lordships accepted that the right to privacy under BOR14 is engaged and is infringed by the arbitrary interference with the private life and dignity of same-sex couples resulting from (i) the real difficulties faced by them in the ordinary course of their private lives, and (ii) their exposure to the publicity, stress, uncertainty and expense of litigation in judicial review proceedings.
6. Since the Appellant's case does not involve the conferment of the rights and obligations mirroring those of a marriage, their Lordships rejected the Respondent's argument that the establishment of an alternative legal framework is excluded by operation of *lex specialis*, or that the establishment would undermine the unique status of the institution of marriage. The Respondent's argument that the obligations imposed on the Government by BOR14 do not encompass a positive obligation to put in place an alternative legal framework was also rejected, as there is no material difference between the reference to the "right to the protection of the law against such interference or attacks" under BOR14, and the reference to the "right to respect for his private life" under Article 8 of the European Convention on Human Rights ("ECHR8"). In so holding, their Lordships held that this Court determines whether a

positive obligation arises by reference to the substantive considerations rather than a narrow textual analysis of the provisions.

7. It was accepted that the Government enjoys a flexible margin of discretion in deciding the content of the rights and obligations to be associated with the scheme of legal recognition to be devised, including a “core” of rights necessary for establishing a legal framework for recognising and defining the main incidents of a same-sex relationship to give effective legal protection to that relationship.
8. Chief Justice Cheung delivered a separate judgment giving his reasons for agreeing with Ribeiro PJ and Fok PJ on Questions 1 and 3 but differing from them on Question 2. On Question 2, Chief Justice Cheung rejected the Appellant’s argument based on equality as it is equivalent to asking for same-sex marriage in another name. On privacy under BOR14, Chief Justice Cheung held that the scope of protection of BOR14 which focuses on protection by law against interferences, are not entirely the same as that of ECHR8 which imposes on a State certain positive obligations to ensure effective “respect” for the rights protected by the article even in the absence of interferences. There is a distinction between the prevention of interferences and a positive duty to enact laws to “ensure effective respect for” the rights in the absence of interferences. Reading the relevant materials on Article 17 of the International Covenant on Civil and Political Rights (“**ICCPR17**”) on which the BOR14 is based, the obligations imposed on a Contracting State is to legislate in order to protect against interferences and attacks instead of to legislate on the right of privacy independent of any interferences or attacks. There was no comment made by the United Nations Human Rights Committee (“**HRC**”) on any duty on the part of a Contracting State to enact laws to recognise same-sex partnership, nor was there any comment criticising or commenting on the absence of any regime in Hong Kong to legally recognise same-sex relationship pursuant to ICCPR17. Thus, in the eyes of the HRC, ICCPR17 carries no such duty.
9. Chief Justice Cheung held that the jurisprudence on the ECHR was influenced by the developments on the European continent. As BOR14 is based on ICCPR17 which is a different international treaty, one must be careful in following the European decisions when the factors influencing them are absent or do not apply in Hong Kong.

10. Finally, Chief Justice Cheung held that the non-recognition of same-sex partnership does not amount to any interference of privacy. Based on the equality rights under BL25 and BOR22, individual rights and benefits cannot be withheld from same-sex couples in comparable situations with opposite sex couples without justification. The repeated need to go to court to enforce such rights and benefits merely reflects the fact that under BOR14 there is no positive duty on the part of the government and legislature to facilitate and ensure the full enjoyment of privacy as such, rather than constituting an interference by itself.
11. Lam PJ gave his reasons for agreeing with Ribeiro PJ and Fok PJ on Questions 1 and 3. On Question 2, His Lordship agreed with Chief Justice Cheung that ECHR8 imposes more extensive obligations than BOR14 and in this context Hong Kong should not adopt the Strasbourg jurisprudence as guidance on the substance of the rights conferred under BOR 14. Though mere non-recognition of same-sex relationship does not constitute “arbitrary or unlawful interference” under BOR14, His Lordship held that the repeated imposition of need or requirement on same sex couple to reveal private information in order to substantiate a claim that they are in such relationship is an arbitrary interference which the Government has a duty to protect against. However, his Lordship was unable to endorse the inclusion of the concept of core rights as necessary incidents of official recognition. Instead, a wide margin of discretion should be left to the Government and the legislature as to the form of official recognition and the substantive rights thereunder.

Disposition

12. Accordingly, this Court unanimously dismissed the appeal on Questions 1 and 3, and allowed the appeal and set aside the judgment of the Court of Appeal on Question 2 by a majority. Subject to receiving further submissions from the parties, this Court, by a majority, also granted a declaration (which may be modified in the light of such further submissions) that the failure of the Government to fulfil its positive obligation to establish an alternative framework for legal recognition of same-sex relationship and to provide for appropriate rights and obligations attendant on such recognition violated the Appellant’s BOR14 rights. The said declaration is to be suspended for a period of two years from the date of the final order to be made.