

## Chapter 3

# Case of Public Interest or Concern





**Leung Chun Kwong v Secretary for the Civil Service and Commissioner of Inland Revenue (FACV No.8 of 2018).**

Leung Chun Kwong ("Mr. Leung") is a Hong Kong permanent resident of Chinese nationality. When he took out the proceedings, he was serving the HKSAR Government as a Senior Immigration Officer. On 18.4.2014, Mr. Leung married his same-sex partner Mr. Scott Adams ("Mr. Adams") in New Zealand where same-sex marriage is legal.

Mr. Leung is entitled to various medical and dental benefits pursuant to the Civil Service Regulations ("CSRs"). These benefits are extended to his family, including his spouse. Before his marriage, Civil Service Bureau replied Mr. Leung's enquiry that his intended same-sex marriage would not constitute a change of his marital status for the CSRs' purposes. Following his marriage, Mr. Leung complained to the Secretary of Civil Service ("the Secretary") that he had been denied the right to update his marital status and that his spouse was denied the spousal benefits under the CSRs. The Secretary replied on 17.12.2014 that Mr. Leung's same-sex marriage was not a marriage within the meaning of Hong Kong law and Mr. Adams was not Mr. Leung's spouse for the purposes of the CSRs. Accordingly, Mr. Adams was not entitled to the spousal benefits (the "Benefits Decision").

In May 2015, when Mr. Leung filed his income tax return through e-filing system, he was unable to include Mr. Adams as his spouse so as to elect joint tax assessment. He raised this issue with the Inland Revenue Department because Mr. Adams was legally married to him in New Zealand and should be qualified as his spouse for tax purposes. The Commissioner of Inland Revenue (the "Commissioner") replied on 9.6.2015 that, in the context of Inland Revenue Ordinance (Cap 112) ("IRO"), marriage refers to a heterosexual marriage between a man and a woman. Parties in a same sex marriage cannot be husband/wife and would be incapable of having a spouse (the "Tax Decision").

With the assistance of legal aid, Mr. Leung challenged the Benefits Decision and the Tax Decision by way of judicial review proceedings. He contended that the decisions unlawfully discriminated against him on the ground of his sexual orientation. The Court of First Instance ruled in favour of Mr. Leung on the Benefits Decision but against him on the Tax Decision. The Judge found that the Benefits Decision constituted differential treatment of Mr. Leung on the basis of his sexual orientation which amounted to unlawful discrimination. But for the Tax Decision, the Judge held that as a matter of statutory construction of the IRO, Mr. Leung's right to equality was not engaged and his marriage was not a marriage for the purpose of IRO.

The Secretary appealed against the judgment on Benefits Decision. Legal aid was granted to Mr. Leung to oppose the Secretary's appeal and also to cross-appeal against the judgment on Tax Decision. The Court of Appeal allowed the Secretary's appeal and dismissed Mr. Leung's cross-appeal. The Court of Appeal held that both the Benefits Decision and the Tax Decision might constitute indirect discrimination on the basis of Mr. Leung's sexual orientation, but according to the Hong Kong law and the prevailing socio-moral values on marriage, those decisions were justified as being rationally connected to and

<sup>1</sup> The International Commission of Jurists appeared as intervener in the appeal.

no more than necessary to achieve the legitimate aim of protecting and not undermining the status of marriage as understood in Hong Kong. The Court of Appeal also upheld that, for the purposes of IRO, marriage meant only an opposite-sex marriage and not a same-sex marriage. As a result, Leung's challenges to both decisions failed.

Legal aid was further granted to Mr. Leung to appeal against the Court of Appeal judgment. The Court of Appeal granted Mr. Leung leave to appeal to the Court of Final Appeal on questions of great general or public importance. Those questions were as follows: -

### Question 1 (for the Benefits Decision)

- (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?

### Question 2 (for the Tax Decision)

- (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 section 10 of the Inland Revenue Ordinance (Cap.112) ("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?"

In the context of the present case which is concerned with financial spousal benefits, the Court of Final Appeal was satisfied that Mr. Leung's marriage has the same characteristics of publicity and exclusivity which distinguish a heterosexual marriage from other relationship. A same-sex married couple and an opposite-sex married couple are relevantly analogous. Accordingly, as conceded by the respondents, those two challenged decisions constitute unlawful indirect discrimination against same-sex couples on the ground of sexual orientation if they are not justified. The burden of justifying those decisions is on the respondents.

In answering Questions (1)(a) and (2)(a), the Court of Final Appeal accepted that the protection of the traditional family constituted by heterosexual marriage is a legitimate aim. But the Court of Final Appeal rejected (i) Court of Appeal's core marriage rights approach as illegitimate and (ii) the prevailing views of the community on marriage as irrelevant consideration in the justification exercise.

The Court of Final Appeal further held that there was no rational connection between denying Mr. Leung's employment and tax benefits and the aim of protecting or not undermining the institution of marriage in Hong Kong. First, those benefits were not conferred to protect the institution of marriage but were provided to acknowledge the economic reality of the family unit. It was (and is) no part of the Secretary's or Commissioner's functions that they were responsible for protecting (much less promoting) the institution of marriage.

Second, it is difficult to see how allowing Mr. Adams spousal benefits and permitting Mr. Leung to elect for joint tax assessment will weaken or impinge the institution of marriage in Hong Kong, or any person will be encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse is denied from those benefits.

Third, restricting financial benefits to opposite-sex married couples on the ground that heterosexual marriage is the only form of marriage recognized in Hong Kong law is circular logic and self-justifying reasoning process. It denies equality to persons of different sexual orientation who are accepted to be in a relevantly analogous position.

Fourth, the rationality of the two decisions was further undermined by (i) the Secretary's own equal opportunities employment policies and (ii) the fact that the IRO also recognizes polygamous marriage.

Fifth, Mr. Leung can demonstrate without any difficulty he and Mr. Adams are parties to a same-sex marriage having the characteristics of publicity as a formal marriage and exclusivity that distinguish it from a mere relationship. There is no administrative difficulty posed by Mr. Leung's case. In this case, it is not necessary to draw a bright line between Mr. Leung's marriage and the traditional marriage in order to achieve administrative workability. The respondents' bright line argument provides no rational justification for both decisions.

In answering Questions (1)(b) and (2)(b), the Court of Final Appeal accepted that the local legal landscape and societal circumstances are relevant to the issue of proportionality and/or justification but not the prevailing socio-moral values of society on marriage.

In answering Question (1)(c) and (2)(c), in the absence of a rational connection, it is unnecessary to consider whether the differential treatment was proportionate to accomplishing any legitimate aim and whether a reasonable balance was struck between the societal benefits and individual equality rights. The Court of Final Appeal remarked that both decisions would likely be adjudged as not proportionate and were not a fair balance as it resulted in an unacceptably harsh burden on Mr. Leung. The Court of Final Appeal concluded that both the Secretary and the Commissioner failed to justify the differential treatment in the Benefits Decision and the Tax Decision. Accordingly, the appeal was unanimously allowed.

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