

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

Leung Chun Kwong

v

Secretary for the Civil Service and Commissioner of Inland Revenue

FACV No. 8 of 2018 on appeal from CACV No. 126 of 2017

[2019] HKCFA 19

APPELLANT: Leung Chun Kwong

1st RESPONDENT: Secretary for the Civil Service

2nd RESPONDENT: Commissioner of Inland Revenue

INTERVENER: The International Commission of Jurists

JUDGES: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Tang NPJ and Mr Justice Gleeson NPJ

COURTS BELOW: Court of First Instance: Chow J; Court of Appeal: Cheung CJHC, Lam VP and Poon JA

DECISION: Appeal unanimously allowed

JUDGMENT: The Court

DATE OF HEARING: 7 May 2019

DATE OF JUDGMENT: 6 June 2019

REPRESENTATION:

Ms Karon Monaghan QC, Mr Nigel Kat SC and Mr Azan Marwah, instructed by Daly & Associates, assigned by the Director of Legal Aid, for the Appellant

Lord Pannick QC, Mr Stewart Wong SC and Mr Johnny Ma, instructed by the Department of Justice, for the 1st and 2nd Respondents

Hogan Lovells, for the Intervener (by written submissions only)

SUMMARY:

The factual background

1. This appeal concerns equality under the law and involves an application of the legal principles identified and applied in this Court's recent decision in *QT v Director of Immigration* (2018) 21 HKCFAR 324.
2. Leung Chun Kwong (“**Leung**”) is a Hong Kong permanent resident of Chinese nationality. He has been serving the HKSAR Government as an immigration officer since 2003. He is homosexual and Leung married his same-sex partner, Mr Scott Adams (“**Adams**”), in New Zealand on 18 April 2014. Same-sex marriage is legal in New Zealand and, upon their marriage there, the couple were issued a New Zealand Marriage Certificate formally acknowledging their marriage.
3. Pursuant to the Civil Service Regulations (“**CSRs**”), Leung is entitled to various medical and dental benefits. These benefits are extended to his family, including his spouse. In order to access these benefits, Leung sought to update his marital status with the Civil Service Bureau. However, the Secretary for the Civil Service (the “**Secretary**”) replied that Leung's same-sex marriage with Adams was not a marriage within the meaning of Hong Kong law, so that Adams was not his spouse for the purposes of the CSRs and was therefore not entitled to the spousal benefits (the “**Benefits Decision**”).
4. In May 2015, Leung sought to include Adams as his spouse when e-filing his income tax return. However, the system did not allow him to do so as Adams had the same prefix as Leung. He raised this issue with the Inland Revenue Department, explaining that since he and Adams were legally married in New Zealand, Adams qualified as his spouse for tax purposes. The Commissioner of Inland Revenue (the “**Commissioner**”) replied that marriage in the context of the Inland Revenue Ordinance (Cap 112) (“**IRO**”) referred to an opposite-sex marriage between a man and a woman and therefore Leung's marriage

was not regarded as a valid one for the purposes of the IRO (the “**Tax Decision**”). Leung then submitted a paper tax return, electing for joint assessment with his husband. His election was refused by the Commissioner on the ground that Leung and Adams were not husband and wife for the purposes of the IRO.

The proceedings below and issues for decision

5. Leung challenged the Benefits Decision and the Tax Decision by way of judicial review proceedings. He argued that the decisions unlawfully discriminated against him on the ground of his sexual orientation.
6. The Court of First Instance ruled in favour of Leung on the Benefits Decision but against him on the Tax Decision. However, the Court of Appeal allowed the Secretary’s appeal and dismissed Leung’s appeal, and as a result Leung’s challenges to both decisions failed.
7. The Court of Appeal held that whilst both the Benefits Decision and the Tax Decision might constitute indirect discrimination on the basis of Leung’s sexual orientation, they were justifiable because according to Hong Kong law and the prevailing socio-moral values on marriage, the only acceptable form of marriage was opposite-sex marriage. Hence, both the Benefits Decision and the Tax Decision were rationally connected to and no more than necessary to protect and not to undermine the institution of traditional marriage as understood in Hong Kong.
8. The Court of Appeal gave permission for Leung to appeal to this Court. The three main contested issues were (i) were local legal landscape and societal circumstances including the prevailing socio-moral values on marriage relevant to the issue of justification; (ii) was the discriminatory treatment rationally connected to the legitimate aim of protecting and not undermining the institution of marriage; and (iii) if so, whether such discriminatory treatment could be justified?
9. It should be noted that this appeal does not concern the question of whether same-sex couples have a right to marry under Hong Kong law.

The Court’s analysis

10. It was not disputed by the parties that Leung and Adams contracted a valid same-sex marriage in New Zealand. Their marriage has the same characteristics of publicity and exclusivity of a heterosexual marriage which distinguish them from a mere relationship. In the context of the present case, concerned with financial spousal benefits,

the Court was satisfied that a same-sex married couple such as Leung and Adams are relevantly analogous with an opposite-sex married couple. Hence, the respondents had rightly accepted that the two challenged decisions, if not justified, would be discriminatory against Leung.

11. The respondents argued, however, that the differential treatment was justified in order to protect the institution of traditional marriage.
12. The Court agreed that the protection of the institution of marriage as defined by the laws of Hong Kong is a legitimate aim. To that extent, the local legal landscape and societal circumstances are relevant to the issue of justification. However, the Court rejected the prevailing views of the community on marriage as a relevant consideration since reliance on the absence of a majority consensus as a reason for rejecting a minority's claim is inimical in principle to fundamental rights.
13. The Court also held that there was no rational connection between denying Leung employment and tax benefits and the aim of protecting or not undermining the institution of marriage in Hong Kong. First, it is difficult to see how any person will be encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse is denied those benefits. Second, it is circular logic to justify the restriction of these benefits to opposite-sex married couples simply because heterosexual marriage is the only form of marriage recognised in Hong Kong law. It uses the fact that the couple has a different sexual orientation from others as the very justification to deny them equality, despite their analogous position. The rationality of the two decisions was further undermined by the Secretary's own equal opportunities employment policies and the fact that the IRO does not serve the purpose of promoting marriage as defined under Hong Kong law as it also recognises polygamous marriage.
14. Nor was administrative difficulty a rational justification for the differential treatment of Leung given that Leung and Adams can produce their marriage certificate without any difficulty.
15. In the absence of a rational connection, the Court found it unnecessary to consider whether the differential treatment was proportionate to accomplishing any legitimate aim.
16. For the reasons stated above, the Court concluded that both the Secretary and the Commissioner failed to justify the differential treatment in the Benefits Decision and the Tax Decision.

DISPOSITION

17. Accordingly, the appeal was unanimously allowed.