CACV 1 & 2 of 2026
King (Plaintiff) *and* Greater Bay Area University (Defendant)
King & Clarke (Applicants) *and* Secretary for Justice (Respondent)
(Joined Appeals)

MOOT PROBLEM

Agreed facts

1. The year is 2026. Billie King (aged 26) is a junior research fellow at the University of the Guangdong-Hong Kong-Macao Greater Bay Area (Hong Kong campus) in mathematics with a specialty in Gaussian error function. He holds a Hong Kong Permanent Identity Card, a Hong Kong passport and a Canadian passport.

2. Mr King lives with his partner of six years Mr Edgar Clarke in Happy Valley. They met at a Kylie Minogue concert at the Convention Centre in 2020. Mr Clarke is a sculptor whose work depicts same-sex erotica. His client base is mostly in the Mainland of China where he spends his working week, promoting and selling his pieces. Mr Clarke holds a New Zealand passport and is permitted to reside in Hong Kong as Mr King's dependant on an 'outside policy' resident visa.

3. In the spring of 2022, Mr King and Mr Clarke were engaged to be married, after Mr Clarke proposed at the *mahyong* table under the tree next to Temple Street where Mr King's mother and father had met some 40 years earlier.

4. The couple promptly reviewed their options: they could both marry lawfully in Canada or New Zealand, but neither locations held a special place in their hearts – unlike Hong Kong – and Mr King's parents were too old and infirm to travel by air. They had heard that 'the Jimmy Sham case' was soon to be heard in the Court of Appeal and decided to extend their engagement in the hope that they would be able to marry in Hong Kong.

5. In September 2023, the Court of Final Appeal handed down its judgment in *Sham Tsz Kit v Secretary for Justice* (2023) 26 HKCFAR 385, which Mr King and Mr Clarke read about in the news. The couple were initially disappointed, since they wanted to get married in Hong Kong in the eyes of God, but following discussions they resolved to wait two years for the Hong Kong Government to introduce an alternative framework for legal recognition of their partnership, and to enter that institution in the presence of their Hong Kong family and friends.

6. Mr King began telling his colleagues at work about the forthcoming celebrations, setting a tentative date in February 2026 and asking them to reserve it. He invited Mr Clarke to a few work events and his colleagues to out-of-work social events (neither of which he had done before).

7. Unfortunately, Mr King's colleagues did not all react positively to the news of his engagement with another man and forthcoming 'alternative framework' celebration. Specifically, they made suggestive and unwelcome comments and gestures in the lab; the word 'gaylord' was written on the inside of one of the men's lavatories; rumours were spread that if Mr King and Mr Clarke had children they would 'grow up gay'; Mr King was avoided in the university gym changing rooms and no longer invited to a monthly swimming practice; he was eventually dropped from the university swimming team on the stated basis that was 'not committed' enough though he heard that others 'felt uncomfortable' changing clothes and training with him; over time, Mr King realised that he was no longer being assigned male PhD students to supervise.

8. This all had took a great toll on Mr King and left him feeling worthless and excluded at work. Fortunately, Mr Clarke's sculpture business was doing well so they decided they would be able to subsist on one income for the time being and Mr King resigned his position from the university effective late December 2023.

Mr King's claims in the District Court

9. Mr King took legal advice from Rubill & Yip and in March 2024 commenced Labour Tribunal proceedings against his former employer for various heads of relief relating to his treatment by his colleagues. His claims were all transferred

to the District Court where Mr King sought: (i) findings that he had been constructively dismissed and/or treated in breach of the implied term of mutual confidence by his employer (including vicariously) in failing to put an end to the treatment; (ii) orders for payments of contractual and statutory entitlements arising from his constructive dismissal; (iii) a finding that he had suffered / his employer has committed the statutory torts of direct and indirect sex discrimination as provided for by sections 5 and 11 of the Sex Discrimination Ordinance (Cap 480) (arguing that, 'if he were a woman' (and Mr Clarke a man) he would not have been treated as he was); (iv) a finding that he had suffered / his employer has committed the common law tort of harassment, relying on *X & Anor v Z* [2020] HKCFI 826, §§14-15; and (v) damages for injury to feelings arising from his discrimination and harassment.

10. Mr King obtained (i) and (ii) by consent. The remaining claims came on before HHJ A Sachs who on the university's application to strike out under Order 18, rule 19 ruled and reasoned that:

(1) The statutory discrimination claim disclosed no reasonable cause of action and would be struck out. The references to 'sex' in the Ordinance meant gender, not sexual orientation, citing and applying *Macdonald v Ministry of Defence; Pearce v Governing Body of Mayfield Secondary School* [2003] ICR 937 (UKHL). Mr King's treatment was not meted out on grounds of his gender but grounds of his sexual-orientation, and was not caught by section 5 of the Ordinance.

(2) The common law harassment claim also disclosed no reasonable cause of action and would be struck out. For the purposes of the strike out application the treatment would be assumed to be proven to have occurred. Putting aside the 'sexual orientation grounds' of the treatment, the treatment had not 'crossed the boundary from the regrettable or even unreasonable to the unacceptable', nor from the 'unattractive to the oppressive' per the *X & Anor v Z* case. The tort did not engage merely where conduct was unreasonable, or 'less favourable'.

(3) The Judge then addressed an argument that the common law develops incrementally and that the tort could and should be made out on proof of

less objectionable conduct – perhaps 'less favourable' treatment – where that conduct is meted out because of someone's sexual orientation, because sexual orientation discrimination breeds tension and discord in society and ought not to be countenanced. His Honour disagreed: the common law developed in line with social standards but it was also cognizant of legislative developments, which more legitimately reflected the will of society; it was constitutionally improper for the courts to frustrate or undermine that will; there were numerous areas in which the development of the common law had been halted, stunted, or even where previously available relief was no longer available, on account of legislative developments; here, the legislature had expressly addressed harassment as recently as 2021 and extended protection to cover breastfeeding and sexual harassment in amendments to the Sex Discrimination Ordinance, but not extended any protection to treatment on grounds of sexual orientation. The provisions were clear so Hansard was strictly irrelevant but they did not disclose any wish during debate to 'go further' and include sexual orientation. It would be illegitimate for the court to 'supplement' those amendments by effectively 'adding' protection for sexual orientation harassment *via* the back door of the common law tort.

(4) His Honour added that an argument that the tort should develop so as to be in line with applicable fundamental / human rights standards, based on *Campbell v MGN Ltd* [2004] 2 AC 457 (UKHL) read with *Sham Tsz Kit* (CFA), did not take Mr King's position any further since the question of sexual orientation discrimination protection was a controversial or sensitive one in Hong Kong, on which the Government has been consulting, and as regards which the Government should be given a wide margin of discretion.

(5) Mr King's damages claims for injury to feelings were therefore not grounded in any reasonable cause of action and had to fail.

11. Mr King was subsequently granted leave to appeal (by HHJ A Sachs) to the Court of Appeal in respect of his harassment claims under the 'other reason in the interest of justice' limb of section 63A of the District Court Ordinance (Cap

336). He was not granted leave in respect of the discrimination claims and did not renew the leave application before the Court of Appeal.

The Secretary for Justice's application to the Court of Final Appeal

12. Meanwhile, the Secretary for Justice applied (in August 2025) to the Court of Final Appeal under §10(b) and §16(3) of the subsequent October 2023 judgment in the 'Jimmy Sham case' ((2023) 26 HKCFAR 478) for an extended suspension of the declaration for a further two years (to October 2027), citing (i) what it said was enormous complexity in making the required legislative changes and (ii) a lack of social consensus in Hong Kong in support of an alternative framework; and proposing (iii) a year-long consultation period. In September 2025, the Court refused the application, ruling that 'compelling reasons' had not been shown and that consultation would serve no useful purpose given that the terms of the declaration do not provide the Government with discretion as to whether a marriage-like regime ought to be implemented.

13. By now, Mr King's and Mr Clarke's intended date in February 2026 was fast approaching and they instructed Rubill & Yip to write to the Secretary for Justice explaining the background facts and asking for confirmation of when a government bill would be introduced to LegCo and whether any steps would be taken to 'speed up' its process through the legislature.

14. The Secretary for Justice replied in terms that, as could be publicly seen from the September 2025 Court of Final Appeal decision, the statutory amendments were very complicated and there was not yet any societal consensus on the form and scope of the alternative arrangements, for example on how they would affect adoption, pensions, housing and other government services; given the various moving parts and numerous stakeholders it was not possible for the Secretary to confirm that a bill would be introduced on any particular date; the Secretary would publicly announce when the bill was ready to be introduced to LegCo which announcement Mr King and Mr Clarke 'may be interested' to 'look out for'.

Mr King and Mr Clarke application in the Court of First Instance

15. Aghast, Mr King and Mr Clarke instructed Rubill & Yip to apply for judicial review, seeking (i) an order of *mandamus* compelling the Secretary for Justice to within 28 days introduce a bill to LegCo providing for a same-sex alternative framework to marriage; and (ii) on the premise that HHJ A Sachs's reading of the Sex Discrimination Ordinance was correct, a declaration that the Government was in violation of its obligations under constitutional guarantees of equality and privacy in having failed to provide statutory protection against sexual orientation discrimination whereas it had done so for (*eg*) gender and race discrimination.

16. Leave was granted on the papers. The substantive hearing came on before Hon Rose and Pannick JJ sitting as a specially convened two-judge divisional court. After two days of argument, the court dismissed the application for judicial review.

17. In respect of *mandamus* relief, the court considered that:

    (1) Relief ought to be refused applying the principle of non-intervention. The separation of powers mandated that the court would not interfere with the legislative process. Whether or when the Secretary would introduce a bill was a question of LegCo's internal processes and/or the manner or exercise its powers, and the court would not intervene on settled and binding principles.

    (2) There was no utility in granting the relief sought and it should additionally be declined for that reason. It was already clear that the Secretary had to do what the order of *mandamus* would direct him to do. What the applicants sought in substance was enactment of an alternative same-sex marriage framework. Yet it was trite that the court would not draft legislation, and could not control the content of the bill. There were far too many ways in which the Secretary could comply with his obligations (or put another way, far too many possible formulations of the bill that would comply with the Court of Final Appeal's order) for the court to indicate that one or other was correct, and in any event it would be improperly contrary

to the separation of powers for the court to embark on a 'discursive' process with the Secretary, approving and disapproving various drafts. The principle of non-intervention further prevented the Court from interfering with the 'process' of the bill and (*eg*) how long it would take to pass. Nor was (nor could) relief be sought requiring the Chief Executive to sign and promulgate the bill under article 76 of the Basic Law. Requiring the Secretary to introduce a bill within a certain timeframe, then, as the applicants sought by their request for *mandamus*, would not take the applicants any closer to the relief they sought in substance.

(3) The Secretary's legal position was clear and it was not for the court to 'spring clean' the statute book, citing *R (Rusbridger & Anor) v Attorney General* [2004] AC 357 (UKHL), §§36, 58, 61.

(4) The appropriate relief to have applied for was contempt of court, relying on *M v Home Office* [1994] 1 AC 377, *Chan Kin Sun Simon & Ors v Secretary for Justice & Ors* (unreported, HCAL 79, 82, 83/2008, 10.03.2009), §45 and *Vallejos v Commissioner of Registration & Anor* [2011] 6 HKC 469. The Secretary's obligation was to comply with the declaration of the Court of Final Appeal following the cessation of its suspension. The Secretary had *prima facie* failed to meet that obligation, and there was jurisdiction to find him in contempt in his official capacity. This relief had not been sought by Mr King and Mr Clarke, however, and it was too late and unfair to impose it at this stage and in this application.

18. In respect of failure to provide statutory protection against sexual orientation discrimination, the court considered that:

(1) Mr King's privacy rights under BOR 14 (including as read with BOR 1) were not engaged because responsibility for his treatment lay with his private employer, not with any conduct of the state or a public body; unlike in *Sham Tsz Kit* (CFA) where the institution of marriage had unmistakably public elements.

(2) Equality guarantees under BL 25 and BOR 22 could not assist Mr King since they did not confer any positive obligations on the Government to

enact legislation, which was the relief Mr King really sought. BL 25 and BOR 22 required that public authorities refrain from discrimination (whether direct, indirect, *de jure* and/or *de facto* as variously described) when and so far public authorities take action that interferes with the lives of residents; but they did not 'impose liability for omission' or oblige public authorities to take positive steps of their own initiative.

(3) An argument that failure to enact sexual-orientation discrimination protection amounted to *Thlimmenos* discrimination (contrary to BL 25 and/or BOR 22) was not made out, since it was not clear that the prohibition of this form of discrimination implied any positive obligations.

(4) *Vriend v Alberta* [1998] 1 SCR 493, relied on by Mr King, was materially different and ought to be distinguished since (i) the Canadian Charter of Rights and Freedoms engaged in respect of omissions to act and conferred positive obligations on provincial legislatures, unlike BL 25 and BOR 22 and (ii) the Sex Discrimination Ordinance was a specific ordinance intended to deal with a limited class of persons / protected characteristics, not a 'general protection scheme' such as the Individual's Rights Protection Act at issue in *Vriend*, referring to *Centrale des syndicats du Québec v Quebec (Attorney General)* [2018] 1 SCR 522, §151.

(5) It was constitutionally unorthodox to contend that, over the course of the years in which the legislature had incrementally extended statutory discrimination protection on grounds of sex, disability, family status and race, it had at each turn contravened Mr King's rights (wherever they may be situated). Putting aside technical rights analysis for one moment, the court had serious doubts that it had any jurisdiction to 'review' the conduct of the legislature over the course of years in this way, which would be contrary to the separation of powers, yet this was what – in effect – Mr King's submissions invited it to do.

This moot in the Court of Appeal

19. Mr King and Mr Clarke appealed as of right from the CFI / divisional court's decision. The two appeals have since been joined to be heard together and the

Court of Appeal has given directions that it wishes to hear submissions on the following four questions:

(1) Can and should the Court of Appeal grant *mandamus* relief requiring the Secretary to introduce a bill providing for a same-sex alternative framework to marriage within 28 days?

(2) Does or should the common law tort of harassment include less favourable, regrettable and/or unreasonable (but not otherwise unacceptable or oppressive) conduct inflicted on the grounds of sexual orientation?

(3) Is the Government in breach of its constitutional obligations in not having enacted legislation protecting individuals against sexual orientation discrimination by employers?

(4) Assuming (without deciding) that the answer to (2) and (3) is 'yes', what is the appropriate relief in respect of each?