

For hearing on 20 August 2022 at 3:45 p.m.

FACV 52/2022

IN THE COURT OF FINAL APPEAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO.52 OF 2022 (CIVIL)
(ON APPEAL FROM CACV 150 OF 2021)

BETWEEN

LM	Appellant
and	
PK	1 st Respondent
SS	2 nd Respondent

SKELETON ARGUMENT OF THE APPELLANT

[AB/1] = [Appellant's Bundle / Page 1]

A. Overview

1. This is an appeal against the judgment of the Court of Appeal, which affirmed the rulings made by HHJ Varadkar. HHJ Varadkar made a non-molestation order against SS (“**the 2nd Respondent**”) under s.3 and s.3A of the Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189) (“**DVO**”), while dismissing the application by LM (“**the Appellant**”) for an ouster order.
2. In gist, it is the Appellant’s submission that:
 - 2.1. The word “spouse” in DVO should be interpreted to include a party to a same-sex marriage performed abroad; and
 - 2.2. The words “monogamous marriage”, “spouse”, “husband” and “wife” in Matrimonial Causes Ordinance (Cap. 179) (“**MCO**”) and Matrimonial

Proceedings and Property Ordinance (Cap. 192) (“**MPPO**”) should be interpreted to include same-sex couples married celebrated outside of Hong Kong according to the law of the place where it was entered into (“**formal validity**”) and between persons having the capacity to do so (“**essential validity**”).

B. Background

3. The Appellant is a female South African citizen while PK (“**the 1st Respondent**”) is a female Irish citizen with Hong Kong permanent residency. They married in Johannesburg in 2017.
4. In 2018, the 2nd Respondent, the father of the 1st Respondent, transferred to the 1st Respondent beneficial ownership of a Tsuen Wan flat as a matrimonial home (“**the Flat**”).
5. The Appellant and the 1st Respondent moved into the Flat in March 2020. The Appellant also obtained a 7-year dependent visa based on her marriage. The Appellant gave up her work and spent all her savings on her IVF treatment.
6. The marriage subsequently deteriorated as the 1st Respondent: (i) chastised, insulted and physically assaulted the Appellant; (ii) reduced family budget and fired the domestic worker that assisted the Appellant in taking care of their child; and (iii) cut off the Appellant’s contact with her family. The Appellant failed to obtain sufficient daily necessities and deteriorated psychologically.
7. The Appellant filed a petition of divorce against the 1st Respondent. Subsequently, the 1st Appellant transferred the Flat back to the 2nd Respondent, who later verbally abused and attempted to oust the Appellant from the Flat.
8. The Appellant then applied under s.17 of MPPO to set aside the gift by the 1st Respondent to the 2nd Respondent, and a separate summons under s.3 and s.3A of

DVO seeking non-molestation orders against both Respondents and their ouster from the Flat.

9. HHJ Varadkar made the following rulings:

9.1. A non-molestation order was made against the 2nd Respondent, on the basis that a restrictive definition of “spouse” to exclude same-sex partners would result in unjustified discrimination against the Appellant following *Leung Chun Kwong v Secretary for the Civil Service (2019) 22 HKCFAR 127* and *Director of Immigration v QT (2018) 21 HKCFAR 324* (“**the Molestation Order Decision**”).

9.2. The application for ouster order was dismissed as s.9 and s.2 of MCO, together Article 37 of the Basic Law (“**BL**”) and Article 19 of the Hong Kong Bill of Rights (“**HKBOR**”), preclude marriage and divorce from same-sex couples. Citing *QT*, it was held the marriage was void and the court has no jurisdiction to rule on the s.17 summons, thereby preventing the court from making the ouster order (“**the Ouster Order Decision**”).

10. The 2nd Respondent appealed against the Molestation Order Decision while the Appellant cross-appealed against the Ouster Order Decision. The Court of Appeal refused both the appeal and cross-appeal.

C. Interpretation of “spouse” in DVO

11. It is submitted that “spouse” could encompass same-sex couples married abroad both under the ordinary rules of statutory interpretation. Further, a contrary interpretation would be inconsistent with the right to equality guaranteed under BL and BOR. Same-sex married couples should be capable of relying on all the limbs of “relatives” under s.3A of DVO.

C.1. Statutory interpretation

12. As the word “spouse” is not expressly defined in DVO, the ordinary rules of statutory interpretation apply. An ordinance should receive “*fair, large and liberal construction and interpretation*” to best suit the object of the Ordinance according to its “*true intent, meaning and spirit*”: Interpretation and General Clauses Ordinance (Cap. 1) [AB/992].
13. It is submitted that the literal interpretation of “spouse” is parties to a marriage. *Prima facie*, homosexual couples married abroad are parties to a marriage: *Leung Chun Kwong* at §60 (the Court) [AB/25].
14. Interpreting “spouse” as including same-sex couples married abroad are also consistent with the intent, meaning and spirit of DVO. It seeks to protect individuals in intimate relationships who are vulnerable to being mistreated by their family members. Same-sex couples married abroad are as vulnerable as other married couples to these risk factors.
15. The Appellant therefore submits that under the rules of statutory interpretation, “spouse” should be interpreted to include same-sex couples married abroad.

C.2. Contrary interpretation would be inconsistent with the right to equality

16. The right to equality is enshrined in BL 25 [AB/755], BOR 1(1) and 22 [AB/933, 947]. The general approach to determining whether the constitutional right to equality is infringed is succinctly summarised in *Leung Chun Kwong*. The court would “*first determine whether there is differential treatment on a prohibited ground and, only if it can be demonstrated, then, to examine whether it can be justified. Differential treatment which is justified does not constitute unlawful discrimination*”: *Leung Chun Kwong* at §19 (the Court) [AB/14].

C.2.1. Differential treatment

17. The test as to the existence of differential treatment is whether a person in a comparable or analogous position has been treated differently based on a prohibited ground: *Leung Chun Kwong* at §20 (the Court) [AB/14].
18. Same-sex couples in a marriage are capable of having a relationship that is as loving as that of heterosexual couples: *QT* at §§44-47 (the Court) [AB/60], therefore, same-sex couples married abroad and heterosexual couples married abroad are in a comparable and/or an analogous position. However, while the latter is recognised by DVO as spouses and thus be able to rely on certain limbs on s.3A of DVO, interpretation contrary to the Appellant's formulation would forbid the former from doing the same. It is submitted that there is clear differential treatment based on **sexual orientation**, which is a prohibited ground recognised by BOR 1 and 22: *QT* at §106 (the Court) [AB/77].

C.2.2 Justification

19. The 4-stage justification test is helpfully summarised in *Leung Chun Kwong* at §22 (the Court) [AB/15], namely: (i) whether the differential treatment pursues a legitimate aim; (ii) whether the differential treatment is rationally connected to the legitimate aim; (iii) whether the differential treatment is proportionate; and (iv) whether a reasonable balance has been struck between the societal benefits arising from the application of differential treatment and the inference with the individual's equality right.
20. The appropriate standard of review applicable in a justification analysis hinges on whether the discrimination goes to "core values that go to personal characteristics": *Fok Chun Wa v The Hospital Authority (2012) 15 HKCFAR 409* at §§77-78 (Ma CJ) [AB/111-112]. It is submitted that as the differential treatment here concerns sexual orientation, it is a core value relating to personal characteristics: *Fok Chun Wa* at §77 (Ma CJ) [AB/111]. Further, given the differential treatment does not concern allocation of public resources, the standard of **reasonable necessity** should be

adopted: *Ng Hon Lam Edgar v Hong Kong Housing Authority* [2021] 3 HKLRD 427 at §64 (Chow JA) [AB/146-147]; *QT* at §108 (the Court) [AB/77].

21. Accordingly, it is submitted that the contrary interpretation of “spouse” would fail to meet the justification test.
22. **First**, the differential treatment **does not pursue any legitimate aim**. Specifically, it could not be said that the protection of heterosexual marriage in Hong Kong can be a legitimate aim in the present context. Unlike other socio-economic policies, the legislative intent of DVO is to prevent domestic abuse by family members of the applicants. Excluding same-sex couples from the definition of “spouse” would fly in the face of the objective of the DVO (i.e. protecting those who are highly susceptible to domestic violence). Accordingly, it is submitted that such an aim is simply irrelevant, or worse still, is wholly illegitimate in that it runs contrary to the legislative intent.
23. **Second**, assuming there is a legitimate aim, there is still **no rational connection** between the differential treatment and such aim. Encompassing same-sex couples married abroad as “spouse” are not equal to recognising the validity of same-sex marriage in Hong Kong, it is only recognising the existence of such marriage and the vulnerability that follows. It is also illogical to argue that any person is encouraged to enter into heterosexual marriage in Hong Kong since same-sex couples are denied protection.
24. **Third**, the differential treatment is **not “no more than necessary”**. It is submitted that there are less intrusive means than a blanket refusal of same-sex couples to rely on the material limbs of s.3A. For example, an interpretation provision could be added to s.2 of DVO to define spouses as “parties to a monogamous marriage performed in Hong Kong and abroad, and same-sex marriage performed abroad”, or to add a third categorisation of “same-sex spouses married abroad” under a new s.3C of DVO and allow them to rely on the material limbs under s.3A of DVO. These could preserve the status quo of DVO without depriving same-sex couples marrying abroad of their

necessary protection.

25. **Fourth**, there is **no reasonable balance struck**. It is unreasonably oppressive for same-sex couples married abroad as they are left with no quick and effective solutions in situations where they are abused by certain groups of their relatives. They are left to suffer from physical and verbal abuse, mistreatment and psychological deterioration.
26. It therefore follows that the Appellant's interpretation of "spouse" should be adopted to align with the right to equality.

D. Interpretation of MCO and MPPO

27. The word "monogamous marriage", albeit not defined in MPPO, is expressly mentioned in s.2 of MCO [AB/557] as follows:-

"if it took place outside Hong Kong, ... and recognized by such law as involving voluntary union for life of one man and one woman to the exclusion of all others;"
(Emphasis added).

28. Therefore, s.2 of MCO excludes same-sex couples from being entitled to the corresponding legal protection under MPPO and MCO. Accordingly, the Appellant respectfully submits that:-

28.1. **First**, exclusion of same-sex couples from the institution of marriage constitutes a violation of the right to marriage protected by BOR 19 [AB/945] and BL 37 [AB/757];

28.2. **Second**, s.2 of MCO, in so far as it does not recognize foreign same-sex marriages, constitutes a violation of the right to equality protected by BOR 1 and 22 [AB/933, 947] and BL 25 [AB/755].

28.3. **Accordingly**, by way of remedial interpretation, the words “monogamous marriage”, “spouse”, “husband” and “wife” in MCO and MPPO should be expanded to include foreign same-sex married couples with formal and essential validity.

D.1. Right to Marriage

29. The Appellant does not dispute that (1) historically, at the time of the promulgation, BL 37 was understood in the traditional sense of being a union between a man and a woman; and (2) the same interpretation goes for BOR 19.

30. It is trite that (1) fundamental rights ought to be interpreted generously; and (2) BL is a living instrument intended to meet changing needs and circumstances: see *MK v Government of HKSAR* [2019] 5 HKLRD 259 at §20 and §22 (Chow J) [AB/168, 169-171]; and *W v Registrar of Marriage* (2013) 16 HKCFAR 112 at §84 (Ma CJ and Ribeiro PJ) [AB/226-227].

31. It is submitted that BL 37 and BOR 19 should be given an updated interpretation to include same-sex marriages for the following reasons.

32. **First**, the exclusion of same-sex marriage **impaired the very essence of the right**:-

32.1. Decisions concerning marriage are amongst the most intimate ones that an individual can make. Besides, marriage is also the very foundation of the family and society, making it one of the most essential rights of an individual; *MK* at §7 (Hon Chow J) [AB/160]; *Obergefell v Hodges* 135 S.Ct. 2584 (2015) at 2589 & 2614 (Kennedy J) [AB/270, 295].

32.2. By virtue of the exclusion of same-sex couples from marriages, they are denied the constellation of benefits linked to marriage and are barred from exercising a fundamental right; *Obergefell* at 2590 (Kennedy J) [AB/271].

- 32.3. It is illusory to suggest that homosexual individuals could still enjoy the right by altering their sexual orientation. As sexual orientation is determined based on biological and psychological traits which go to the personal characteristics of an individual, such a suggestion is simply nonexistent; *Christopher C. H. Cook (2020): The causes of human sexual orientation, Theology & Sexuality [AB/512-530]*.
33. **Second**, in recent years, there emerged a **robust body of case law** recognizing certain legal protection and/or social benefits for same-sex couples:-
- 33.1. In *QT*, this Court had held that all same-sex civil partnerships and marriages legally entered into abroad would now be recognized locally for immigration-related issues;
- 33.2. In *Leung Chun Kwong*, the Court had agreed that the government had acted in a discriminatory manner by refusing to recognize same-sex marriages, in the sense that the Appellant could not enjoy spousal benefits and joint tax assessment;
- 33.3. In *W*, this Court had accepted that the right to marriage should be given an updated construction to include post-operative transgendered persons marrying in their acquired sex. Particularly, this Court had **denied procreation being an essential purpose of marriage**; and,
- 33.4. In *Ng Hon Lam*, the Court held that the exclusion of same-sex spouses of owners of Home Ownership Scheme flats from the definition of ‘family members’ and ‘spouses’ is unconstitutional.
34. **Third**, the absence of a **majority consensus is irrelevant** when ascertaining a minority’s right; see *W* at §116 (Ma CJ and Riberio PJ) [AB/236-237]. It is precisely those minorities that “cannot count on popular support and strong representation in the legislature” that have a claim to vindicate their fundamental rights; see *Minister of*

Home Affairs and Another v Fourie and Another (CCT 60/04) at §76 (Sachs J) [AB/372-373].

35. Accordingly, it follows that the exclusion of same-sex couples from the institution of marriage is contrary to the right to marriage protected by BOR 19 and BL 37.

D.2. Right to Equality

36. Alternatively, even if the Court finds that same-sex marriage should not be generally accepted in Hong Kong, it is submitted that the non-recognition of foreign same-sex marriages in MPPO and MCO amounts to unjustified discrimination.

37. The relevant legal principles are set out in §§16, 17, 19 and 20 of this Submission.

D.2.1. *Differential treatment*

38. Adopting §18 of this Submission, the suitable comparator in the present case should be heterosexual couples married abroad. By denying legal protection (i.e. s.17 of MPPO) to same-sex married couples, there is indirect discrimination against their sexual orientation.

D.2.2 *Justification*

39. As reasoned in §20 of the Submission, it is submitted that the 4-stage justification test with the standard of review - “reasonable necessity” should be adopted.

40. Accordingly, it is submitted that such differential treatment would fail to meet the justification test for the reasons below:

41. **First**, assuming the Respondents allege that the legitimate aim for the differential treatment is to preserve the traditional institution of marriage, in any event, the differential treatment **is not rationally connected** to the aim for the following grounds:-

- 41.1. Providing equal legal protection to foreign same-sex married couples would not serve to encourage homosexual conduct and it would not induce someone to re-orient one's sexual desire; see §56 of *Ng Hon Lam* (Chow JA) [AB/451] and §§67, 71 and 72 of *Leung Chun Kwong* (The Court) [AB/27, 29];
- 41.2. There is a demarcation between recognizing the validity of foreign same-sex married couples in MCO and MPPO and locally legalizing same-sex marriage. Whilst the latter might infringe the traditional institution of marriage, the former leaves it intact; and
- 41.3. Accordingly, the contention that the traditional institution of marriage would be undermined if the Court offers the same legal protection to foreign same-sex married couples is only based on a bare assertion.
42. **Second**, the differential treatment is **not “no more than necessary”**. The Appellant submits that there are less intrusive alternatives available. Following the argument advanced above, this includes only recognizing foreign same-sex married couples with the necessary formal and essential validity.
43. **Third**, the current differential treatment **operates with oppressive unfairness**. In particular, foreign same-sex married couples are left with no legal protection under MPPO and MCO.
44. Accordingly, it follows that the exclusion of same-sex couples under MPPO and MCO violates the right to equality protected by BOR 22 and BL 25.
- D.3. Relief
45. The scope of remedial interpretation was concisely summarized in *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229 [AB/436-510] as capable of going beyond ordinary common law interpretation and may involve the use of judicial techniques

such as **reading down and reading in**. The remedial techniques open to the Court also include the **severance or striking out of parts or the whole of the offending provision**.

46. It is submitted that the Court should sever the definition of ‘monogamous marriage’, ‘spouse’, ‘husband’ and ‘wife’ to include foreign same-sex couples married with the necessary formal and essential validity. Alternatively, the court should declare the current statutory meaning unconstitutional.

E. Conclusion

47. For the aforementioned reasons, the Appellant humbly suggests that the appeal against the Molestation Order Decision be dismissed, while the appeal against the Ouster Order Decision be allowed.

Dated this 6th day of August 2022

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PK	1 st Respondent
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LIST OF AUTHORITIES OF THE APPELLANT

A. Primary Materials

1. *Leung Chun Kwong v Secretary for the Civil Service* (2019) 22 HKCFAR 127
2. *Director of Immigration v QT* (2018) 21 HKCFAR 324
3. *Fok Chun Wa v The Hospital Authority* (2012) 15 HKCFAR 409
4. *Ng Hon Lam Edgar v Hong Kong Housing Authority* [2021] 3 HKLRD 427
5. *MK v Government of HKSAR* [2019] 5 HKLRD 259
6. *W v Registrar of Marriage* (2013) 16 HKCFAR 112
7. *Obergefell v Hodges* 135 S.Ct. 2584 (2015)
8. *Minister of Home Affairs and Another v Fourie and Another* (CCT 60/04)
9. *Leung Kwok Hung v HKSAR* (2005) 8 HKCFAR 229

B. Secondary Materials

1. Christopher C. H. Cook (2020): The causes of human sexual orientation, Theology & Sexuality

C. Statutes and Constitutional Documents

1. Domestic and Cohabitation Relationships Violence Ordinance (Cap. 189)
2. Matrimonial Causes Ordinance (Cap. 179)
3. Matrimonial Proceedings and Property Ordinance (Cap. 192)
4. Basic Law of HKSAR
5. Hong Kong Bill of Rights Ordinance (Cap. 38)
6. Interpretation and General Clauses Ordinance (Cap. 1)

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