

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 RESPONDENTS

[RB/1] = [Respondents' 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 Respondents' submission that:
 - 2.1. The word “spouse” in DVO should not 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 not 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 and between persons having the capacity to do so.

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 (“**the Flat**”).
5. Due to the Appellant’s pregnancy, the 1st Respondent’s job in Hong Kong and the pandemic, 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.
6. The marriage subsequently deteriorated and the Appellant filed a petition of divorce against the 1st Respondent, alleging that the 1st Respondent had engaged in unreasonable behaviour. The beneficial interest of the Flat was transferred from the 1st Respondent back to the 2nd Respondent.
7. 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.
8. HHJ Varadkar made the following rulings:
 - 8.1. 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”).

8.2. The application for an ouster order was dismissed as s.9 and s.2 of MCO, together with 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”).

9. 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

10. It is submitted that while “spouse” could encompass heterosexual couples married abroad, it ought not to be interpreted as including same-sex couples married abroad under the ordinary rules of statutory interpretation. Such interpretation is also consistent with the right to equality guaranteed under BL and BOR.

C.1. Statutory interpretation

11. As “spouse” is not expressly defined in DVO, the ordinary rules of statutory interpretation apply. Under s.19 of the Interpretation and General Clauses Ordinance (Cap. 1) [RB/875], 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*”. The court should also balance various interpretative factors in construing a statute, including the **context of other statutes in pari materia**, and the **reluctance of the court to find a radical change by a side-wind**:

The Medical Council of Hong Kong v Chow Siu Shek (2000) 3 HKCFAR 144 at 156B and 158C (Bokhary PJ) [RB/91, 93].

12. The literal interpretation of “spouse” is parties to a marriage. While marriage is not defined in DVO, it is trite that under the law of Hong Kong, marriage is the **voluntary union for life of one man and one woman to the exclusion of all others**: *W v Registrar of Marriage* (2013) 16 HKCFAR 112 at §25 (Ma CJ and Riberio PJ) [RB/115]. By definition, marriage is not a status open to couples of the same-sex: *QT* at §25 (the Court) [RB/54].
13. Confining “spouse” to heterosexual couples is also consistent with the true intent and spirit of the Ordinance: see *Legislative Brief of Domestic Violence (Amendment) Ordinance Bill 2009 LW/CR 1/3281/01*:
 - 13.1. **First**, to mitigate equating same-sex cohabitation with spouses, the legislature introduces a definition of cohabitation relationship under the new DVO which is devoid of reference to spouse: §8 [RB/370-371];
 - 13.2. **Second**, the legislature has removed heterosexual cohabitants from the coverage of the old s.3, so that s.3 now exclusively deals with applications by spouses, former spouses and their children: §13 [RB/372]; and
 - 13.3. **Third**, the DVO was renamed to highlight that the DVO is also applicable to persons in cohabitation as opposed to only marriage: §14 [RB/373].
14. The Respondents’ interpretation is also consistent with the interpretive factors established in *Chow Siu Shek*:
 - 14.1. **First**, the interpretation is consistent when read in the context of other statutes in *mari materia*. For instance, the MCO defined monogamous marriage taking place outside Hong Kong as the marriage “celebrated or contracted in accordance with the law in force where the marriage was performed and

recognised by such law as **involving the voluntary union for life of one man and one woman to the exclusion of all others**".

14.2. **Second**, a contrary interpretation would create a radical change by a side-wind. If the court includes same-sex couples into the definition of spouse, it would distort the traditional understanding of the laws of Hong Kong that marriage is a special status exclusively for heterosexual couples: *W* at §51 (Ma CJ and Ribeiro PJ) [**RB/140**]. This requires a difficult reconciliation of the conflicting views on ethics and morality, which should be best dealt with by the legislature.

15. It is therefore submitted that under the rules of statutory interpretation, "spouse" should only encompass heterosexual couples married in Hong Kong or overseas.

C.2. The Respondents' interpretation is consistent with the right to equality

16. 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) [**RB/14**].

C.2.1 *Differential treatment*

17. To establish a differential treatment, the Appellant must establish that she has been treated differently from a person in a comparable or analogous position: *Leung Chun Kwong* at §20 (the Court) [**RB/14-15**].

18. It is submitted that same-sex married couples are not subject to differential treatment following the Respondent's interpretation of "spouse". The fact that same-sex couples could not invoke certain limbs of "relatives" under s.3A of DVO stems from the fact

that such marriage is invalid in the eyes of Hong Kong, hence, it cannot create legal obligations on relatives. Notably, heterosexual couples not married or married invalidly (e.g. polygamy) are equally not recognised as spouses. Same-sex married couples and couples married validly are not comparable given the **unique status** of marriage in Hong Kong, which gives rise to unique cultural, legal and social implications: *MK v Government of Hong Kong* [2019] 5 HKLRD 259 at §§7-8 (Anderson Chow J) [RB/180].

C.2.2 *Justification*

19. The 4-stage justification test is helpfully summarised in *Leung Chun Kwong* at §22 [RB/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. Where the distinction is not based on core values that go to personal characteristics, the standard of review in proportionality analysis should be that of “manifestly without reasonable foundation”: *Fok Chun Wa v The Hospital Authority* (2012) 15 HKCFAR 409 at §71 (Ma CJ) [RB/235-236]. It is submitted that the differential treatment (if any) is based on a distinction based on marital status. Accordingly, the standard should be that of “**manifestly without reasonable foundation**”.
21. It is further submitted that such purported differential treatment would satisfy the justification test.
22. **First**, the interpretation pursues the **legitimate aim** of preserving the special status of marriage by confining the concept of “spouse” to heterosexual marriage, which is a well-established legitimate aim: *Leung Chun Kwong* at §60 (the Court) [RB/22]; *Ng Hon Lam Edgar v Hong Kong Housing Authority* [2021] 3 HKLRD 427 at §52 (Chow JA) [RB/269]. Marriage has its unique status and gives rise to special legal consequences. Encompassing foreign same-sex marriage as “spouse” would create

legal effects on certain groups of “relatives”. This would accord same-sex marriage, which is not a valid marriage in the eyes of the law of Hong Kong, a status akin to that of traditional marriage recognised by BL and HKBOR, and affect the unique nature of marriage.

23. **Second**, the differential treatment is **rationally connected** to the legitimate aim. The exclusion of recognising same-sex couples as “spouse” could prevent the creation of legal obligations on their purported “relatives” and thus draws a bright legal distinction with couples married under valid marriage. This could preserve the special legal status of marriage.

24. **Third**, the differential treatment is **not manifest without reasonable foundation**:

24.1. Except that same-sex couples are not allowed to identify certain groups of individuals as “relatives” under s.3A, the protection offered to heterosexual couples and homosexual couples is **identical** as to the types and extent of injunction orders that the District Court can grant under s.3 and s.3B of DVO; and

24.2. Under the Respondent’s interpretation, s.3A **only** excludes same-sex couples married abroad to the extent that the recognition of those persons as relatives will affect the status of marriage and family. It does not affect an applicant’s own family, and only affects the groups of people who would become purported relatives after a so-called family was formed between the same-sex couple.

25. **Fourth**, **a reasonable balance has been struck**. Same-sex couples married abroad could still rely on s.3A (to the extent that there is no spousal requirement) and s.3B under DVO. They could also rely on the criminal justice system or the law of tort for protection.

D. Interpretation of MCO and MPPO

26. The word “monogamous marriage”, albeit not defined in MPPO, is expressly mentioned in s.2 of MCO [RB/440] 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).

27. Therefore, s.2 of MCO effectively excludes same-sex couples from being entitled to the relevant legal protection under MPPO and MCO in Hong Kong. Accordingly, the Respondents respectfully submit that:-

27.1. **First**, exclusion of same-sex couples from the institution of marriage does not contravene the right to marriage protected by BOR 19 and BL 37;

27.2. **Second**, s.2(b) of MCO, in so far as it does not recognize foreign same-sex marriages, does not violate the right to equality protected by BOR 22 and BL 25.

27.3. **Accordingly**, the words “monogamous marriage”, “spouse”, “husband” and “wife” in MCO and MPPO should not include foreign same-sex married couples with formal and essential validity.

D.1. Right to Marriage

28. At the outset, it is submitted that under the doctrine of *lex specialis*, when ascertaining the right of marriage, the Court should only examine the article which deals specifically with the marriage right, i.e. BL 37.

D.1.1. Construction of BL 37 and BOR 19

29. In *MK* at §§14-15 [RB/184-186], Chow J held that at the time of the promulgation of the BL, BL 37 was clearly understood to be confined to the traditional sense of being a union between a man and a woman based on the following factors:-
- 29.1. The state of the domestic legislation and the fact that no country recognized same-sex marriage at the time BL came into effect; and
- 29.2. BOR 19(2) has consistently and uniformly been interpreted to mean recognition and protection of a heterosexual marriage between a man and a woman. BL 37 and BOR 19 should be read consistently with each other; See *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at §55 (The Court) [RB/293].
30. The same interpretation was also reached in several cases: *W* at §63 (Ma CJ and Ribeiro) [RB/127]; and *QT* at §26 (The Court) [RB/54].

D.1.2. Updated Interpretation

31. It is trite that in principle, legislation, the BL and the BOR may, in appropriate circumstances, be given an “updated interpretation” to meet changing needs and circumstances; see *MK* at §20 and §22 (Chow J) [RB/188-189]; and *W* at §84 (Ma CJ and Ribeiro PJ) [RB/124].
32. It should be noted that such an updated interpretation should be limited within “reasonable bounds”. The concept was succinctly summarized by Chow J in *MK* at §23 [RB/191]:-
- 32.1. There must be shown **strong and compelling local reasons** for the court to depart from what has been generally understood to be the law;
- 32.2. The Court should **not introduce nor make a new social policy**;

- 32.3. The Court should be **cautious** when exercising its interpretative power where the new interpretation has **far-reaching consequences or ramifications**; and
- 32.4. The interpretation should not lead to a construction which the language of the instrument **is not capable of bearing**.
33. It is submitted that BL 37 and BOR 19 should not be given an updated interpretation to include same-sex marriages for the following reasons:
34. **First**, there is **no evidence** that social attitudes in Hong Kong on the institution of marriage have changed to the extent that the traditional concept of marriage has been substantially weakened; c.f. *Obergefell v Hodges* 135 S.Ct. 2584 (2015) [RB/308-367].
35. **Second**, there is a sharp division of public opinion on whether same-sex relationships should be recognized. Expanding the constitutional meaning of marriage would amount to introducing a **new social policy** on a fundamental issue with far-reaching legal, social and economic consequences and ramifications, see *MK* at §24 (Chow J) [RB/191].
36. **Third**, the issue of same-sex marriage concerns a sensitive area of social, political and religious controversy. In the absence of consensus, the HKSAR should enjoy a particularly **wide margin of appreciation**.
37. **Fourth**, amending the constitutional meaning of marriage has **far-reaching consequences**, including the confrontation of public discontent. It will also shatter the socio-economic foundations relevant to traditional marriage.
38. Accordingly, it follows that the Court should not adopt an updated interpretation of BOR 19 and BL 37 to recognize same-sex marriage.

D.2. Right to Equality

39. It is also submitted that the non-recognition of foreign same-sex marriages in MPPO does not infringe the constitutional right to equality.

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

D.2.1. *Differential treatment*

41. Similar to the reasons stated in §18 of the Submission, it is submitted that the position of a married couple is not comparable to that of an unmarried couple. Accordingly, there is no differential treatment.

D.2.2. *Justification*

42. Assuming, *arguendo*, there is differential treatment, as reasoned in §20 of the Submission, the 4-stage justification test with the standard of review - “manifestly without reasonable foundation” should be adopted.

43. Accordingly, it is submitted that such differential treatment is justified for the reasons below:

44. **First**, the differential treatment based on marital status **pursues the well-established legitimate aim** of preserving the special status of marriage by confining it to heterosexual marriage only.

45. **Second**, the differential treatment is **rationally connected** to the legitimate aim as it could draw a bright legal distinction with couples married under valid marriage; see §23 of the Submission.

46. **Third**, the differential treatment is **not manifestly without reasonable foundation**. The issue of same-sex marriage concerns a sensitive area of social, political and

religious controversy where the scope of marriage is within the legislator's margin of appreciation; *Schalk and Kopf* (2011) 53 EHRR 20 at §62 (The Court) [RB/294]. Equating the degree of legal protection between foreign heterosexual and homosexual marriages would have the effect of undermining the special status of traditional marriage and blurring the distinction of validity between homosexual and heterosexual marriages.

47. **Fourth**, the current differential treatment **does not operate with any oppressive unfairness**. In particular, heterosexual married couples whose marriages are invalid are also treated in identical manners under MPPO and MCO.
48. Accordingly, it follows that the alleged differential treatment does not violate the right to equality protected by BOR 22 and BL 25.

E. Conclusion

49. For the aforementioned reasons, the Respondents humbly suggest that the appeal against the Molestation Order Decision be allowed, while the appeal against the Ouster Order Decision be dismissed.

Dated this 6th day of August 2022.

GO KA LOK
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For hearing on 20 August 2022 at 9:30 a.m.

FACV 52/2022

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LIST OF AUTHORITIES OF THE RESPONDENTS

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. *The Medical Council of Hong Kong v Chow Siu Shek* (2000) 3 HKCFAR 144
4. *W v Registrar of Marriage* (2013) 16 HKCFAR 112
5. *MK v Government of Hong Kong* [2019] 5 HKLRD 259
6. *Fok Chun Wa v The Hospital Authority* (2012) 15 HKCFAR 409
7. *Ng Hon Lam Edgar v Hong Kong Housing Authority* [2021] 3 HKLRD 427
8. *Schalk and Kopf v Austria* (2011) 53 EHRR 20
9. *Obergefell v Hodges* 135 S.Ct. 2584 (2015)

B. Secondary Materials

1. *Legislative Brief of Domestic Violence (Amendment) Ordinance Bill 2009 LW/CR 1/3281/01*

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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