IN THE HIGH COURT OF HKSAR
COURT OF APPEAL

BETWEEN

CK Appellant

and

GOVERNMENT OF HKSAR Respondent

MEMORANDOM OF THE APPELLANT

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1. This is an appeal against the Court of First Instance ("**CFI**") judgment of Leung J (the "**Judgment**"). In the Judgment, Leung J confirmed that under s.15(5) of the Human Reproductive Technology Ordinance (Cap.561) (the "**Ordinance**"), same-sex couples are not entitled to access assisted reproductive technology procedures ("**ARTPs**") in Hong Kong, and that s.15(5) is constitutional.

2. In gist, the Appellant submits that:

   a. S.15(5) of the Ordinance unfairly discriminates against same-sex couples on the basis of their sexual orientation, in contravention of Art.25 of the Basic Law of the HKSAR ("**BL**") and Art.22 of the Hong Kong Bill of Rights ("**HKBOR**").

   b. Alternatively, s.15(5) of the Ordinance infringes the Appellant's right to found a family, protected by BL Art.37 and HKBOR Arts.1(1) and 19(2).

A. <u>Background</u>

3. The Appellant is an unmarried female Hong Kong permanent resident of marriageable age in a stable cohabitation relationship with a same-sex partner.

4. In March 2018, the Appellant consulted a local private fertility specialist, in hopes of accessing ARTPs in Hong Kong. She was informed that pursuant to s.15(5) of the

Ordinance, ARTPs are only available to **married** persons, and not to the Appellant. At present, same-sex couples are unable to be married in Hong Kong: *see* s.40 of the Marriage Ordinance (Cap.181).

5. Hence, the Appellant consulted a fertility specialist in Los Angeles. The total costs of one round of ARTP therein, including flights and accommodation, amounted to more than US$25,000. In September 2018, notwithstanding the significant investment, the Appellant undertook one round of ARTP in Los Angeles, which was unsuccessful. The Los Angeles specialist advised the Appellant that many couples only succeed after three or more rounds of ARTPs. As additional ARTP rounds were beyond the Appellant's means, she was unable to pursue further treatment.

6. In January 2019, the Appellant commenced the present judicial review proceedings against the Respondent, alleging that the failure to extend the right to marry (or to enter into functionally equivalent arrangements) to same-sex couples, which disentitles the Appellant from seeking ARTP in Hong Kong, was discriminatory.

7. Leung J, sitting in the CFI, dismissed the Appellant's application for the following reasons:

   a. **First**, although s.15(5) of the Ordinance does not state that only heterosexual marriage shall be recognised thereunder, BL Art.37 and HKBOR Art.19(2) only protected the right of heterosexual couples to marry. The Respondent's policy to deny recognition of same-sex marriage or to provide an alternative legal framework such as civil unions was upheld in other proceedings.

   b. **Second**, any extension of ARTPs under the Ordinance to same-sex partners is a matter for the Legislative Council to consider rather than the courts.

8. The Appellant appeals against the Judgment on the following stated grounds:

   a. **First**, s.15(5) of the Ordinance, by denying unmarried persons access to ARTPs, discriminates against same-sex couples. It prevents same-sex couples from

expressing their shared desire to found a family in the same way as heterosexual married couples could.

b. **Second**, the denial of same-sex couples' access to ARTPs constitutes a violation of their constitutional rights including BL Arts.25 and 27, and/or HKBOR Arts.1(1), 19 and 22.

B. Right to Equality

9. The Appellant submits that s.15(5) of the Ordinance is unfairly discriminatory against same-sex couples wishing to found a family using ARTPs.

10. The approach of the Court in any alleged case of discrimination is "*first, to determine whether there is differential treatment on a prohibited ground and, only if this can be demonstrated, then, to examine whether it can be justified. Differential treatment which is justified does not constitute unlawful discrimination. However, where differential treatment is not justified, it is unlawful discrimination*": *see Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127 **[A#1]** at §19 (the Court).

B.1 Comparable Position

11. Thus, the first issue is determining whether the Appellant has been subject to differential treatment vis-à-vis a person in a comparable position, and if the reason for this difference in treatment can be identified as a prohibited ground: *Leung Chun Kwong* **[A#1]** at §20 (the Court).

12. The Appellant has clearly been subject to differential treatment due to the denial of access to ARTPs under s.15(5) of the Ordinance. By comparison, heterogenous married persons are able to access ARTPs under the provision. There is thus differential treatment to a person in a comparable position.

B.2 Four-Stage Justification Test

13. The next step is determining whether the differential treatment is justified pursuant to the four-step justification test. As held in *Leung Chun Kwong* **[A#1]** at §22 (the Court):

"*The justification test consists of four steps or elements: (i) does the differential treatment pursue a legitimate aim; (ii) is the differential treatment rationally connected to that legitimate aim; (iii) is the differential treatment no more than necessary to accomplish the legitimate aim; and (iv) has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual's equality rights.*"

14. In particular, given that the differential treatment is based on the Appellant's sexual orientation, this is a **suspect ground**, which is encompassed by the "*sex*" ground in HKBOR Art.1(1) and 22. Consequently, the infringement on the Appellant's rights must be "*no more than reasonably necessary*": *see Leung William TC v Secretary for Justice* [2006] 4 HKLRD 211 **[A#2]** at §§44, 50 (Ma CJHC, as the second Chief Justice then was).

15. The differential treatment is not justified for the following reasons.

16. **First**, there is no genuine need for the differential treatment in the current case: *see Secretary for Justice v Yau Yuk Lung Zigo* (2007) 10 HKCFAR 335 **[A#3]** at §27 (Li CJ). Assuming the Respondent alleges that homosexual couples must be prohibited from reproductive treatment to maximise the interests of the child, this is problematic. Peer-reviewed research conducted by Professors Ellen C. Perrin[1] and Benjamin S. Seigel,[2] accounting for longitudinal data spanning over 30 years, demonstrates that homosexual couples are equally suitable to raise children when compared to heterosexual couples: *see* Perrinet al., 'Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian', (2013) Pediatrics 131(4) 1374 **[A#9]**.

17. **Second**, for similar reasons, the differential treatment is not rationally connected to any alleged legitimate aim.

[1] Professor at Tufts University School of Medicine.
[2] Professor at Boston University School of Medicine.

18. **Third**, the differential treatment is not "*no more than necessary*". In particular, it is uncertain why a blanket ban is justified: *see QT v Director of Immigration* (2018) 21 HKCFAR 324 **[A#4]** at §71 (the Court). The Appellant submits that there are many less intrusive alternatives to the blanket ban at present. These include checking the commitment of relationships or family backgrounds of prospective users of reproductive technology. These ensure that the welfare of the child is protected whilst not banning homosexual couples from accessing in reproductive technology in **all circumstances**.

19. Further, the specific rejection of the Appellant's request for reproductive technology based on her sexual orientation constitutes discrimination: *see E.B. v France* (App. No. 43546/02) 22 January 2018 **[A#5]** at §93; *Yau Yuk Lung* **[A#3]** at §28 (Li CJ).

20. **Fourth**, the current differential treatment operates with oppressive unfairness. In particular, homosexual couples have no alternative means of accessing children of their own since they are unable to undergo natural copulation. Consequently, a blanket ban on reproductive technology means that **all** homosexual couples will have **no chance** of having their own children and starting their own family. This operates with oppressive unfairness on them.

21. For completeness, even if the Respondent alleges that the present discrimination is based on marital status rather than sexual orientation, the Applicant submits that it nonetheless constitutes **indirect discrimination** on the basis of sexual orientation: *see QT* **[A#4]** at §§31, 33(c) (the Court). Even if s.15(5) of the Ordinance is "*ostensibly neutral*" on its face in relation to homosexual couples, as such couples are unable to be married in Hong Kong, a marital status requirement is nonetheless "*significantly prejudicial*" to them.

22. The Courts will subject measures that involve indirect discrimination on sexual orientation to "*severe scrutiny*": *see QT* **[A#4]** at §121 (the Court). *Per* the analysis above, even if the present case involves indirect discrimination, the infringement is still disproportionate.

C. **Right to Found a Family**

23. Alternatively, the Appellant submits that, on a proper construction of BL Art.37 and HKBOR Art.19(2), the right to found a family was infringed by s.15(5) of the Ordinance.

C.1 Principles

24. The principles for construction of human rights provisions in BL and HKBOR are trite:

a. In construing the BL and HKBOR provisions, a purposive and **generous** interpretation should be given: *see*, for example, *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 **[A#6]** at §58 (Sir Anthony Mason NPJ).

b. Furthermore, the BL and HKBOR are **living instruments**, whose interpretation can be adapted to meet changing needs and circumstances. Therefore, notwithstanding any possible arguments based on the context (social or otherwise) at the time of their enactment, changes in circumstances may constitute a basis for accepting a more generous interpretation of a fundamental right: *W v Registrar of Marriage* (2013) 16 HKCFAR 112 **[A#7]** at §115 (Ma CJ and Ribeiro PJ).

c. In the interpretive exercise, the Court may take account of established principles of international jurisprudence, and the decisions of international courts and tribunals on like provisions in the International Covenant on Civil and Political Rights (the "**ICCPR**") and other international instruments: *Shum Kwok Sher* **[A#6]** at §59 (Sir Anthony Mason NPJ). This would include General Comments and decisions of the United Nations Human Rights Committee (the "**UNHRC**"), and decisions of the European Court of Human Rights with regard to the European Convention of Human Rights ("**ECHR**").

25. The right to found a family is found in the following provisions:

a. BL Art.37: "*The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.*"

b. HKBOR Art.19(2) (which reproduces ICCPR Art.23(2)): "*The right of men and women of marriageable age to marry and to found a family shall be recognized.*"

c. Insofar as relevant comparatively, ECHR Art.12: "*Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.*"

26. As astutely observed by the UNHRC in General Comment 19 at §5, the core of the right to raise a family is the possibility of procreation.

C.2 *Language of the Provisions*

27. Considering first BL Art.37, its language suggests that "*Hong Kong residents*" generally, including the Appellant, are entitled found a family. In particular, the Appellant notes that this interpretation of the applicability of Art.37 stands on its own feet, regardless of whether Art.37 entitles homosexual couples to be married in Hong Kong.

28. At the outset, the Appellant notes that a homosexual Hong Kong resident **is** entitled to the freedom of marriage, even if it could only be exercised in a less meaningful, heterosexual way at present. That the Appellant cannot meaningfully exercise her freedom of marriage does **not** necessitate that she completely loses the separate right to raise a family, or that the separate right to raise a family could only be exercised if the freedom to marry could also be exercised in a "meaningful" way.

29. Furthermore, with respect to Leung J of the Court of First Instance, the entitlement to raise a family **cannot** be consequent on the **existence** of a marriage: *see* §14 of the Moot Problem.

a. **First**, as explained by the UNHRC in *Ngambi v France*, Communication No 1179/2003, UN Doc CCPR/C/81/D/1179/2003 (16 July 2004) **[A#8]** at §6.4:

"*...the term 'family', for the purpose of the [ICCPR], must be understood* ***broadly*** *as to include all those comprising a family as understood in the society concerned. The protection of such family is* ***not necessarily obviated****, in any particular case,* ***by the absence of formal marriage bonds*** *...*" (Emphasis added.)

Where the definition of "family" does not require the existence of marriage links, a generous reading of BORO Art.19(2) suggests that the fundamental right to found a family should not be consequent on the existence of a marriage.

b. **Second**, as the structure of Art.37 indicates, the "*freedom to marry*" and the "*right to raise a family*" are two distinct rights contained in distinct sub-clauses. In affording the fundamental right a generous interpretation, the concepts of "marriage" and "family" shall not be needlessly entangled to limit the "*Hong Kong residents*" entitled to the fundamental right protected by Art.37.

30. A similar conclusion may be reached for HKBOR Art.19(2), such that Art.19(2) would also support a standalone right for the Appellant to access ARTPs in Hong Kong, regardless of marital status or sexual orientation.

31. In fairness, in defining the persons protected by Art.19(2), the phrase "*men and women*" was used. This contrasts with the more general terms adopted in other articles, such as "*everyone*" (e.g. HKBOR Art.5(1)) or "*all persons*" (e.g. HKBOR Art.10).

32. Nevertheless, notwithstanding this distinction, HKBOR Art.19(2) may still protect the Appellant's right to found a family. In particular, whilst Art.19(2) only protects the rights of "*men and women*", there is no suggestion on its face that the men and women must be *married*, or in some way connected to each other, in order for one to be entitled to the right to found a family. It follows that the Appellant, as a *female woman*, is entitled to protection under BORO Art.19(2), even if she remains unmarried.

33. Given that an unmarried female is protected by HKBOR Art.19(2), under HKBOR Art.1(1), the rights recognized in HKBOR "*shall be enjoyed without distinction of any kind, such as … sex … or other status*." Particularly, since "*sex*" encompasses sexual orientation for anti-discrimination purposes, the Appellant cannot be deprived of the right to found a family simply because her partner is of the same sex as she is.

C.3 *Living Instrument*

34. Indeed, even if at the time of their enactment, the language of BL and HKBOR only supported the right for married couples to raise a family, the "*changing needs and circumstances*" require these instruments to be given a more generous interpretation as living instruments: *W* **[A#7]** at §115 (Ma CJ and Ribeiro PJ).

35. In particular, according to data from peer-reviewed research conducted by Professor Stuart Gietel-Basten,[3] the percentage of births outside marriage in Hong Kong has more than doubled by 2015 compared to 1990: *see* Gietel-Basten et al, 'The changing relationship between marriage and childbearing in Hong Kong' (2018) PLoS ONE 13(3) **[A#10]**. Although Gietel-Basten et al noted that the increase remains "*modest*", the overall increasing trend suggests that society is now more receptive to family formation and child-bearing outside marriage. Without prejudice to the arguments based on the language of the relevant BL and BORO provisions, the construction of BL Art.37 and BORO Art.19(2) as living instruments provide that the right to found a family is **unconditioned** on the existence of marriage.

36. Therefore, the BL and HKBOR right to found a family is **not** conditioned on marriage. The Appellant, as an unmarried female with a homosexual partner, is entitled to raise a family pursuant to BL Art.37 and BORO Art.19(2). S.15(5) of the Ordinance, by completely preventing the Appellant from procreating through assisted reproductive technologies in Hong Kong, constituted a violation of the Appellant's constitutional rights under the said provisions.

[3] Professor of Social Science and Public Policy at the Hong Kong University of Science and Technology.

D. Conclusion

37. By reason of the aforesaid, the Appellant humbly invites this Court to allow the appeal.

Dated this 7th Day of August 2021

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LIST OF AUTHORITIES FOR THE APPELLANT

A. Primary Materials

1. *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127
2. *Leung William TC v Secretary for Justice* [2006] 4 HKLRD 211
3. *Secretary for Justice v Yau Yuk Lung Zigo* (2007) 10 HKCFAR 335
4. *QT v Director of Immigration* (2018) 21 HKCFAR 324
5. *E.B. v France* (App. No. 43546/02) 22 January 2018
6. *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381
7. *W v Registrar of Marriage* (2013) 16 HKCFAR 112
8. *Ngambi v France*, Communication No 1179/2003, UN Doc CCPR/C/81/D/1179/2003 (16 July 2004)

B. Secondary Materials

9. Perrinet al., 'Promoting the Well-Being of Children Whose Parents Are Gay or Lesbian', (2013) Pediatrics 131(4) 1374
10. Gietel-Basten et al, 'The changing relationship between marriage and childbearing in Hong Kong' (2018) PLoS ONE 13(3)

C. Statutes, Constitutional Documents and Other International Treaties

a. Human Reproductive Technology Ordinance (Cap.561, Laws of HKSAR)

b. Basic Law of HKSAR Arts.25 and 37

c. Hong Kong Bill of Rights Ordinance (Cap.383, Laws of HKSAR), s.8; Arts.1(1), 19, and 22.

d. Marriage Ordinance (Cap.181), s.40

e. International Covenant on Civil and Political Rights Arts.2(1), 23(2)

f. United Nations Human Rights Committee General Comment 19

Dated this 7th Day of August 2021

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