IN THE HIGH COURT OF HKSAR
COURT OF APPEAL

BETWEEN

CK Appellant

and

GOVERNMENT OF HKSAR Respondent

MEMORANDOM OF THE RESPONDENT

---

1. This is an appeal against the judgment of Leung J of the Court of First Instance ("**CFI**") (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 access assisted reproductive technology procedures ("**ARTPs**") in Hong Kong, and that s.15(5) is constitutional.

2. In gist, the Respondent submits that:

   a. S.15(5) of the Ordinance does not discriminate 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 does not infringe 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.

5. 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 relationships) to same-sex couples, which disentitles the Appellant from seeking ARTP in Hong Kong, was discriminatory.

6. 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.

7. 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, in that 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 couple's access ARTPs constitutes a violation of their constitutional rights including BL Arts.25 and 27, and/or HKBOR Arts.1(1), 19 and 22.

B. Statutory Interpretation

8. S.15(5) of the Ordinance reads as follows:

"*Subject to subsections (6), (7) and (8), no person shall provide a reproductive technology procedure to persons who are not the parties to a marriage*."

9. The rest of the Ordinance or the Interpretation and General Clauses Ordinance (Cap. 1) both do not additionally define the meaning of the word "*marriage*".

10. Consequently, the plain language of s.15(5) of the Ordinance does **not exclude married** homosexual couples from accessing reproductive technology procedures. The same has been held in other contexts such as the access to public housing: *see Ng Hon Lam Edgar v The Hong Kong Housing Authority* [2021] HKCFI 1812 **[R#1]** (Chow JA, sitting as an additional judge of the CFI), where the word "*spouse*" included spouses from foreign same-sex marriages. It follows that any conditions placed upon access to s.15(5) of the Ordinance do not depend on sexual orientation, but on **marital status**.

C. Right to Equality

11. In this light, it is plain that s.15(5) of the Ordinance is **not** unfairly discriminatory.

12. 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 Ng Hon Lam Edgar* **[R#1]** at §39 (Chow JA, sitting as an additional judge of the CFI).

C.1 Comparable Position

13. 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: *Ng Hon Lam Edgar* **[R#1]** at §41 (Chow JA, sitting as an additional judge of the CFI).

14. The Respondent submits that the Appellant has not been subject to differential treatment when compared to a person in a comparable position. In particular, an **unmarried** heterosexual couple is also *not* entitled to access ARTPs under s.15(5) of the Ordinance. In this regard, it is trite that marriage confers a special status to those who enter it, and gives rise to a specific bundle of social, personal and legal consequences. The position of a married couple is not comparable to that of an unmarried couple: *see Gas v France* (2014) 59 EHRR 22 **[R#2]** at §69.

C.2 Four-Stage Justification Test

15. Assuming, *arguendo*, that married individuals are in a comparable position, the next step is determining whether the differential treatment is justified pursuant to the four-step justification test. As held in *Ng Hon Lam Edgar* **[R#1]** (Chow JA) at §49:

"*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.*"

16. In particular, given that the differential treatment is based on the Appellant's marital status, this is an **acquired right**. Consequently, the differential treatment must be "*manifestly without reasonable foundation*" in order to be disproportionate: *see Fok Chun Wah v Hospital Authority* (2012) 15 HKCFAR 409 **[R#3]** at §71 (Ma CJ).

17. The Respondent submits that this high threshold is not met for the following reasons.

18. **First**, the differential treatment based on marital status pursues the legitimate aim of **(1)** protecting the traditional concept of a family and **(2)** maximising the child's welfare

and best interests. Marriage indicates a couple's intention and commitment to stay together for life. Importantly, it brings legal rights and obligations to the couple: *see Gas* **[R#2]** at §68, which may benefit the child. Even upon dissolution, legal schemes ensure that the child's interests and welfare will be maximized in the divorce process. Consequently, child welfare is generally better protected in married families when compared to less committed relationships.

19. **Second**, the differential treatment is rationally connected to this legitimate aim. The ban on unmarried couples from having reproductive treatment prevents them from conceiving of children in a less ideal environment through such procedures. This clearly protects the rights of the child.

20. **Third**, for similar reasons, the differential treatment is not manifestly without reasonable foundation. In particular, the reasonableness of differential treatment has to be weighed against the strength of the legitimate aim advanced. The protection of the rights of the child is clearly a weighty reason for the current policy and justify a large margin of appreciation to executive authorities: *see Gas* **[R#2]** at §69. In particular, the specific protections for the child such as those upon divorce only manifest upon the existence of **marriage**. Consequently, the current differential treatment for individuals who are not married is justified.

21. **Fourth**, the current differential treatment does not operate with any oppressive unfairness. In particular, homosexual couples can opt to be married in other jurisdictions and undergo reproductive treatment subsequently. Their situation is also no different from heterosexual unmarried couples who are denied similar treatment. There is consequently no oppressive unfairness as required.

C.3 Relationship with Right to Found a Family

22. Finally, if the Appellant does not enjoy any right to start a family due to s.15(5) of the Ordinance, the relevant consideration of the Court should be whether such a right can be derived under BL Art.37 or HKBOR Art.19(2) – which is *lex specialis* in relation to other rights such as the right to equality.

23. Consequently, if these specific constitutional provisions do not give the Appellant the right to start a family through reproductive treatments, the same right cannot be obtained through the backdoor by alleging discrimination: *MK v Government of HKSAR* [2019] 5 HKLRD 259 **[R#4]** at §§32-38 (Anderson Chow J, as Chow JA then was).

24. The Respondent will thus now turn to analyse these specific constitutional provisions.

D. Right to Found a Family

25. BL Art.37 and HKBOR Art.19(2) do **not** provide for a right for unmarried couples to access ARTPs. Adopting a purposive construction of the relevant provisions, the right to found a family is an **appendage** to the right of "*men and women of marriageable age*" to marry.

D.1 Scope of the Right to Found a Family

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

    a. The language of BL and HKBOR provisions guaranteeing fundamental rights are to be interpreted in light of its context and purpose: *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 **[R#5]** at 223J-224A (Li CJ).

    b. Whilst a literalist or overly technical approach to interpretation must be avoided, the Court cannot give the language in the provisions a meaning which it cannot bear. "*Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language*": *Chong Fung Yuen* **[R#5]** at 224A-D (Li CJ).

27. 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) of BORO (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.*"

28. Considering first HKBOR Art.19(2), the right to found a family is clearly an appendage to the right to marry, such that the Appellant only enjoys the right to found a family if she enjoys the right to marry in the first place. This argument takes three steps:

a. **First**, Art.19(2) refers to the **singular** right to marry and found a family, as evidenced by the singular form of the word "right" adopted in the provision. This interpretation was adopted by the European Court of Human Rights with regard to the corresponding Art.12 of the ECHR, in the context of (the lack of) the right for an unmarried person to adopt: *X v Belgium and the Netherlands* App no 6482/74 (ECtHR, 10 July 1975) **[R#6]** at §2.

"*In the first place, this provision [Article 12] does not guarantee the right to have children born out of wedlock. Article 12, in fact, foresees the right to marry and to found a family as* ***one simple right*** *... However, even assuming that the right to found a family may be considered irrespective of marriage, the problem is not solved. Article 12 recognises in fact the right of man and woman at the age of consent to found a family i.e. to have children.* ***The existence of a couple is fundamental.***" (Insert and emphasis supplied.)

b. Moreover, the singular nature of HKBOR Art.19 is supported by the structure of the article itself. Both aspects of the Art.19(2) right were listed under the same sub-paragraph in an enumerated list. If the freedom to marry and to found a family were intended to be separate rights, it is far likelier that the two would be contained in *separate* sub-paragraphs, where an enumerated list had already been used by the drafters.

c. **Second**, as a singular right, the scope of persons enjoying the right should be **one and the same**, regardless of the *aspect* of the right considered.

d. **Third**, not all persons are entitled to the Art.19(2) right. As noted by the UNHRC regarding the corresponding ICCPR Art.23(2): *see Joslin v New* Zealand, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (30 July 2002) **[R#7]** at §8.2.

"… ***Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term 'men and women', rather than 'every human being', 'everyone' and 'all persons'.*** *Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the* ***union between a man and a woman wishing to marry each other***." (Emphasis added.)

e. **Hence**, Art.19(2) of BORO, particularly the textual context thereof, suggests that only **heterosexual couples** enjoy protection thereunder.

f. Viewed in this light, s.15(5) of the Ordinance, by entitling all married couples to access assisted reproductive treatment, goes **beyond** the protections afforded by Art.19(2) of BORO. *Homosexual* couples are thus **entitled** to access ARTPs, provided that they are married.

29. Insofar that the Appellant complains that the right to found a family is conditioned upon marriage, the Respondent submits that it has significant latitude in deciding the extent to which the Art.19(2) right should be protected. As the UNHRC astutely observed in *Aumeeruddy-Sziffra et al v Mauritius,* Communication No 35/1978, UN Doc CCPR/C/12/D/35/1978 **[R#8]** at §9.2(b)2(ii):

"*... the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions*."

30. The need to protect the proper interest of any child born through ARTPs justifies restricting the right to access these treatments to married couples. The analysis in §§18-20 hereinabove applies *mutatis mutandis*.

31. Similarly, BL Art.37 should be interpreted alongside BORO Art.19(2) as a "*coherent whole*": *Comilang v Director of Immigration* (2019) 22 HKCFAR 59 **[R#9]** at §§30, 61 (Ribeiro and Fok PJJ). The above arguments apply *mutatis mutandis*.

32. Therefore, neither HKBOR Art.19(2) nor BL Art.37 guarantees the Appellant a right to access ARTPs in Hong Kong. It follows that s.15(5) of the Ordinance is constitutional.

D.2 Effect of HKBOR Art.1(1)

33. In respect of HKBOR, HKBOR Art.1(1) has an "accessory character", and as such does not expand the scope of rights which the Appellants enjoy under the substantive Art.19(2).

34. HKBOR Art.1(1), which replicates ICCPR Art.2(1), in gist, provides as follows:

> "*The rights recognized in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*"

35. Nevertheless, HKBOR Art.1(1) does not take the Appellant's case any further. The corresponding ICCPR Art.2(1) has long been recognised to possess subordinate and "*'accessory character', meaning that it can be violated only in conjunction with another substantive provision of the Covenant*": PM Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (CUP 2020) **[R#10]** at pp.59-61. Thus, unless and until the Appellant proves a violation of substantive articles such as Arts.19 and 22 (which is denied), there can be **no independent violation** of Art.1(1) on the Respondent's part.

E. Conclusion

36. By reason of the aforesaid, the Respondent humbly invites this Court to dismiss the appeal.

Dated this 7th Day of August 2021

JOSHUA YEUNG
ALEX YEUNG
Counsel for the Respondent

IN THE HIGH COURT OF HKSAR
COURT OF APPEAL

BETWEEN

CK Appellant

and

GOVERNMENT OF HKSAR Respondent

LIST OF AUTHORITIES FOR THE RESPONDENT

A. Primary Materials

1. *Ng Hon Lam Edgar v The Hong Kong Housing Authority* [2021] HKCFI 1812
2. *Gas v France* (2014) 59 EHRR 22
3. *Fok Chun Wah v Hospital Authority* (2012) 15 HKCFAR 409
4. *MK v Government of HKSAR* [2019] 5 HKLRD 259
5. *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211
6. *X v Belgium and the Netherlands* App no 6482/74 (ECtHR, 10 July 1975)
7. *Joslin v New Zealand*, Communication No 902/1999, UN Doc CCPR/C/75/D/902/1999 (30 July 2002)
8. *Aumeeruddy-Sziffra et al v Mauritius,* Communication No 35/1978, UN Doc CCPR/C/12/D/35/1978 (9 April 1981)
9. *Comilang v Director of Immigration* (2019) 22 HKCFAR 59

B. Secondary Materials

10. PM Taylor, *A Commentary on the International Covenant on Civil and Political Rights* (CUP 2020) at pp.59-61

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

e. United Nations Human Rights Committee General Comment 19

Dated this 7th Day of August 2021

JOSHUA YEUNG

ALEX YEUNG

Counsel for the Respondent