

Moot Problem

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL**

BETWEEN

CK

Applicant

and

Government of the Hong Kong SAR

Respondent

Facts

1. CK is a female Hong Kong permanent resident. She was born and raised in Hong Kong. CK is 38 years of age and a lesbian. In her twenties, she had a few short term relationships with same-sex partners, but for the past eight years she has been cohabiting with her same-sex partner, who is also a Hong Kong permanent resident. CK describes her relationship with her partner as stable and would marry her if she were able to do so. Both CK and her partner's families and friends are supportive of their relationship. CK and her partner participate in family gatherings and celebrations.
2. In January 2018, CK and her partner discussed the possibility of having a child together in Hong Kong or elsewhere. They wished to pursue fertility treatment to enable them to conceive a child. CK planned to be the genetic mother of the child.
3. In March 2018, CK attended an appointment with a private fertility specialist. CK did not disclose her sexuality to the fertility specialist, and indicated that she hoped to pursue fertility treatment as a single woman. The fertility specialist, Dr Yip, explained that Hong Kong law does not permit single women to access IVF treatment, which is only accessible to heterosexual, married couples. Dr Yip empathised but explained that according to the Human Reproductive Technology Ordinance (Cap. 561) he could be fined or face imprisonment if he were to provide reproductive technology services to CK. Dr Yip suggested that CK explore fertility treatment elsewhere if she were in a financial position to do so.

4. CK and her partner explore fertility treatments elsewhere. CK has heard that Thailand has good fertility treatment, but similar to Hong Kong, same-sex couples are prevented from accessing fertility treatment. They have located a number of fertility clinics in the United States that provide reproductive technology services to LGBTQ families. CK and her partner arranged an online consultation appointment with a fertility specialist based in Los Angeles, Dr Loudensack.
5. Dr Loudensack explained that IVF treatment would cost USD\$18,000 per cycle. This cost did not include fertility medications, which would cost up to USD\$5000. He explained that while some patients start treatment remotely with monitoring by a local physician, the patient needed to arrive in Los Angeles by Day 9 of their cycle in order to complete the treatment. At that time, they would need to stay in Los Angeles for at least a week.
6. Although CK and her partner had limited savings they were desperate to start a family. The cost of fertility treatment, flights and accommodation amounted to a cost of more than USD\$25,000. As it was not possible to commence fertility treatment remotely due to Hong
7. Kong's restrictive fertility laws, CK and her partner would be required to stay in Los Angeles for the duration of their treatment.
8. In September 2018, CK and her partner decided to travel to Los Angeles to have one cycle of IVF treatment. CK and her partner were devastated that the IVF treatment was unsuccessful. Dr Loudensack explained that often many couples only have success after three or more rounds of IVF, particularly in women of advanced maternal age.
9. CK and her partner no longer have any savings left. They are not able to return to Los Angeles for further IVF treatment. Their families are also not able to provide them with any financial support.
10. In January 2019, CK applied for judicial review on the basis that the Hong Kong SAR
11. Government's failure to extend the right to marry to same-sex partners or to provide an alternative legal framework such as civil unions was discriminatory and prevented same-sex partners from accessing the same goods, facilities and services, such as fertility treatment, as married, heterosexual couples.

The Court of First Instance Judgment

12. In the Court of First Instance, Justice Leung found that s.15 (5) of the Human Reproductive Technology Ordinance (Cap. 561) clearly states that, ‘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.’
13. Justice Leung explained that although the statute does not specifically state heterosexual marriage, when read together both the Basic Law (art. 37) and the Hong Kong Bill of Rights Ordinance (Cap. 383) art. 19 only protect the right of heterosexual couples to marry. In his judgment, Justice Leung noted that in the CFI case of *MK v Government of Hong Kong SAR*, the Hong Kong SAR Government’s policy to deny recognition of same-sex marriage or to provide an alternative legal framework such as civil unions was upheld.
14. Justice Leung noted that the status of marriage created a range of economic, personal, social, and legal consequences, one of which is access to reproductive technology procedures that non-married couples and single people do not enjoy. According to Justice Leung, any extension of reproductive technology procedures such as those contained within the Human Reproductive Technology Ordinance (Cap. 561) to same-sex partners is a matter for the Legislative Council to consider rather than the courts.
15. CK appeals on the basis that the CFI judgment has failed to consider in any detail whether such differential treatment is discriminatory under the law.

Grounds of Appeal

1. That the denial of reproductive technology procedures to persons who are not parties to a marriage under s.15 (5) of the Human Reproductive Technology Ordinance (Cap. 561) discriminates against same-sex couples as it prohibits them from accessing fertility treatments, which would enable them to share a similar expression of their shared desires to found a family as heterosexual, married couples.

2. That the denial of same-sex couple's access to reproductive technology procedures constitutes a violation of their constitutional rights including art. 25 and art. 37 of the Basic Law together with the Bill of Rights Ordinance (Cap. 383) arts. 1(1), 19 and 22.