CACV 1 & 2 of 2026

IN THE COURT OF APPEAL

OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

APPEAL NOS. 1 & 2 OF 2026 (CIVIL)

(JOINT APPEALS)

BETWEEN

KING

Plaintiff

and

GREATER BAY AREA UNIVERSITY

Defendant

BETWEEN

KING & CLARKE

Applicants

and

SECRETARY FOR JUSTICE

Respondent

SKELETON ARGUMENTS FOR THE RESPONDENTS

A. **Introduction**

1. Billie King ("**Plaintiff**") is a junior research fellow at the University of the Guangdong-Hong Kong-Macao Greater Bay Area (Hong Kong campus) ("**University**" or "**Defendant**"). He lives with his partner of six years, Edgar Clarke, in Hong Kong.

2. In spring 2022, Mr. King and Mr. Clarke were engaged. They decided to wait two years, hoping Hong Kong would introduce a legal framework to recognise their partnership after the decision of ***Sham Tsz Kit v Secretary for Justice*** **(2023) 26 HKCFAR 385** was handed down in September 2023. King's colleagues at the university reacted negatively to the news of his engagement. They made suggestive and unwelcome comments to King, performed a series of homophobic conducts, deliberately avoided and excluded him, all at workplace. Worse still, King was no long assigned male PhD students to supervise. This took a great toll on King mentally. He consequently resigned in November 2023.

Proceeding in the District Court

3. In March 2024, King commenced Labour Tribunal proceedings against his former employer and his claims were transferred to the District Court. King obtained findings of constructive dismissal and damages from dismissal. However, HHJ A Sachs struck out the application for findings of sex discrimination under the Sex Discrimination Ordinance (Cap 480), the common law tort of harassment, and the damages for injury to feelings arising from the discrimination and harassment ("**District Court Decision**"). His Honour reasoned that: (a) King's treatment was based on sexual orientation, not sex, and was not caught by the Sex Discrimination Ordinance; (b) The alleged treatment was not "unacceptable" or "oppressive", per ***X & Anor v Z***; and (c) His Honour found it improper to "supplement" the recent legislative protections via the backdoor of common law tort, as the issue of sexual orientation protection was sensitive in Hong Kong and the government should have wide discretion. Leave to appeal was solely granted on the harassment issue.

4. In September 2025, the CFA refused the application by the Secretary for Justice for an extended suspension of the declaration in the "Jimmy Sham" case.

Proceeding in the Court of First Instance

5. When February 2026 was approaching, the Secretary of Justice, upon inquiry by King and Clarke, refused to commit to a particular date to introduce the bill. Aghast, King and Clarke applied for judicial review. They sought (a) *mandamus* compelling the government to introduce a bill within 28 days providing for a same-sex alternative to marriage, (b) a declaration that the government was in violation of constitutional guarantees of equality and privacy by failing to legislate against sexual orientation discrimination while having done so for other grounds like gender and race.

6. Rose and Pannick JJ dismissed the judicial review ("**CFI Decision**").

7. In respect of the mandamus, the court reasoned that (a) whether and when the Secretary introduces a bill is a matter of the LegCo's internal processes, which the court will not intervene in, (b) there was no utility in granting the mandamus, (c) the court will not "spring clean" the statute book, and (d) the appropriate relief would have been a contempt of court.

8. In respect of the declaration, the court reasoned that (a) Mr. King's right to privacy under BOR14 was not engaged, (b) the equality guarantees under BL25 and BOR22 did not confer any positive obligations on the Government to enact legislation against sexual orientation discrimination, (c) *Thlimmenos* discrimination was not made out, (d) *Vriend v Alberta* should be distinguished, and (e) the court has no jurisdiction to review the conduct of the legislature over the years.

B. **Submissions**

Grounds of Appeal

9. In relation to four questions that the Court of Appeal wishes to hear submissions on, the Respondents submit that:-

(1) The Court of Appeal cannot and should not grant mandamus relief requiring the Secretary to introduce a bill providing for a same-sex alternative framework to marriage within 28 days ("**Ground 1**").
(2) The common law tort of harassment should not include less favourable, regrettable and/or unreasonable (but not otherwise unacceptable or oppressive) conduct inflicted on the grounds of sexual orientation ("**Ground 2**").
(3) The Government is not in breach of its constitutional obligations in not having enacted legislation protecting individuals against sexual orientation discrimination by employers ("**Ground 3**").
(4) Assuming that the answer to (2) and (3) is 'yes', the appropriate relief in respect of Ground 2 is nominal damage; the appropriate relief in respect of Ground 3 is a declaration that the Government is in breach of its constitutional obligations in not having enacted legislation protecting individuals against sexual orientation discrimination by employers, an order that the operation of the said declaration be suspended for two years (or for a period the Court finds reasonably necessary), and liberty to apply for an extension of the period of suspension ("**Question of Relief**").

Question 1 (mandamus)

The principle of non-intervention

10. According to the principle of non-intervention, the courts would recognise the exclusive authority of the legislature in managing its own internal processes in the conduct of its business, in particular its legislative processes. The court would not exercise jurisdiction to determine the occasion or the manner of exercise of powers by LegCo: ***Leung Kwok Hung v President of LegCo (No 2)*** **[2014] HKCFA 74** at paras 28, 43.

11. The introduction of a Bill into the LegCo forms part of the proceedings within the legislature. The introduction of the bill is governed by ss.50, 51 and 52 of the Rules of Procedure of the Legislative Council of the HKSAR. See, in particular, Rules of Procedure s.51(9): "A public officer presenting a bill shall be known throughout the subsequent proceedings on the bill as the public officer in charge of the bill; and *references in these Rules of Procedure to a Member in charge of a bill include a public officer in charge of a bill*" (emphasis added). This means the Secretary (as "public officer"), when presenting a bill, is more in a capacity that is analogous to Member of LegCo than in his capacity as Secretary for Justice. To order the Secretary to introduce a bill within a certain timeframe would be to order him to do an act within LegCo in a capacity analogous to Member of LegCo and would be to trespass impermissibly on the province of LegCo/contrary to the principle of non-intervention. This reasoning finds support in ***R (on the application of Wheeler) v Office of the Prime Minister*** **[2008] EWHC 1409 (Admin)** at para 49.

No utility in granting mandamus

12. There is no utility in granting the mandamus. Even if the Secretary introduces the bill, the bill must go through lengthy procedures before it becomes law (three readings, promulgation by Chief Executive). Granting mandamus relief would not take the applicants any closer to the relief they sought in substance, namely the expedited enactment of an alternative same-sex marriage framework. Mandamus is a discretionary relief and should therefore be declined for lack of utility.

The appropriate relief to have applied for was contempt of court

13. The court has jurisdiction to make a finding of contempt against a government department in his official capacity: ***M v Home Office*** [1994] 1 AC 377, at 395G-H.

14. Breaching the Court's declarations would involve the risk of the Government official concerned committing a contempt of court if there has been no suspension: ***Chan Kin Sun Simon & Ors v Secretary for Justice & Ors*** **[2009] HKCFI 172**, at paras 45, 64

15. In ***Vallejos v Commissioner of Registration & Anor*** **[2011] 6 HKC 469,** the court, upon judicial review, made a declaration that a provision in the Immigration Ordinance (Cap 115) was unconstitutional. The HKSAR Government was appealing against this ruling of unconstitutionality. The court held that by adopting a policy of not implementing the law declared by the court on a full-scale basis during the course of an appeal the Commissioner or other public official was NOT guilty of contempt of court, since (a) the grant of declaration of unconstitutionality *per se* did not require the Government to take any action, (b) the exercise by a party of a right to appeal should not normally be regarded as acting in defiance of the rule of law, and (c) it falls on the Government, not the court, to decide what policy to adopt in different aspects of public administration in the interim period pending final determination as to the law (paras 194, 198-200).

16. In contrast, in the present case (a) the declaration from *Sham Tsz Kit* expressly provided for a positive obligation on the Government to take action to introduce alternative same-sex framework, (b) the declaration was made by the Court of Final Appeal so there was no question of further appeal. Therefore, ***Vallejos*** should be distinguished, and the appropriate relief to have applied for was contempt of court.

17. However, the contempt of court is not the relief sought by the claimants and it is too late and unfair to grant the relief.

Question 2 (common law harassment)

Common law harassment should not develop to be made out on less objectionable conduct

18. Firstly, the threshold of common law harassment is already lower than other common law torts in the sense that "mere humiliation" is sufficient and "anxiety is capable of constituting damage": ***X & Anor v Z*** **[2020] HKCFI 826**, at para16. Being reckless as to whether the victim would suffer injury, ranging from mere humiliation to psychiatric injury, is sufficient to satisfy the mental element. If the conduct needs not cross the boundary from the regrettable to the unacceptable or from the unattractive to the oppressive, then the scope of the tort will be excessively large, opening the floodgate of litigation. Secondly, it is arbitrary that the tort should be made out on less objectionable conduct if it is inflicted on the ground of sexual orientation, but not on other grounds (*eg*, gender). Thirdly, sexual orientation discrimination protection is a controversial social policy issue and should be properly addressed by the government and legislature, which have more legitimacy and expertise, than via the backdoor of common law tort. Therefore, the common law harassment should not develop to be made out on less objectionable conduct when inflicted on the grounds of sexual orientation.

19. ***Campbell v MGN Ltd*** **[2004] 2 AC 457**, relied on by the Appellants, does not support the argument that the tort should develop so as to be in line with applicable fundamental / human rights standards. The Human Rights Act 1998 in ***Campbell*** did not create any new cause of action between private citizens. Instead, the court adopted a pre-existing cause of action and applied it in a way compatible with both parties' Convention rights: ***Campbell*** at paras 132-133. Accordingly, in the present case, the correct approach would

be to apply ***X & Anor v Z*** compatibly with both parties' constitutional rights, which calls for a balancing exercise.

The tort is not made out per the X & Anor v Z case

20. Applying ***X & Anor v Z***, the alleged conduct (unwelcome remarks, spreading rumors, dropping King out of university swimming team, not assigning him male PhD students to supervise, etc.) would not materially hinder his ability to work as a university research fellow and conduct academic research. It was merely "unreasonable" or "less favourable", short of being "oppressive". Such a finding strikes a fair balance between King's colleagues' freedom of expression (BL27/BOR16) and King's right to privacy (BOR14). Therefore, the tort is not made out.

Question 3 (breach of constitutional obligations)

Scope of positive obligations under BOR14 does not extend to enacting legislation

21. The Government has a "wide margin of discretion" as to the choice of measures to be used to discharge its positive obligations under BOR14. The touchstone is whether "practical and effective protection" is achieved. Positive obligations should be interpreted in such a way as not to "impose an excessive burden" on the authorities, bearing in mind operational choices which must be made in terms of "priorities and resources". To argue that the scope of the BOR14 obligation extends to enacting legislation against sexual orientation discrimination by employers, the Appellants need to show a causal connection between the failure to take such measure and the breach of the BOR14 rights: ***ZN v Secretary for Justice and Another*** **[2019] HKCFA 53** at paras 88-92. It is submitted that the Government has already achieved practical and effective protection of BOR14 rights by alternative measures (*e.g., issuing a Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation),* and the positive obligation does not

extend to enacting such legislation, given the resources required and complexity of taking that measure. The same could be said for the scope of positive obligations under BL25/BOR22, if positive obligations arise at all.

Thlimmenos discrimination is not made out

22. *Thlimmenos* discrimination arises when the Government, without an objective and reasonable justification, fails to treat differently persons whose situations are significantly different. Taking the comparator as many other disadvantaged groups (e.g. gender and race), they are offered statutory protection against discrimination, which is not extended to sexual orientation, thus making the *Thlimmenos* category inapplicable. Also, it is not clear that the prohibition of *Thlimmenos* discrimination engages mere omission of the Government. Alternatively, if *Thlimmenos* discrimination *prima facie* exists, it is justified by the controversy and sensitivity of sexual orientation legislative protection.

Vriend should be distinguished

23. ***Vriend v Alberta* [1998] 1 SCR 493** should be distinguished. Firstly, the Canadian Charter of Rights and Freedoms has a specific provision (s.32 of the Charter) on the application of the Charter. The language of this provision does not restrict the application of the Charter to positive actions encroaching on rights by the authorities only, but further extends it to legislative omissions (paras 50-64). By contrast, there is no provision in the Basic Law or the Hong Kong Bill of Rights that expressly authorises Hong Kong courts to review the LegCo's omission. Secondly, ***Vriend*** concerns an underinclusive legislative act, whereas in the current case, the claimant is challenging the government's failure to act at all, and the court in ***Vriend*** expressly refused to comment on this point (para 63).

24. In conclusion of Question 3, the Government is not in breach of constitutional obligations.

Question of Relief

Relief for Question (2) (common law harassment)

25. ***Lau Tat Wai v Yip Lai Kuen Joey*** [2013] HKCFI 639 should not be followed. The harassment tort as formulated in ***Lau Tat Wai*** permits a claim for mental distress falling short of psychiatric injury ("mere humiliation" or "anxiety" may suffice: paras 66-68), and this is a radical departure from recognized tort law remedies. This formulation was adopted from the UK statutory tort of harassment, but that case provides little meaningful guidance on how common law harassment should be developed in Hong Kong. In the present case, King only felt worthless and excluded at work, falling short of suffering psychiatric injury or even distress. The appropriate relief should be nominal damage.

26. Exemplary damages are punitive in nature and are awarded to teach the culprit that 'tort does not pay' and to deter him and others from similar conduct: ***Lau Tat Wai*** at para 72. Since (a) the University did not deliberately act to profit from the alleged wrongdoing; (b) the University did not act outrageously but was only indirectly at fault for failing to maintain an inclusive environment at workplace; and (c) there is no evidence to suggest exemplary damages are needed to deter the University from future wrongdoing, exemplary damages should not be awarded.

Relief for Question (3) (breach of constitutional obligations)

27. The court should make a declaration that the Government is in violation of its positive constitutional obligation to enact legislation protecting individuals against sexual orientation discrimination by employers. Given that a significant effort would be required

to work out and implement such a legislation, the court should further order that the operation of the abovementioned declaration be suspended for two years (or for a period the Court finds reasonably necessary) to allow the time to comply with its aforesaid obligation. Further, there should be liberty to apply for an extension of the period of suspension in the event that such extension was necessary.

C. **Conclusion**

28. By reason of the aforesaid, the Respondents submit that the court should dismiss the appeals of both the District Court Decision and the CFI Decision.

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Dated this 3rd day of August 2024

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LIST OF AUTHORITIES FOR THE RESPONDENTS

Cases referred to

1. *Campbell v MGN Ltd* [2004] 2 AC 457
2. *Chan Kin Sun Simon & Ors v Secretary for Justice & Ors* [2009] HKCFI 172
3. *Lau Tat Wai v Yip Lai Kuen Joey* [2013] HKCFI 639
4. *Leung Kwok Hung v President of LegCo (No 2)* [2014] HKCFA 74
5. *M v Home Office* [1994] 1 AC 377
6. *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 (Admin)
7. *Vallejos v Commissioner of Registration & Anor* [2011] 6 HKC 469
8. *Vriend v Alberta* [1998] 1 SCR 493
9. *X & Anor v Z* [2020] HKCFI 826
10. *ZN v Secretary for Justice and Another* [2019] HKCFA 53

Legislation referred to

11. Basic Law of the HKSAR art 25, 27
12. Hong Kong Bill of Rights Ordinance (Cap 383) arts 14, 16, 22

Other sources referred to

13. Rules of Procedure of the Legislative Council of the HKSAR ss 50, 51, 52