

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 1 & 2 OF 2026

BETWEEN

BILLIE KING & EDGAR CLARKE

Applicants/Appellants

And

SECRETARY FOR JUSTICE

1st Respondent

BILLIE KING

Plaintiff/Appellant

And

GREATER BAY AREA UNIVERSITY

Defendant/2nd Respondent

SKELETON ARGUMENT ON BEHALF OF THE APPELLANTS

A. Overview

1. This is a joint appeal from the Court of First Instance's decision (the "**1st decision**") to dismiss the Appellants' judicial review claims against the 1st Respondent and the District Court's decision (the "**2nd decision**") to strike out the Appellant's harassment claims against the 2nd Respondent.

B. Background

2. In Spring of 2022, Mr King and Mr Clarke were engaged to be married, and decided to extend their engagement pending the "Jimmy Sham case". However, in September 2023, following the Court of Final Appeal's judgement in *Sham Tsz Kit v Secretary for Justice* (2023) 26 HKCFAR 385, the couple resolved to wait an additional two years for the Hong Kong Government to introduce an alternative framework for legal recognition of their partnership.
3. Following this decision, Mr King began telling his colleagues at work about the engagement. Some of Mr. King's colleagues did not react positively to the news of his engagement, which led to the following
 - a. Suggestive and unwelcome comments and gestures in the lab.
 - b. Rumours were being spread that if the Appellants had children they would 'grow up gay'.
 - c. Mr King was avoided in university gym changing rooms and no longer invited to the monthly swimming practice.
 - d. Mr King was dropped from the university swimming team on the basis he was 'not committed', though he had heard others 'felt uncomfortable' changing clothes and training with him.
 - e. Mr King was no longer assigned male PhD students to supervise.
4. This led Mr King to feel worthless and excluded, resigning from his position from the university in late December 2023. He made claims in the Labour Tribunal, later the District Court, for relief; the court struck out his common law harassment claim on the following bases:

- a. The conduct had not crossed the “unreasonable” threshold per *X & Anor v Z* [2020] HKCFI 826.
 - b. The common law should account for legislative intent when developing.
 - c. The Government should be given a wide margin of discretion on sexual orientation discrimination.
5. Mr King sought (i) an order of mandamus compelling the Secretary for Justice to introduce a bill to LegCo providing for a same-sex alternative framework to marriage; and (ii) a declaration that the Government was in violation of its obligations under constitutional guarantees of equality and privacy in having failed to provide statutory protection against sexual orientation discrimination despite having done so for gender and race discrimination.
6. In respect of mandamus, the court at First Instance considered that relief should be refused on 4 grounds which would be discussed later.
7. In respect of failure to provide statutory protection against sexual orientation discrimination, the court considered that the government had not breached its constitutional obligations in not having enacted legislation protecting individuals against sexual orientation.
8. The Appellant’s submissions shall anchor itself upon two assertions:
 - a. The 1st Decision should be overturned, as mandamus was the justified and appropriate relief, and there exists a positive constitutional obligation on the Government’s part to enact sexual orientation discrimination legislation, for which a mandatory order is justified.
 - b. The 2nd Decision should be overturned, as the common law tort of harassment did comprise and account for sexual orientation in its context based analysis, for which damages are the appropriate relief.

C. Appeal against the 1st Decision

C1. A mandamus should be granted against the executive.

9. Where the issue involves a fundamental right, this is a compelling reason as to why the court should grant the order. In the case of *R (on the application of Imam) (Respondent) v London Borough of Croydon (Appellant)*.

A) *It is the vindication of their right which is being denied, and if the impact on them of the failure to comply with it is very serious and their need is very pressing, this may justify the court in issuing a mandatory order despite the wider potentially disruptive effects it may have. [68]*

12. Additionally, the executive has not taken all reasonable steps to perform its duty; the executive shall be under an obligation to comply with the court order.

A) *Since it is the court which has to be satisfied that it is not appropriate to grant a mandatory order, the question whether the authority has taken all reasonable steps is an objective one for the court to determine, [54]*

13. This test is satisfied because:

- A) The proposed consultation would serve no useful purpose as the question was not whether a marriage-like regime should be implemented.
- B) General budgetary constraints should not inhibit government action in compliance with their legal obligations.
- C) Finally, the government did not suggest that it was impossible for the government to comply with their legal obligations.

C2. The CFI has erred in its judgement in determining that there is no utility for granting a mandamus.

14. In *ClientEarth (No.3) v Secretary of State for the Environment, Food and Rural Affairs, Secretary of State for Transport and Welsh Ministers [2018] EWHC 315 (Admin)*, the court acknowledged that it cannot determine the specific plan for government to carry

out however, the court can grant a liberty to apply to ensure that the applicant can bring the matter back to court if there was evidence that the overall objective was not being achieved.

C3. Mr King’s Privacy Rights Under BOR 14 were Engaged.

15. The approach in determining whether Article 14 of the BOR is engaged is set out in *Sham Tsz Kit (岑子杰) v Secretary for Justice*, [2023] 26 HKCFAR 385. Ribeiro PJ and Fok PJ states that

A) BOR 14 is wider in scope as “*it protects against such interference by anyone, including fellow residents. Secondly, it gives a right not merely to being free from such interference but a right to the protection of the law against the same.* [155]

16. This test is satisfied because:

A) The court established that the right under BOR 14 is engaged where inference is not “confined” to public authorities but interference by fellow residents as well.

17. Where BOR 14 is engaged, the state or a public body must take the necessary steps to adopt legislation to prohibit such interference. It is stated in *Sham Tsz Kit*,

A) *a positive obligation to take legislative or other measures may arise if positive measures are needed to guarantee effective protection.* [160].

C4. The Government Has a Positive Duty to Enact Legislation to Provide Equality Guarantees under BL 25 and BOR 22.

18. The BOR can confer a positive duty on the government to give effect to such rights. Discussed in *Sham Tsz Kit*,

A) *Accordingly, in Leung Kwok Hung v HKSAR, it was held that the Government had a positive duty to take reasonable and appropriate measures to enable lawful demonstrations to take place peacefully. That was based on what was required for*

the effective protection of the rights in question and not on some textual dissection of BL27 and BOR17. [167].

19. Further, the omission of government to enact legislation to extend equality protections for sexual orientation under the Sexual Discrimination Ordinance has resulted in differential treatment breaching equality guarantees under the Basic Law 25 and BOR 22.

20. Following the BOR 22, prohibited grounds of discrimination include “other status”; discrimination based on sexual orientation falls within “other status”.

21. The omission upon government to enact legislation has resulted in the third indirect category of discrimination against the applicant. The correct approach to the third form of discrimination is established in *QT v Director of Immigration, [2017] HKCU 2419*

A) The third form of discrimination occurs when a general policy or measure has disproportionately prejudicial effects on a particular group although it is couched in neutral terms and is not specifically aimed at that group [94].

22. This test is satisfied because

A) Individuals who have a minority sexual orientation are not protected under any statutory legislation in Hong Kong.

B) Individuals who have different sexual orientations are not protected under the SDO Thus, applying the principles established in *QT* the omission of government is discriminatory given that such protections cannot be met by people of differing sexual orientations.

23. The discrimination suffered and the difference in treatment cannot be justified. The correct approach the court should take is established in *QT v Director of Immigration 2018 HKCU 2216* where the CFA established that:

A) The correct approach is to examine every alleged case of discrimination to see if the difference in treatment can be justified. [83].

24. The current regime of discrimination legislation and policies do not adequately protect individuals of a minority sexual orientation. There is also no justification as to why the statutory provisions do not extend to protect sexual orientation. The Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation is not legally binding thus there is no justification for this differential treatment.
25. We submit that such a differential cannot be justified following the test as established in *QT*.
- A) The aim of the government is to conduct further consultations as sexual orientation legislation is still controversial. The government states HK is not ready for sexual orientation legislation because “*society is divided on the issue and given the complex and controversial nature of the matter*” is inadequate(EOC Report, 21
- B) Instead, in accordance with the report, *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*: found that public support for introducing LGBTI anti-discrimination legislation had increased significantly.
26. There is also no rational connection to exclude or omit to enact legislation to protect the intended legitimate aims.
27. The test is not satisfied given that the enactment of legislation to protect discrimination of people based on sexual orientation will not as the government contends usurp traditional family values and religious beliefs. It is no longer the case that the majority of citizens are strongly opposed to legislation in respect to sexual orientation. (200) ICCPR 4th report. It is not clear that sexual orientation legislation will cause unwarranted effects to society.
28. We submit that the standard of review is that of reasonable necessity following the position established in *QT*.

A) Accordingly, where a person is subjected to differential treatment on any of the suspect grounds, including sexual orientation, the government's margin of discretion is much narrowed and the court will subject the impugned measure to "particularly severe scrutiny". [108].

29. It is also submitted that courts have the jurisdiction to review whether legislative acts are constitutional or lawful. Established in *QT v Director of Immigration*,

A) The courts have the ultimate responsibility of determining whether acts are constitutional or lawful. It would be appropriate for the courts to intervene (indeed they would be duty-bound to do so) where, even in the area of socio-economic or other government policies, there has been any disregard for core-values." [105].

Third Ground of Appeal: Unlike cases that should not be treated alike, failure to enact legislation is prejudicial to Mr King.

30. The approach to establishing Thlimmenos Discrimination is where the state has "failed to treat differently persons whose situations are significantly different"[14] as established in *Burnip v Birmingham City Council and another* [2012] All ER (D) 170 (May). This will therefore impose a positive obligation upon the state to make provisions to "cater for the significant difference". [15].

31. This test is satisfied because:

- A) There are significant differences in needs of individuals who are discriminated against based on their sexual orientation.
- B) There was failure to accommodate different needs in the absence of any legislation against the discrimination of sexual orientation.
- C) Inadequacy of existing policies to guard against sexual orientation discrimination.

D. Appeal against the 2nd Decision

D1. The distinction between the regrettable and unacceptable is not accepted

32. The case of *Lau Tat Wai v Yip Lai Kuen Joey* [2013] 3 HKC 361 at [62] provides the definition of “harassment” which “enjoys almost universal approval in the trial courts of Hong Kong” (*Tort Law in Hong Kong 5th ed.* at p.741); this definition does not differentiate between regrettable conduct and unacceptable conduct. Instead, it focuses on whether a “course of conduct” is “sufficiently repetitive” such that “it would cause, and which he ought reasonably to know would cause, worry, emotional distress or annoyance to another person” (*Lau Tat Wai* at [62]), which invariably depends on the context and content of the conduct concerned.
33. *X & Anor v Z* [2020] HKCFI 826 [14]-[15] failed to cite any legal authority for the proposition that the court draws a “boundary from the regrettable or even unreasonable to the unacceptable”. The decisions cited by the court in that case did not provide the distinction elicited in *X & Anor v Z*. Furthermore, the court in *X v Z & Anor* does not provide a clear definition of what is merely “regrettable” as opposed to what would be “unacceptable”.

D2. Even if accepted, sexual orientation plays a factor in the analysis

34. Even if this distinction is accepted, it was recognised in *X & Anor v Z* that whether conduct is “unacceptable” is largely dependent on “context” at [15] and [23], which could include the “social or working context” in which the conduct occurs. This would presumably comprise the object of the conduct, as this would clearly have an effect on what constitutes a “sufficiently repetitive” course of conduct to cause emotional distress and annoyance.
35. This context-based approach is illustrated by the range of time periods for which the court has previously found harassment, which could last from three days to several years (*Tort Law in Hong Kong 5th ed.* at p.740). Conduct inflicted on the grounds of sexual orientation would more readily cause emotional distress and annoyance than in the more

common cases of debt collection or romantic relationships, and should be taken into account in the context-based framework of harassment.

D3. If it is not contained with the common law tort, the object of the tort justifies its inclusion

36. The object of the tort of harassment, which targets substantial harm produced from “persistent, and personalised” conduct (*Tort Law in Hong Kong 5th ed.* at p.742), provides an apt justification for the inclusion of sexual orientation as part of the context in which the harassing conduct has occurred: indeed, conduct targeting one’s sexual harassment targets a constituent part of their identity, and would cause further harm than the matters normally involved in such cases, including romantic relationships and debt collection.

D4. The argument on legislative developments is artificial

37. According to the District Court’s argument, it would be inappropriate for the courts to alter the threshold of what is “sufficiently repetitive” to amount to harassment in all other contexts outside of those covered by statute. Indeed, if context requires that this threshold be lowered, this could amount to “additional protection” as defined by the District Court at [10](3). However, the approach of the court in assessing harassment is inherently context based, meaning that different contexts will imply different thresholds of what constitutes “sufficiently repetitive” conduct.

38. The additional protection afforded to victims of sexual harassment under the Sex Discrimination Ordinance (Cap. 480) (the “**SDO**”) are different to simply accommodating sexual orientation within the framework of the common law tort of harassment. The SDO provides for an altered definition of harassment, which does not require a “course of conduct” which is “sufficiently repetitive”, but rather “making an unwelcome sexual advance”, engaging in “unwelcome conduct”, or “engages in conduct of a sexual nature which creates a hostile or intimidating environment for her” (Cap. 480 s.2(5)). The lower threshold here for a course of conduct inflicted on the grounds of

sexual orientation is still made by reference to elements of the common law tort of harassment, including its context-based approach.

D5. The Government does not have the same wide margin of discretion in this area

39. As discussed previously, sexual orientation falls under one of the prohibited grounds, which entails that the government's margin of discretion is narrowed. Accordingly, the point that tort should develop so as to be in line with applicable fundamental / human rights standards, based on *Campbell v MGN Ltd* [2004] 2 AC 457 read with *Sham Tsz Kit* [2023] 26 HKCFAR 385, holds strong.

E. Appropriate Relief

In respect of the 1st Decision

40. In respect of the constitutional obligation, the appropriate relief is that of mandamus to provide for sexual orientation discrimination. A helpful summary of the law can be found in *Halsbury's Laws of Hong Kong Judicial Remedies* [10.132] [citation needed]; citing *IRC v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 at 650, the duty must be of a public character and must be owed to the applicant in question. This is the case here, as it is the Government's positive obligation under BOR 14 and is one in which the applicant is concerned.

41. Furthermore, mandamus may issue where, even if there is an alternative legal remedy, mandamus remains the more convenient, beneficial and effective means (*R v Thomas* [1892] 1 QB 426). Given that the Government is actively breaching this fundamental right, and has failed to provide for it over several years, a purely declaratory order for which mandamus may have to be subsequently sought, as was the case here concerning the alternative framework, may be the most efficient way to guarantee rectification of this omission. Alternatively, the Appellants seek a Declaratory Order in similar form to that given in *Sham Tsz Kit v Secretary for Justice* (2023) 26 HKCFAR 385.

In respect of the 2nd Decision

42. In *Lau Tat Wai*, the court stated that the plaintiff could recover damages caused as a result of the harassment, and that financial loss is also recoverable *Lau Tat Wai* [2013] 2 HKLRD 1197 at [66]-[69]. Reference can be made to other cases involving a similar duration: in *Kwong Yiu Keung Stanley v Chiu Sin Shum* [2021] HKDC 158, given the lack of intimidating words, foul language or threats of violence, and the lack of intention to scare the defendant's young children, aggravated damages could not be awarded. However, the court considered that the repeated prank calls over a duration of a six week period justified an award of HKD100,000 in general damages.
43. Aggravated damages could be made out in harassment cases premised on sexual orientation; indeed, as recognised in *Kwong* at [83], "aggravated damages are awarded to compensate the plaintiff for injury to his proper pride and dignity and the consequence of his being humiliated". Given the highly personal nature of one's sexual orientation, harassment on such a basis could and has resulted in such harm to the Appellant, who felt "worthless" and "excluded". Furthermore, contrary to the *Kwong* case, the conduct here did involve foul language targeted at the Appellant's sexual orientation.
44. Exemplary damages could equally be justified in harassment cases focusing on sexual orientation. Indeed, the basis for exemplary damages as recognised in *Lau Tat Wai* is "punitive in nature" and works to deter from such type of conduct; in that case, the fact that innocents were "put to suffer" and the victim had suffered a setback to his career at a critical time had justified imposition of exemplary damages (*Lau Tat Wai* 2013] 2 HKLRD 1197 at [72]). Sexual orientation is covered as a prohibited ground and is a highly personal matter, harassment for which should be deterred from.

F. Conclusion

By reason of the aforesaid, the Appellants invite the Court to dismiss both the 1st Decision and 2nd Decision.

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APPELLANTS' LIST OF AUTHORITIES

Cases:

1. *Burnip v Birmingham City Council and another* [2012] All ER (D) 170 (May)
2. *Campbell v MGN Ltd* [2004] 2 AC 457
3. *ClientEarth (No.3) v Secretary of State for the Environment, Food and Rural Affairs, Secretary of State for Transport and Welsh Ministers* [2018] EWHC 315 (Admin)
4. *Kwong Yiu Keung Stanley v Chiu Sin Shum* [2021] HKDC 158
5. *Lau Tat Wai v Yip Lai kuen Joey* [2013] 2 HKLRD 1197
6. *QT v Director of Immigration*, [2017] HKCU 2419
7. *R (on the application of Imam) (Respondent) v London Borough of Croydon (Appellant)* [2023] UKSC 45
8. *R v Thomas* [1892] 1 QB 426
9. *Sham Tsz Kit v Secretary for Justice* (2023) 26 HKCFAR 385
10. *X & Anor v Z* [2020] HKCFI 826

Secondary Authorities:

1. Chen, W., & Lim, C. L. (Eds.). (2021). *Law of the Hong Kong Constitution*. Thomson Reuters Corporation Pte Limited.
2. TORT LAW IN HONG KONG, FIFTH EDITION, 5 edition, Rick Glofchesk October 2023.
3. Report on Study on Legislation against Discrimination on the Grounds of Sexual Orientation, Gender Identity and Intersex Status, 2016.

Legislation:

1. Sex Discrimination Ordinance (Cap. 480)
2. Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation
3. Bill of Rights Ordinance (Cap. 383)
4. The Basic Law of the Hong Kong SAR