HCAL 124/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST
NO 124 OF 2014

BETWEEN

QT Applicant

and

DIRECTOR OF IMMIGRATION Respondent

Before: Hon Au J in Court
Dates of Hearing: 14 and 15 May 2015
Date of Judgment: 11 March 2016

J U D G M E N T

A. INTRODUCTION

1. The applicant is a female national of the United Kingdom. By way of this judicial review, she challenges the Director of Immigration ("the Director")'s decision ("the Decision") to refuse her application to grant her a visa ("a dependant visa") to enter and stay in Hong Kong as a dependant of her same-sex civil partner ('the sponsor"), who is working in Hong Kong under an employment visa.

2. The Director rejected her application on the basis that the applicant was not the "spouse" of the sponsor and thus her application fell outside the Director's existing dependant policy ("the Policy"). It is the Director's case that the meaning of "spouse" refers only to one whose marriage is a heterosexual and monogamous marriage, as this is the only form of valid marriage recognised under Hong Kong's laws.

3. The applicant challenges the Decision on three grounds, which are in gist as follows:

(1) The Decision is *Wednesbury* unreasonable as it is discriminatory against the applicant on sexual orientation grounds, which is not justified ("Ground 1").[1]

(2) The Director erred in law in construing "spouse" in the Policy to mean husband or wife but not include a party to a same-sex marriage-like relationship ("Ground 2").[2]

(3) If the Director was correct in his construction of "spouse" then this infringes the applicant's constitutional rights under articles 1, 14 and 22 of the Hong Kong Bill of Rights (Cap 383) ("BOR") and articles 25, 39 and 41 of the Basic Law ("BL") ("Ground 3").[3]

4. The applicant seeks the relief of quashing the Decision and declarations that:

(1) To the extent that sections 11(2)(a) and 11(5A) of the Immigration Ordinance, and/or the Policy purport to authorise the imposition of less favourable conditions of stay

---

[1] See Form 86, paragraphs 61 – 95.
[2] See Form 86, paragraphs 96 – 137.
[3] See Form 86, paragraphs 138 – 174.

on the ground only of the sexual orientation of the person concerned, they are unconstitutional.

(2) The word "spouse" within the prevailing immigration policy applicable to dependants includes a party to settle, marriage-like same-sex relationship.

5. The Director opposes this application on the principal basis that there is no discrimination based on sexual orientation under the Policy and the Decision.

B. FACTS

6. The relevant facts in this case are not in dispute and could be briefly summarised as follows.

7. It is the applicant's case that she and the sponsor have been in a permanent and settled relationship since 2004. They eventually entered into civil partnership in accordance with the laws of the UK in May 2011.

8. The sponsor was offered work in Hong Kong in late 2011 and moved here with the applicant on 23 September 2011. The sponsor came to Hong Kong on a work visa, while the applicant was with a visitor visa.

9. Relevant to this judicial review, under the Policy, a "spouse" of a sponsor who is working in Hong Kong could apply to join the sponsor in Hong Kong as a defendant. As stated in the "Guidebook for Entry for Residence as Dependants in Hong Kong" at paragraph 4:

> "For a sponsor who has been admitted into the HKSAR to take up employment… the following dependants may apply to join him/her for residence in the HKSAR:
>
> a. his/her spouse; and
>
> b. his/her unmarried dependent child under the age of 18."[4]

10. Thus, only a spouse or a child under the age of 18 of the sponsor in Hong Kong could apply under the Policy to join the sponsor in Hong Kong if the spouse or child also shows that he or she is dependent on the sponsor.

11. The applicant previously sought a dependant visa and also an employment visa on her own right, and on all three occasions without success.

12. She made a fresh application for a dependant visa on 29 January 2014. She claims to be the "spouse" of the sponsor and thus falls within the Policy. Following the submission of that application, correspondence ensued between the Director and the applicant's solicitors as to whether same-sex couples could come within the Policy.

13. The Director refused the application on the basis that the applicant was not regarded as the "spouse" of the sponsor and thus she did not come within the Policy. The Director communicated the Decision by way of a letter dated 18 June 2014. In the letter, after referring to the Policy, the Director explained the decision as follows:

---

[4] See also the Affirmation of Wong Mo Cheong, Wilson at paragraph 11 and "Immigration Guidelines for Entry to the Hong Kong Special Administrative Region of the People's Republic of China" at paragraph 45.

> "The existing immigration policy on admission of spouse as a dependant *is based on monogamy and the concept of a married couple consisting of one male and one female*. In other words, when applying for a dependant visa, the applicant and his/her spouse should, among other things, show that their marriage was celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed and recognized by such law as involving the voluntary union for life of one man and one woman to the exclusion of all others." (*emphasis* added)

14. The applicant applied for leave to apply for judicial review in October 2014.

15. After leave was granted, the Director wrote to the applicant stating that, while she was not entitled to a dependency visa under the Policy, on reconsidering all available up-to-date information and circumstances of the case revealed or elaborated in the applicant's documents filed in support of the application for judicial review, on humanitarian considerations relating to her health, he was prepared to alter her conditions and limit of stay. The effect of this is that she will no longer be subject to conditions of stay as a visitor, and can take up study/employment in Hong Kong without seeking prior approval from the Director. She could also apply for extension of her limit of stay in due course.

16. The applicant however declines to accept this alternative and proceeds with the present judicial review.

C. THIS JUDICIAL REVIEW

17. As I mentioned above, the applicant raises three grounds to challenge the Decision. I will look at them in turn.

C1. Ground 1 – Is there discrimination based on sexual orientation under the Policy

C1.1 Parties' primary contentions

18. Under this ground, Mr Parker for the applicant submits that it is clear that the Decision is discriminatory based on sexual orientation. This can be easily demonstrated by the fact that were the applicant and sponsor an opposite sex couple, they would, because they could acquire marital status, have been afforded the privilege under the Policy of preferable immigration status for the dependant. But they are gay and that makes it impossible, under the Policy as the Director applies it, for them to ever enjoy the benefit.

19. Mr Wong SC (together with Ms Grace Chow) for the Director fairly accepts that the principle of equality constrains the Director's exercise of his statutory power and if he exercises it without treating "like cases alike and unlike cases differently", he would be exercising his power irrationally. See: *Matadeen v Pointu* [1999] 1 AC 98 at 109C - D, *per* Lord Hoffmann.

20. However, Mr Wong SC contends that, in the present case, the differential treatment (ie, the entitlement to *apply* for a dependant visa) under the Policy is based on marital status between married persons and unmarried persons, and these two groups of persons are of sufficiently different status to justify such a differential treatment in the context of immigration control. Thus, the applicant, being in an unmarried relationship, is in a sufficiently different situation to a married person so as to justify different treatment. Similarly, under the Policy, heterosexual partners who are not married are also not entitled to make an

application for a dependant visa. There is therefore no discrimination based on sexual orientation.

21. Before I look at these contentions, I would first set out some principles that are relevant to their consideration.

C1.2 Relevant principles

22. First, the court's approach when considering whether there is infringement to the right to equality has been explained by Li CJ in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 at paragraphs 19 - 22 as follows:

> "[19] In general, the law should usually accord identical treatment to comparable situations. As Lord Nicholls observed in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at p.566C:
>
> *Like cases should be treated alike, unlike cases should not be treated alike*.
>
> [20] *However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment may be justified for good reason*. In order for differential treatment to be justified, it must be shown that:
>
> (1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.
>
> (2) The difference in treatment must be rationally connected to the legitimate aim.
>
> (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.
>
> The above test will be referred to as 'the justification test'. In the present case, the Court has had the benefit of submissions on its appropriate formulation. There is

> no material difference between the justification test and the test stated in *R v Man Wai Keung* (No 2) [1992] 2 HKCLR 207 at p.217 which was used by the Court in *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 at para.20." (*emphasis* added)

23. This approach has been further considered and explained by Ma CJ in *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at paragraphs 58 - 59 as follows:

> "58. While perhaps in some cases, this two-stage approach can neatly be applied, it is important that it should not be regarded as if it were a statute and treated as such. A step by step approach is useful as far as it goes but it must not give rise to complicated and long-drawn out (but ultimately unproductive) arguments as to whether this step or that step has been overcome. Such arguments will often obscure the real issues in a case. This should be borne in mind when dealing with issues of equality where the two-stage approach is useful but must not give rise to complex and unnecessary arguments. I have been guided here by the remarks of Lord Walker of Gestingthorpe in his speech in *R (Carson) v Secretary of State for Works and Pensions* [2006] 1 AC 173, 194B-F ([63]). For my part, I have no objection in adopting the two-stage approach set out in *Yau Yuk Lung* as long as one firmly bears in mind the following points:
>
> (1) The object of the exercise (when considering issues of equality) is ultimately to ask a simple question and here, I would respectively adopt the way in which this was put by Lord Hoffmann in *Carson*, 186H ([31]), 'is there enough of a relevant difference between X and Y [the comparators] to justify differential treatment?'
>
> (2) In the majority of cases where equality issues are involved, it will be necessary for the Court to look at the materials which go to the three facets of the justification test before this crucial question is answered. It will be a rare case, I daresay, where the court will comfortably be able to answer this question without any recourse to the issue of justification at all. Seen in this way, it may matter not at all whether the court's approach is seen as a two-stage one or not.
>
> (3) Here, I associate myself with the approach of Lord Nicholls of Birkenhead in *Carson*, at 179C-E ([3]):

> [3] For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 [of the European Convention on Human Rights - the equipment of art.22 of the Bill of Rights] does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in art.14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.
>
> 59. This approach, which I believe to be a principled one, recognises that in most questions involving the right to equality, there will be an overlap in the application of the two-stage test set out in *Yau Yuk Lung*."

24. In the premises, the law does not treat differential treatment between two groups of person as discrimination if there is sufficient relevant difference between them to justify the differential treatment. As observed by Ma CJ in *Fok Chun Wa*, in considering this particular question of whether there is sufficient difference to justify differential treatment, the court usually would also have to take into account the issue of justification as well. This is the approach I would adopt below.

25. Second, as submitted by Mr Wong, the law clearly accepts and recognises that, given the special circumstances of Hong Kong,[5] the Director in exercise of his discretion entrusted to him under Article 145 of the Basic Law and under section 11 of the Immigration Ordinance is entitled to adopt a strict immigration policy to limit the number of people who could enter and stay in Hong Kong.[6] In doing so, and given that immigration control has a social and economic impact on Hong Kong, he is also entitled in formulating the relevant policy to draw a bright line as to which categories of people he consider would be allowed to enter into Hong Kong.[7] Further, in drawing the bright line, the Director is entitled to take into account the need for clarity, certainty of the line and administrative convenience of implementing the policy.[8] In this respect, the court would generally give difference to the executive as to where to draw the line. However, as pointed out by Ma CJ in *Fok Chun Wa* at paragraphs 77 and 78, the court will subject a challenged decision which said to have offended the core values (such as race, colour, gender, sexual orientation, religion, politics or social origin) to a particularly severe scrutiny.

26. Third, it has well been recognised that being married is a special legal status which gives the married couple new legal rights and

---

5 In the light of Hong Kong's small geographical size, huge population, substantial intake of immigrants, relatively high per capita income and living standard, and local living and job market conditions, which bring constant and high pressure on Hong Kong society as a whole in particular and labour market, social benefits system, housing, education and infrastructure.

6 See for examples: *Hai Ho Tak v Attorney General* [1994] 2 HKLR 202 at 208, *per* Mortimer JA, and 209, *per* Nazareth JA; *Christian Bulao Palmis* (unreported, HCAL 2104/2001, 19 February 2003) at paragraph 19, 50, *per* Hartmann J; *Gurung Ganga Devi v Director of Immigration* (unreported, HCAL 131/2008, 23 September 2009) at paragraph 31; *MA v Director of Immigration* (unreported, HCAL 10/2010, 6 January 2011) at paragraph 97, *per* A Cheung J; *Comilang v Director of Immigration* (unreported, HCAL 28/2011, 15 June 2012) at paragraphs 28 - 29, *per* Lam J.

7 See: *Fok Chun Wa*, paragraph 72; *AM (Somalia) v Entry Clearance Officer* [2009] UKHRR 1073 at paragraph 65, *per* Elias LJ.

8 See: *Fok Chun Wa*, paragraphs 70 - 75.

obligations with regard to the rest of the public, although the status so acquired may vary according to the laws of different communities.[9] Similarly, the European Court of Human Rights ("ECHR") has also accepted that marriage confers a special status on those who enter into it, giving rise to social, personal and legal consequences which could well be different from civil partnerships.[10]

27. Fourth, as accepted by the applicant,[11] under common law, the word "spouse" means husband and wife of a heterosexual marriage and excludes same-sex couples.[12]

28. Finally, under the laws of Hong Kong, marriage is monogamous and heterosexual.[13] Further, as confirmed by Mr Parker, the applicant does not in this application seek to contend that the non-recognition of same-sex marriages or civil partnerships under the existing Hong Kong laws is unlawful or unconstitutional.

C1.3 Court's analysis

29. Bearing the above principles in mind, I now move on to consider the primary question under this ground, which is whether the applicant (or those who are parties to a homosexual (or heterosexual)

---

9 See: *In re G (Adoption: Unmarried Couple)* [2009] AC 173 at paragraph 7, *per* Lord Hoffmann; *Bellinger v Bellinger (Attorney General intervening)* [2002] Fam 150 (CA) at paragraph 99 and *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467, *per* Lord Hope, at paragraph 58.

10 See for examples *Gas v France* (2014) 59 EHRR 22 at paragraph 68; *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at paragraphs 62 - 64.

11 See: Form 86, paragraph 115.

12 See: *Black's Law Dictionary* (10th edition, 2014) at 1621; *Jowitt's Dictionary of English Law* (3rd edition, 2010) at 2148 and *Stroud's Judicial Dictionary of Words and Phrases* (8th edition, 2012) at 2801.

13 See section 40 of the Marriage Ordinance (Cap 181), and section 2 of Matrimonial Causes Ordinance (Cap 179). See also: *Hyde v Hyde* (1866) LR 1 P&D 130 at 133, *per* Lord Penzance.

relationship who are not married) and married persons are in a sufficiently relevant different position to justify the differential treatment provided under the Policy.

30. In my view, I think they are. My reasons are as follows.

31. As pointed out by Mr Parker, although he accepts that *generally* married persons may occupy a status with obligations and rights which are different from unmarried persons, he submits (rightly so I think) that the question of whether these two groups of person are of such sufficient relevant differences to justify different treatment under the Policy should be considered in a proper context but not in vacuum. He says what the court should consider for the present purpose is whether the differences in status between married and unmarried persons *in the context of the present circumstances* are sufficient to justify the complained differential treatment. Further, as explained in *Fok Chun Wa*, in determining that question, the court should also have regard to the purported justifications provided by the Director under the justification test to see whether the Director' case on sufficiently different situation based on marital status is made out.

32. I agree that that I should consider this question in the proper context and with reference to the Director's purported justifications.

33. The proper context in the present circumstances is, in my view, immigration control.

34. As to justifications, Mr Wong SC has helpfully provided the court at the hearing a written summary of the Director's case on justifications in relation to the elements of legitimate aim, the rational connection and the proportionality of the measures. For convenience, I would quote the summary in full as follows:

> "The difference in treatment pursues the legitimate aim of striking a balance between (1) maintaining Hong Kong's continued ability to attract people with the right talent and skills to come to Hong Kong to work (by giving them the choice of bringing in their closest dependants to live with them in Hong Kong and to care for and support them in Hong Kong); and (2) the need for a system of effective, strict and stringent immigration control in the light of Hong Kong's small geographical size, huge population, substantial intake of immigrants, relatively high per capita income and living standard, and local living and job market conditions, which bring constant and high pressure on Hong Kong's society as a whole in particular the labour market, social benefits system, housing, education and infrastructure.
>
> To achieve the said legitimate aim, the Director adopts a bright-line rule, based on marital status as defined by Hong Kong's matrimonial law and which the Director is obliged to follow and give effect to, and which provides for legal certainty and administrative workability and convenience, which is rationally connected with the said aim and is no more than necessary to accomplish the said aim."

35. Thus, it is the Director's case and evidence that in seeking to be able to *lawfully* apply the Policy, he draws the line based on marital status to achieve the legitimate aim ("the Legitimate Aim") of striking a balance between (1) maintaining Hong Kong's continued ability to attract people with the right talent and skills to come to Hong Kong to work (by giving them the choice of bringing in their closest dependants to live with them in Hong Kong and to care for and support them in Hong Kong); and

(2) the need for a system of effective, strict and stringent immigration control.[14]

36. As I mentioned above, under the context of immigration control, the Director is entitled to draw a bright line, and in doing so, he is also entitled to (and probably should) take into account considerations relating to clarity, certainty of the line and administrative convenience of its implementation. Further, in drawing the line, he must also be entitled to have regard to the consideration that its implementation and application have to be regarded as lawful in Hong Kong. It cannot be seriously suggested that the Director could apply a relevant immigration policy where certain elements or aspects of it would be regarded as unlawful in Hong Kong.

37. Thus, given the context of tight immigration control, it is for the Director to decide how best to strike the balance between maintaining that strictness and at the same time allowing certain room to attract skilled and talented foreigners to come to Hong Kong to work. The Director for the Policy has decided that to achieve the right balance, the way to attract these workers is to allow only certain categories of people (ie, children under 18 and spouse of a recognised marriage) who are also dependant on the foreigner working in Hong Kong to join him or her. It is true that some of such skilled foreigners who cannot bring in their same-sex partners (whether under civil partnerships or same-sex marriages) may not want to come to Hong Kong to work. But the same is also true that some of them may also not want to come to work here because they cannot bring in their children who are above 18, or also their

[14] See: Affirmation of Wong Mo Cheong Wilson, paragraphs 16 - 22.

parents or brothers who are dependent on them. Some may not want to come simply because they cannot bring in their girlfriends or boyfriends. These limited categories of eligible applicants for dependant visas under the Policy do therefore limit or reduce the potential number of skilled and talented foreigners who may be prepared to come to Hong Kong to work. However, in deciding how to strike a right balance to have some room in his tight immigration control to attract foreigners to come to work in Hong Kong, and having regard to the lawfulness of the implementation of the Policy, this is a bright line (in deciding which categories of dependants the foreign worker in Hong Kong may be able to "bring" in as an incentive) the Director is entrusted with the discretion to draw.

38. In the premises, in order to achieve the aim of striking the right balance, the Director is entitled to draw the line based on marital status between married and unmarried persons to decide who could apply to join the sponsor working in Hong Kong.

39. Next, in deciding for the purpose of the Policy, who would fall with the meaning of a "spouse", I also accept Mr Wong's submissions that, in order to enable the Director to apply the Policy lawfully in Hong Kong, he should adopt the legal meaning of marriage as recognised in Hong Kong, that is a heterosexual and monogamous marriage, to inform the meaning of the word "spouse". In formulating and implementing a policy, the Director is obliged to follow and give effect to marital status as defined by Hong Kong's matrimonial laws.[15]

---

[15] I note that the applicant argues in this application under this ground and also Ground 2 that there are various relevant ordinances in Hong Kong which accept and recognise valid foreign marriages, which should include those same-sex marriages which are valid under relevant foreign law. Thus it is contended that in certain circumstances, Hong Kong does recognise same-sex marriages. I will look at these contentions in greater detail below in the judgment.

Moreover, such a meaning would also provide clarity, certainty, and administrative convenience in its application because (a) this is a meaning well established and known to Hong Kong; and (b) its meaning is simple and clear.

40. As a result, given the context of immigration control and to have a Policy which can be applied lawfully in Hong Kong, the Director is entitled to draw a bright line between married and unmarried persons and under that, it is only the sponsor's spouse of a marriage validly recognised in Hong Kong who may apply to join the sponsor in Hong Kong as a dependant.

41. These two categories of persons are sufficiently different to justify the difference in treatment under the Policy in the context of immigration control. Therefore, the Policy and the Decision made pursuant to that are not discriminatory based on sexual orientation as contended by the applicant.

42. As submitted by Mr Wong, this approach is consistent with the ECHR' approach and judgment in *Gas v France*, *supra*.

43. In that case, the 1st and 2nd applicants were lesbian cohabitants and were in civil partnership (at that time France did not permit or recognise same-sex marriage). The 2nd applicant gave birth to a girl, A, who was conceived by an anonymous donor insemination. A had since birth been living with the 1st and 2nd applicants. The 1st applicant later applied to adopt A as her daughter under the form of

simple adoption available in France.[16] Under simple adoption, and where the adoptee is a minor (as was A then), all the rights associated with parental responsibility would be removed from the child's biological father or mother in favour of the adoptive parent. There was however a legislative exception provided under Article 365 of the Civil Code, which stated as follows:

> "**Article 365 of the Civil Code**
>
> All rights associated with parental responsibility shall be vested in the adoptive parent alone, including the right to consent to the marriage of the adoptee, unless the adoptive parent is married to the adoptee's mother or father. In this case, the adoptive parent and his or her spouse shall have joint parental responsibility, but the spouse shall continue to exercise it alone unless the couple make a joint declaration before the senior registrar of the *tribunal de grande instance* to the effect that parental responsibility is to be exercised jointly. …"

44. Thus, under Article 365, the parental responsibility of the adoptee child would be vested not only in the adoptive parent alone but jointly in the adoptive parent and his or her spouse *if* the adoptive parent is *married* to the child's mother or father (as the case may be). Since the 1st and 2nd applicants were in civil partnership but not married (as the French law then prohibits same-sex marriage), if the intended adoption was allowed, the 1st applicant would be vested with the sole parental responsibility and the 2nd applicant under the law would not have any parental right over A.

45. The public prosecutor objected to the intended adoption based on Article 365 and the first instance court refused the application on the basis that the requested adoption had legal implication which ran

---

[16] In France, there were then two forms of adoption. One called full adoption and the other simple adoption.

counter to the applicants' intention (as both the 1st and 2nd applicants in fact intended to have joint responsibility over A) and child's interests by transferring parental responsibility only to the 1st applicant and depriving the birth mother (ie, the 2nd applicant) of her own rights in relation to the child.

46. The applicants eventually appealed to the ECHR on the principal basis that the refusal to grant the 1st applicant a simple adoption order had infringed their right to respect for their private and family life under the European Convention, in a discriminatory manner based on their sexual orientation. This was so because French authorities prohibited same-sex couples, but not heterosexual couples, from obtaining a simple-adoption order, as same-sex marriage was prohibited in France and therefore same-sex couples could never be able to rely on Article 365.

47. The ECHR dismissed the applicants' appeal and concluded that the difference in treatment was afforded between married and unmarried couples, and these two groups of person occupied sufficiently different situation in this context to justify the difference in treatment. There was therefore no discrimination based on sexual orientation. The ECHR explained their reasons at paragraphs 58 - 60 and 64 - 70 as follows:

> "1. General principles
>
> 58. The Court has established in its case-law that in order for an issue to arise under art.14 there must be a difference in the treatment of persons in relevantly similar situations. Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable

relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

59. On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification.

60. On the other hand, the margin of appreciation enjoyed by states in assessing whether and to what extent differences in otherwise similar situations justify a different treatment is usually wide when it comes to general measures of economic or social strategy.

…

64. The applicants maintained that the French courts' refusal to grant the first applicant a simple-adoption order in respect of A infringed their right to respect for their private and family life in a discriminatory manner. They alleged that, as a same-sex couple, they had been subjected to an unjustified difference in treatment compared with heterosexual couples, whether married or not.

65. The Court considers it necessary first to examine the applicants' legal situation compared with that of married couples. It notes that art.365 of the Civil Code provides for the sharing of parental responsibility in cases where the adoptive parent is the spouse of the biological parent. The applicants cannot avail themselves of this possibility since they are prohibited under French law from marrying.

66. The Court observes at the outset that it has already ruled, in examining the case of *Schalk*, cited above, that art.12 of the Convention does not impose an obligation on the governments of the Contracting States to grant same-sex couples access to marriage. Nor can a right to same-sex marriage be derived from art.14 taken in conjunction with art.8. The Court has further held that, where a state chooses to provide same-sex couples with an alternative means of recognition, it enjoys a certain margin of appreciation as regards the exact status conferred.

67. The Court notes that in the instant case the applicants stated that they were not seeking access to marriage but alleged that, since their situation was relevantly similar to that of

> married couples, they had been subjected to a discriminatory difference in treatment.
>
> 68. The Court is not persuaded by this argument. It points out, as it has already held, that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by art.12 of the Convention and gives rise to social, personal and legal consequences. Accordingly, the Court considers that, for the purposes of second-parent adoption, the applicants' legal situation cannot be said to be comparable to that of a married couple.
>
> 69. Next, turning to the second part of the applicants' complaint, the Court must examine their situation compared with that of an unmarried heterosexual couple. The latter may, like the applicants, have entered into a civil partnership or may be cohabiting. In essence, the Court notes that any couple in a comparable legal situation by virtue of having entered into a civil partnership would likewise have their application for a simple-adoption order refused. It does not therefore observe any difference in treatment based on the applicants' sexual orientation.
>
> 70. It is true that the applicants also alleged indirect discrimination based on the fact that it was impossible for them to marry, whereas heterosexual couples could circumvent art.365 of the Civil Code by that means.
>
> 71. However, in that connection the Court can only refer to its previous findings."

48. For the reasons I have explained above, I agree that these analyses and observations in *Gas v France* are equally applicable in the present case with reference to the context of immigration control.

49. Mr Parker however raises a number of contentions to say why the difference in treatment is *not* based on married or unmarried persons but on sexual orientation. I will deal with them in turn.

50. First, he says the Director's above submissions are inconsistent with a number of authorities, which instead support his

contention that the Director's application of the Policy in treating a spouse by reference only to a heterosexual marriage amounts to discrimination based on sexual orientation. These authorities are *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17 at paragraphs 15, 27 - 60; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 and *Preddy and Hall v Bull* [2013] UKSC 73.

51. With respect, I do not accept Mr Parker's above submissions as I find these authorities to be distinguishable.

52. *National Coalition* involves the question of the meaning of the word "spouse" in section 25(5) of the Aliens Control Act 96 of 1991 ("the Act") in South Africa which read as follows:

> "Notwithstanding the provisions of subsection (4), but subject to the provisions of subsection (3) and (6), a regional committee may, upon adjudication by the spouse or the dependent child of a person permanently and lawfully resident in the Republic, authorize the issue of an immigration permit."

53. The respondent ministers in that case interpreted and treated the word "spouse" to refer to only the spouse of a heterosexual marriage and did not include a same-sex partner of marriage like relationship. The applicants (which included a gay and lesbian interest group and the individual applicants who were affected by the decisions made by the respondents under section 25(5)) challenged the said interpretation on the basis that (a) on a proper construction, the word "spouse" included partners under same-sex marriage like relationships; or (b) if the respondents' interpretation was correct, then the provision itself is

unconstitutional in infringing the right to equality and human dignity as guaranteed respectively under sections 9[17] and 10[18] of the Constitution.

54. The High Court of South Africa rejected the construction argument but found the provision to be unconstitutional as contended by the applicants. On appeal to the Constitutional Court of South Africa, Ackermann J dismissed the appeal and upheld the decisions of the High Court. He also rejected the construction argument but agreed that the provision so construed infringed the right to equality and was thus unconstitutional.

55. However, in my view, Ackermann J's decision that that interpretation infringed the right to equality is distinguishable in relation to the arguments now raised by the Director in the present judicial review:

(1) Ackermann J rejected the respondent's argument that the concerned differentiation was based on the ground that they were non-spouses but not sexual orientation for the reasons that "spouse is defined with regard to marriage and is but the name given to the partners to a marriage" (see paragraph 33) and thus the provision *prima facie* constituted overlapping

---

[17] Section 9 provided: "**Equality**: (1) Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

[18] Section 10 provided: "**Human dignity**: Everyone has inherent dignity and the right to have their dignity respected and protected."

discrimination on the grounds of sexual orientation *and* marital status.

(2) In this respect, it is pertinent to note that sections 9(3) and (5) of the South Africa Constitution specifically provided that the state may not unfairly discriminate directly or indirectly against anyone on the ground of, among others, marital status and sexual orientation, and any discrimination on those bases was presumed be unfair unless it can be shown otherwise.

(3) Then, in assessing whether the "discrimination" was fair in the context of the South Africa Constitution, the respondents advanced the submissions that it was so because the interpretation was made with the aim to protect traditionally recognised family life (see paragraph 45). This was rejected by the court to be a good reason to satisfy the proportionality test to show that the discrimination was fair (by looking at the impact of the "discrimination" on the affected persons: see paragraphs 46 - 56).

(4) This is clearly different and distinguishable from the present case where, as I explained above, the aim and proper context advanced by the Director are to strike the right balance between maintaining the tight immigration control in Hong Kong and attracting skilled foreigners to come to work in Hong Kong. The Director does not rely on an aim to protect traditional family life to justify the difference in treatment.

(5) As such, *National Coalition* cannot be treated as an authority that runs against the Director's submissions that, given the aim and context of striking a right balance between immigration control and attracting skilled foreigners to work

> in Hong Kong, the difference between married and unmarried persons justifies the difference in treatment under the Policy.

56. Relevant for the present purpose, *Ghaidan* involves the question of whether a homosexual partner of a protected tenant can succeed the statutory protection provided under paragraphs 2(2) of Schedule 1 ("Schedule 1") to the Rent Act 1977 upon the death of the original protected tenant. Paragraph 2(2) provided as follows:

> "(2) For the purposes of this paragraph, a person who was living with the original tenant *as his or her wife or husband* shall be treated as the spouse of the original tenant…" (*emphasis* added)

57. In that case, the applicant was the same sex partner of the originally protected tenant of a flat. The applicant had been living in that flat with the tenant. Upon the death of the tenant, the claimant owner of the flat brought the action against the applicant claiming possession of the flat. The applicant defended the claim on, among others, the basis that he fell within paragraph 2(2) of Schedule 1 and thus was protected.

58. When the case went to the House of Lord, it was held that the word "spouse" in paragraph 2(2) referred only to a partner from a heterosexual marriage as it referred to "as husband and wife". However, that was not compliant with articles 8 and 14 of the Convention on Human Rights as it would amount to discriminatory infringement of the right to a person's home (guaranteed under article 8), which right shall be secured without discrimination (under article 14). This was so as the

court was the view that the differential treatment could not be justified by the aim (as advanced by the claimant) to protect traditional family under the proportionality test (see for example, paragraphs 15 - 18, *per* Lord Nicholls; paragraphs 136 to 143, *per* Baroness Hale).

59. This case is again distinguishable on the basis that:

(1) It did not deal with any arguments based on whether the differential treatment was afforded between married or unmarried persons who were *not* in analogous situation.[19] As emphasised by Baroness Hale at paragraph 138 of the judgment, the court in that case was *not* concerned with a difference in treatment between married and unmarried couples (which *is* however the primary argument raised by the Director in the present case) as the provision dealt with unmarried partners only (given the words "living as … his or her wife or husband"). That case thus was decided based on the question of whether justification for the differential treatment based on the proportionality test could be established.

(2) In that respect, the purported aim advanced by the claimant in that case to justify the discrimination was to protect traditional family. As explained above, this again is very different from the present case where the relevant aim and context is striking the right balance between tight immigration control and attracting skilled foreign workers.

(3) For these reasons, I do not think *Ghaidan* stands in the way (as Mr Parker seeks to contend) of the Director's

[19] An issue which Baroness Hale recognised at paragraphs 133 - 134 that the court has to deal with in a discrimination case if it is raised and insofar as it is relevant.

submissions that the persons afforded with differential treatment under the Policy are not in analogous situation.

60. In *Preddy v Bull*, the defendants owned and ran a private hotel. They operated a policy to restrict occupancy of the double-bedded rooms in their hotel to unmarried couples. They operated such a policy as it was their belief that it was sinful for persons, whether homosexual or heterosexual, to have sexual relations outside marriage and that, if they permitted unmarried couples to share a double bed, they themselves would be involved in promoting that sin. Based on that policy, the defendants refused to honour a booking for a double-bedded room made by the claimants, a homosexual couple in a civil partnership. The claimants brought the claim against the defendants saying that they had suffered discrimination, either direct or indirect, on the ground of sexual orientation in contravention of regulation 3 and 4 of the Equality Act (Sexual Orientation) Regulations 2007. The defendants opposed the claim on the grounds that (a) there was no discrimination as they applied the restriction to homosexual and heterosexual orientation alike (as the policy was against all unmarried couples); and (b) any finding of discrimination would infringe the defendants' rights to freedom of thought, conscience and religion protected under article 9 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

61. The first instance judge found in favour of the claimants, which decision was upheld by the Court of Appeal. The Supreme Court also dismissed the defendants' further appeal by a majority (Lord Neuberger PSC and Lord Hughes JSC dissenting). The reasons of

the judgment as summarised in the headnotes of the law report are in gist as follows:

(1) being in a civil partnership was indistinguishable from the status of marriage in United Kingdom law and the defendants' policy of letting double-bedded rooms only to heterosexual couples who were married and not to same sex couples who were in a civil partnership therefore applied a criterion which was based solely on sexual orientation and amounted to direct discrimination under regulation 3(1) of the Equality Act (Sexual Orientation) Regulations 2007 (see: paragraphs 25 - 29, 30, 55, 57 - 62, 64, 67 - 71).

(2) if the discrimination were not direct, the policy would, or (*per* Lord Neuberger of Abbotsbury PSC and Lord Hughes JSC) the policy did, amount to indirect discrimination because, although it applied to all unmarried couples, it put homosexual couples as a group at a serious disadvantage as compared with heterosexual couples since the former could not enter together into a status which the defendants would regard as marriage, and the defendants' sincerely held religious belief that sexual relations between unmarried couples were sinful, although capable of being a matter other than the claimants' sexual orientation within the meaning of regulation 3(3)(d) of the 2007 Regulations, did not provide reasonable justification for their policy; and that, accordingly, the defendants' refusal of a double-bedded room to the claimants constituted discrimination on grounds of sexual orientation which regulation 4 made unlawful unless that were incompatible with the defendants' Convention rights (see: paragraphs 33 - 38, 55, 63, 72, 73 - 85, 87 - 93).

(3) the limitation imposed by the 2007 Regulations on the defendants' right under article 9 of the Convention to manifest their religion was not incompatible with that right since it was a proportionate means of achieving the Regulations' legitimate aim of protecting the domestic as well as Convention rights and freedoms of the claimants, and thus necessary in a democratic society for that purpose; and that, accordingly, the defendants' actions constituted unlawful discrimination against the claimants on grounds of sexual orientation (see: paragraphs 51, 53, 55, 72, 73, 85, 87, 93).

62. Given these bases of the judgment, this case is also distinguishable from the present case:

(1) The majority found that one could not have a distinction between married and unmarried couple because of the specific statutory provision under regulation 3(4) of the Regulations which provided that being married and being a civil partner "shall not be treated as a material difference" for the purpose of a finding of either direct or indirect discrimination. This constituted one of the underlying reasons for the court to reject the defendants' argument that the differential treatment was based between married and unmarried couples but not on sexual orientation (see paragraphs 26 - 28, *per* Baroness Hale). We do not have such a specific provision in Hong Kong and thus it is open to the Director in the present case to advance that argument.

(2) In this respect, this court does note that Baroness Hale further concluded at paragraph 29 that, even without regulation 3(4), there still could not be a valid distinction

between married couples and unmarried couples for the purpose of considering whether there was discrimination based on sexual orientation. However, Baroness Hale came to that conclusion because she was of the view that marriage and civil partnership was indistinguishable under UK laws as both provided "*a legal framework within which loving, stable and committed adult relationships can flourish*". As a result, a discrimination between a married and a civilly partnered person (who could not be married) could be anything other than discrimination on grounds of sexual orientation. Again, we do not have a similar legal recognition of civil partnership in Hong Kong and therefore Baroness Hale's said observation and reasoning cannot be simply applied in Hong Kong.

(3) Finally, in that case, the court considered the question of justification under the context of the defendants' protected right to manifest their religion. This is also very different from the arguments run in the present case which is premised on the context of tight immigration control.

63. Therefore, *Preddy v Bull* also cannot be treated as an authority that stands against the Director's primary submissions as considered above.

64. For all these reasons, I reject Mr Parker's submissions that these cases can be treated as authorities against the Director's above primary contention. Quite to the contrary, as I explained above, the Director's contention is consistent with the ECHR's analysis and judgment in *Gas v France*.

65. Second, Mr Parker submits that there are no reasons why the Director cannot include in the meaning of the spouse also same-sex marriage-like relations which are legally recognised by other foreign countries (such as civil partnership, or formal same-sex marriage), as they are in all material aspects similar to a marriage. This, says Mr Parker, will similarly provide administrative convenience and certainty. In support of his contentions that homosexual partnership under a civil partnership (or a same-sex marriage which is now recognised and permitted in some countries, including the UK) is of no material difference from a heterosexual partnership under a traditional marriage, Mr Parker in particular relies on the observations by Baroness Hale in *Preddy v Bull* at paragraph 29 (as quoted above) and in *Ghaidan* at paragraph 142 where her Ladyship said this:

> "142. Homosexual couples can have exactly the same sort of inter-dependent relationship as heterosexuals can. Sexual 'orientation' defines the sort of person with whom one wishes to have sexual relations. It requires another person to express itself. Some people, whether heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the essence of being a couple. And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation."

66. Mr Parker therefore says it amounts to discrimination based on sexual orientation for the Director not to include such foreign recognised same-sex relationships in the meaning of "spouse" under the Policy.

67. I am also not persuaded by this submission.

68. As I mentioned above, Baroness Hale's above observations are made in the context that civil partnership was legally recognised in UK and some other countries. The observations cannot be directly applied to Hong Kong for the present purpose with reference to the legal position that Hong Kong does not recognise civil partnership or same-sex marriage. When viewed under this context, if for the purpose of the Policy, the Director is to treat a same-sex marriage-like relationship equivalent to the marriage legally recognised in Hong Kong, it would amount to requiring the Director to at least indirectly recognise civil partnership or same-sex marriage as valid in Hong Kong through the backdoor. This would effectively require the Director to apply a policy with an element which is regarded as unlawful in Hong Kong. This simply cannot be right. In this respect, it must be reminded that the applicant does not seek to challenge the lawfulness or constitutionality of Hong Kong's matrimonial laws in not allowing same-sex marriages or civil partnerships.

69. Moreover, I also accept Mr Wong's submissions that different countries may attribute different legal obligations and rights under their respective laws to the particular form of civil partnership or same-sex marriages they recognise. It therefore cannot be said that every such recognised foreign same-sex marriages or civil partnerships could as a matter of course be treated as the same as that of a traditional marriage. For example, the ECHR observed the differences between a civil partnership and a marriage in France in *Gas v France* at paragraph 24 as follows:

> "24 A civil partnership is defined by art.515-1 of the Civil Code as
>
> > 'a contract entered into by two individuals of full age, of opposite sex or of the same sex, for the purposes of organising their life together'.
>
> Civil partnerships entail a number of obligations for those who enter into them, including the obligation to live as a couple and lend each other material and other support.
>
> Civil partnerships also confer certain rights on the parties, which increased with the entry into force on 1 January 2007 of the Law of 23 June 2006 on the reform of the arrangements concerning inheritance and gifts. Hence, the partners constitute a single household for tax purposes; they are also treated in the same way as married couples for the purposes of exercising certain rights, particularly in relation to health and maternity insurance and life assurance. Some effects deriving from marriage remain inapplicable to civil partnerships. Among other things, the legislation does not give rise to any kinship or inheritance ties between the partners. In particular, the dissolution of the partnership does not entail judicial divorce proceedings but simply involves a joint declaration by both partners or a unilateral decision by one partner which is served on the other. Furthermore, civil partnerships have no implications as regards the provisions of the Civil Code concerning legal adoptive relationships and parental responsibility."

70. In the premises, the underlying premise of Mr Parker's above submission that civil partnership or similar same-sex marriage-like relationships are in all materials aspects the same as the relationship of a valid legal marriage is also simply incorrect.

71. Further, if the Director is only to include those foreign legally recognised relationships only insofar as they are indeed in all material aspects the same as a valid legal marriage recognised in Hong Kong, it would (as rightly submitted by Mr Wong) open up the question of how "marriage-like" is that relationship under the relevant law, which

would create uncertainties and put an intolerable administrative burden on the Director.

72. I therefore also reject Mr Parker's above submission.

73. Third, Mr Parker argues that the Director's application and interpretation of the Policy in any event amounts to an indirect discrimination on sexual orientation or even on sex. On the former, he says as a marriage status as recognised by the Director under the Policy can never be achieved by homosexual couples and thus it is an indirect discrimination based on sexual orientation (see *Ghaidan*, paragraphs 26 and 33, *per* Baroness Hale). As to the latter, he says it can be demonstrated by taking the present sponsor as an example. Insofar as she is concerned, only a male applicant could have a chance to come under the Policy, while a female applicant could never have such a chance. Thus, females as a group (including the applicant) have been put under a disadvantage compared with the males.

74. I am unable to agree.

75. I have already said above that, in the special context of tight immigration control and striking a balance to attract talented and skilled foreigners to work in Hong Kong, married persons and unmarried persons occupy sufficiently *not* analogous position to justify the difference in treatment under the Policy which can be applied lawfully in Hong Kong. As such, there is simply no question or issue of discrimination based on

sexual orientation[20] or sex whether direct or indirect as one is not comparing like cases with like cases. *Cf*: *Gas v Fance, supra*, at paragraph 70.

76. Fourth, Mr Parker says it is the Director's case that he has adopted the interpretation of the word "spouse" to mean *only* traditional form of a heterosexual and monogamous marriage as this is the only legally recognised form of marriage in Hong Kong. Mr Parker therefore says that the Director's said interpretation is wrong. Counsel's contentions run as follows.

77. He fairly accepts that this is the traditional common law meaning of the word "spouse", and the meaning adopted in the relevant definition of marriage in the Marriage Ordinance and the Matrimonial Causes Ordinance. However, Mr Parker says that there are a number of other Ordinances in Hong Kong which accept and recognise marriages that are regarded as valid under foreign laws, and these foreign recognised marriages must include foreign legally recognised civil partnership or same-sex marriage. Thus, it is not correct that traditional heterosexual and monogamous marriage is the only form of marriage recognised under Hong Kong laws. The other Ordinances relied on by Mr Parker are:

(1) The Married Persons Status Ordinance (Cap 182) ("MPSO"): under section 2(1), that ordinance applies "to

---

[20] It should be noted that, in coming to the conclusion that there was also indirect discrimination in *Ghaidan*, Baroness Hale also took into account the position that civil partnership was equivalent to civil partnership whether by reason of regulation 3(4) (see paragraph 26) or not (see paragraph 29). As I explained above, these observations in my view do not apply to Hong Kong for the present purposes in determining whether in the context of immigration control in Hong Kong, married and unmarried persons occupy a sufficiently different situation.

persons who are parties to a marriage, whether married before or after the commencement of this Ordinance", and a "marriage" is defined in section 2(2) to mean, among others:

> "…
>
> (d) a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed."

(2) The Intestates' Estates Ordinance (Cap 73) ("IEO"),[21] the Inheritance (Provision for Family and Dependants) Ordinance (Cap 481) ("IO"),[22] and the Legitimacy Ordinance (Cap 184) ("LO")[23] which also respectively adopt or include this same meaning for a "valid marriage" or "marriage".

(3) Inland Revenue Ordinance (Cap 112) ("IRO"): its section 2 defines "marriage" to mean "(a) any marriage recognized by the laws of Hong Kong; or (b) any marriage, whether or not so recognized, entered into outside Hong Kong according to the laws of the place where it was entered into and between persons having the capacity to do so, but shall not, in the case of a marriage which is both potentially and actually polygamous, include marriage between a man and any wife other than the principal wife, and married shall be so construed accordingly".

78. It is Mr Parker's submissions that these definitions accept and recognise for the purposes of those Ordinances a marriage contracted outside Hong Kong in accordance with the law in force at the place where

---

21 In section 3(d).
22 In section 2.
23 In section 2.

it was performed. This must include a same-sex marriage which is validly contracted under the laws of another jurisdiction, and accordingly the parties to it have married status.

79. Thus, these shows (says further Mr Parker) that the Director is wrong to regard the word "spouse" in the Policy to have "*all along carried the traditional meaning of husband and wife under a monogamous marriage (i.e., heterosexual) under Hong Kong law*" and that a lawful marriage recognised under Hong Kong law is exclusively limited to this traditional meaning.[24]

80. I am also unable to agree with Mr Parker. Quite to the contrary, I agree with Mr Wong that on a proper objective and purposive construction of these definitions of "marriage" in these Ordinances, with reference to their history and the various other provisions in them, the legislature in enacting them did not intend to include in those definitions foreign legally recognised civil partnership or same-sex marriage. My reasons are as follows.

81. It is not disputed that the first country to recognise same-sex marriage is the Netherlands in 2001.[25] At the same time, all these Ordinances were enacted well before 2001.[26] In the premises, unless there is evidence to show otherwise (and there is none), it is quite clear to me that when the definitions in these legislations were enacted, objectively the legislature did not and could not have at that time

---

[24] See the Affirmation of Wong Mo Cheong, Wilson at paragraphs 19 - 21.

[25] See Scherpe, "The Legal Recognition of Same-Sex Couples in England and the Role of the European Court of Human Rights" (2013) 10 Equal Rights Review 83 at 84.

[26] The MPSO, LO and IEO were all enacted in 1971, while the IO in 1995. The IRO was enacted in 1947 with the definition of "marriage" under section 2 amended in 1989.

same-sex marriage in mind. The court should construe these definitions by reference to this objective state of mind of the legislature.[27] This would point to the construction that these definitions when referring to marriages contracted validly under the relevant foreign law could not have been intended to also include same-sex marriages.

82. Further, the following respective aspects of these Ordinances also support the construction that the definitions are not objectively intended to refer to same-sex marriages:

(1) The MPSO is intended to regulate the law on the status of married persons, in particular to change the position of wives in respect of various legal status as then recognised under common law. The drafting of the entire ordinance is premised on the concept of a marriage being a heterosexual one is demonstrated by the repeated and many references to "married women" and "husband" and "wife" under all its main sections. These purpose and references support the construction that the marriages intended under this ordinance are heterosexual ones.

(2) The same applies to IEO, where in some of its main sections, such as sections 4 to 8A, they refer to "husband", "wife" and "issues" which again support a construction of the meaning of a marriage under it to mean a heterosexual one.

---

[27] See *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* [1981] AC 800 at 822B, *per* Lord Wilberforce (and as approved in *B v Commissioner of the ICAC* (2010) 13 HKCFAR 1 at paragraphs 12 and 13, *per* Bohkary PJ.

(3) Again, the IRO[28] and IO[29] refer in their respective relevant sections to husband and wife, supporting a construction of the meaning of a marriage under them to be a heterosexual one.

(4) The LO deals with *legitimacy* of a child and his or her rights. The context must thus be a child born of the couple of a heterosexual marriage. Moreover, it also refers to "the father" of the child in its various sections.[30] All these again support the construction of the meaning of a marriage under it to be a heterosexual one.

83. For all the above reasons, I conclude that on a proper and purposive construction, the objective meaning of the definitions of a "marriage" under these various Ordinances do not include a same-sex marriage even if that is recognised by the relevant law of another country.

84. I therefore also reject this submission of Mr Parker.

85. Fifth, Mr Parker says it is one of the Director's contentions that the reference to "spouse" in the Policy must be construed and interpreted consistently with Hong Kong's laws. As such, the word should and could only be interpreted to mean a spouse of a homosexual and monogamous marriage as it is the only form of marriage recognised under Hong Kong's matrimonial laws. As such, the word "spouse" cannot be interpreted to include a partner from a same-sex marriage-like

---

[28] For example, in its definition section 2, "spouse" is defined to mean a husband or wife, and "husband" is defined to mean a married man whose marriage is a marriage within the meaning of that section, and "wife" is a married woman whose marriage is a marriage within that section.

[29] Such as sections 2 and 3.

[30] For example, such as sections, 3, 8 and 11.

relationship even if that is valid under the foreign law where the relationship is legally contracted.

86. However, Mr Parker says this contention flies in the face of the Director as it is common ground that under the Policy, the Director would accept a wife of a foreign legally recognised polygamous marriage as a "spouse" to apply for a dependant visa. Although it is the Director's case that that can only be done if the sponsor in Hong Kong chooses only one of the wives as the principal wife, and it is only that principal wife who can be regarded as the spouse for the purpose of the Policy to apply for a dependant visa. This, Mr Parker submits, is effectively turning a blind eye to the polygamous marriage (which is not valid in Hong Kong) and indirectly accepting polygamous marriage. Thus, there is no reason why the Director could not adopt the same with regard to a same-sex marriage-like relationship. The Director could also simply regard the partner in such a relationship as a spouse notwithstanding the position that Hong Kong laws do not recognise that as legally valid.

87. I am unable to accept this contention.

88. Insofar as the position concerning polygamous marriages is concerned, the practice adopted by the Director can render it consistent with Hong Kong law on monogamous marriage since, insofar as Hong Kong is concerned, the sponsor working in Hong Kong can only have one wife as his spouse to apply for a dependant visa.

89. However, it is impossible to adopt a practice that could render any acceptance of a partner in a same-sex marriage or civil partnership to be treated as being consistent with an opposite-sex partner under a heterosexual marriage. The sponsor in Hong Kong would have a "spouse" who is of the same sex.

90. I therefore also reject Mr Parker's said submission.

91. Sixth, it is Mr Parker's submission that there cannot be any rational connection between the aim and context of tight immigration control and the measure to limit the meaning of spouse to only that of a heterosexual and monogamous marriage. This is so as whenever there is a foreigner who has come to Hong Kong to work under a work visa, he or she is entitled to bring in a spouse as a dependant. Thus, for example, if there are 100 such foreigner workers in Hong Kong, the Director would expect potentially there are also 100 spouses that could apply to join them under the defendant policy. Whether the "spouse" is of a heterosexual or homosexual relationship simply does not matter insofar as immigration control is concerned.

92. Although this submission has *prima facie* attractiveness, on further reflection, I do not think it is correct.

93. As I have tried to demonstrate at paragraphs 37 to 40 and 68 above, properly understood, the rational connection is between adopting a bright line rule based on marital status to achieve the Legitimate Aim *which can be applied lawfully* in Hong Kong. In immigration context, the lawfully valid way in Hong Kong to give an incentive to attract

certain skilled foreigners to come to work in Hong Kong is to, among others, allow him or her to bring the spouse who is married to him or her as lawfully recognised in Hong Kong (ie, under a heterosexual and monogamous marriage).

94. Lastly, Mr Parker contends that the said measure adopted to achieve the aim is in any event disproportionate. It is disproportionate as the aim could be equally and effectively achieved by including in the requisite marital status in the Policy other same-sex marriage like relationships. Even if so included, the impact on the immigration control would only be insignificant.

95. I also reject this contention. Again, as I said above, the measure is adopted to achieve the aim to strike the right balance under immigration control in a *lawful* way in Hong Kong. To effectively accept a same-sex marriage-like relationship to be equivalent to a married status in Hong Kong is not permissible under the laws of Hong Kong as they now stand. The measure to recognise only a marriage which is lawfully valid in Hong Kong under the spousal requirement is thus a proportionate.

96. For all the above reasons, I conclude that given the context of tight immigration control, and the need to draw a lawfully valid bright line based on marital status to achieve the Legitimate Aim, married person (of a valid marriage recognised under Hong Kong laws) and unmarried persons are in a sufficiently different situation to justify the differential treatment under the Policy. There is thus no question of discrimination (direct or indirect) based on sexual orientation.

97. I therefore reject Ground 1.

C2. Ground 2 – The Director has wrongly interpreted the word "spouse" in the Policy

98. Ground 2 is the applicant's contention that the Director has wrongly interpreted the word "spouse" in the Policy to mean a spouse of a homosexual and monogamous marriage on the basis that this is the only form of marriage recognised under Hong Kong laws. The applicant's submissions under this ground are the same as those set out at paragraphs 76 to 79 above.

99. For the same reasons I set out in paragraphs 80 to 83 above in rejecting those submissions, I also reject Ground 2.

C3. Ground 3 – constitutional challenge

100. As confirmed in the Form 86 at paragraph 140 and paragraph 55 of Mr Parker's skeleton submissions, as well as his oral submissions, it is only necessary for the applicant to rely on the constitutional challenge raised under this ground if the court has come to the conclusion, in the context of Grounds 1 and 2, that the Director has been authorised by sections 11(2)(a) and (5A) of the Immigration Ordinance to act in a discriminatory fashion. In that way, it is the applicant's contention that, insofar as if those provisions authorise the discrimination, they are unconstitutional as they are incompatible with the constitutional right to equality protected under Article 25 read together with Articles 39 and 41 of the BL, as well as Articles 1, 14 and 22 of the BOR.

101. The court in rejecting Grounds 1 and 2 above has *not* come to that conclusion. Mr Wong has also confirmed at the hearing it is not the Director's case in this judicial review that those statutory provisions authorise the Director to act in a discriminatory fashion. It is the court's conclusion (in accepting the Director's submissions made under Ground 1) that there is no discrimination as contended for by the applicant. There is therefore no question that any of the rights protected under the BL and BOR have been engaged and infringed.

102. It is therefore unnecessary for this court to deal with this ground.[31]

D. CONCLUSION

103. For all the above reasons, the applicant has failed in her grounds in support of this judicial review. I therefore dismiss the application.

104. I further order on a *nisi* basis that costs of this application be to the Director, to be taxed if not agreed, with certificate for two counsel, and the applicant's own costs be taxed in accordance with legal aid regulations.

---

[31] It should be noted that as a fall back, Mr Wong has also made detailed and powerful submissions both in his skeleton and at the hearing on why the applicant cannot rely on those rights in case the court has to deal with this ground. Mr Parker with his usual skill and meticulousness has also advanced interesting arguments as to why those rights are engaged. However, given the way in which some of these arguments are advanced, including the way how remedial construction of those statutory provisions should be applied, these arguments could and should only be properly and meaningfully considered with reference to how the court has found those statutory provisions to have authorised the contended discrimination. As the court has not come to that conclusion, I therefore do not think it is appropriate for me to proceed to consider these submissions even for completeness sake.

105. Lastly, I must thank counsel for their very helpful and valuable assistance in this matter.

(Thomas Au)
Judge of the Court of First Instance
High Court

Mr Timothy Parker, instructed by Vidler & Co, assigned by Director of Legal Aid, for the applicant

Mr Stewart Wong SC and Ms Grace Chow, instructed by Department of Justice, for the respondent