IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO 117 OF 2016
(ON APPEAL FROM HCAL NO 124 OF 2014)

BETWEEN

QT	Applicant (Appellant)
and	
DIRECTOR OF IMMIGRATION	Respondent (Respondent)

Before: Hon Cheung CJHC, Lam VP and Poon JA in Court

Dates of Hearing: 15 and 16 June 2017

Date of Judgment: 25 September 2017

J U D G M E N T

Hon Cheung CJHC:

1. The facts and arguments in this appeal are fully set out in Poon JA's judgment. I would gratefully adopt them in this concurring judgment.

Local definition of marriage

2. Marriage is no doubt a most important social and legal institution on which any society is founded, and Hong Kong is no exception. In Hong Kong, marriage means heterosexual marriage, that is, between persons of opposite sex. And since the marriage reforms in early 1970s, marriage in Hong Kong is monogamous in nature. In other words, marriage in Hong Kong means the voluntary union between a man and a woman to the exclusion of all others. This is how article 37 of the Basic Law, which guarantees Hong Kong residents the freedom of marriage, is generally understood. The article, in other words, gives all residents of Hong Kong a constitutional guarantee of access to monogamous heterosexual marriage. The matrimonial laws in Hong Kong all prescribe accordingly.

3. This local position regarding marriage is not challenged in the appeal. Ms Dinah Rose QC (Mr Timothy Parker with her), for the applicant, confirmed that in this regard, her client, an English woman, is prepared to accept the law as she finds it. This is not surprising, as even the European Court of Human Rights has repeatedly resisted claims by gay couples for access to marriage in Member States : *Schalk and Kopf v Austria* (2011) 53 EHRR 20; *X v Austria* (2013) 57 EHRR 14; *Gas v France* (2014) 59 EHRR 22; *Hamalainen v Finland* (2014) 37 BHRC 55; *Chapin et Charpentier v France*, Request No 40183/07, 9 June 2016; *Aldeguer Tomás v Spain*, Application No 35214/09, 14 September 2016. At least, that is still the position in Europe; certainly, it is the position in Hong Kong.

Differentiation based on the status of marriage

4. Given the unique importance of marriage as a social and legal institution in society, it is natural to find many laws in Hong Kong which use the status of marriage as a qualifying condition or differentiating criterion, carrying with it legal consequences that treat married couples differently (– very often, but not always, more favourably) than others; for instance, housing benefits, social welfare benefits, immigration, taxation, pensions, inheritance, life insurance policies, criminal law: see *Bellinger v Bellin*ger [2003] 2 AC 467, para 42, where the analogous position in the United Kingdom at the time was described. In other words, married (heterosexual) couples are treated differently from all others – including, relevantly, (unmarried) same-sex couples.

5. Indeed, this difference in treatment in many areas of life between heterosexual couples who are married and unmarried couples, including gay couples who cannot, as a matter of domestic law, get married, has been a fact of life in Hong Kong for so many years that one almost takes the position for granted. However, times have changed and an increasing number of people are no longer prepared to accept the status quo without critical thought.

Traditional explanation

6. Traditionally, the explanation for the difference in treatment is simply that in one case, the couple is lawfully married to each other and in the other, the couple is not. After all, like cases should be treated alike, and different cases should be treated differently. However, as Baroness Hale pointed out in *Rodriguez v Minister of Housing of the Government* [2009] UKPC 52, para 17, the very differentiating criterion under challenge is used here to explain why the cases are different. Put another way, this traditional explanation simply appeals to one's intuition, commonsense or belief, rather than giving any reasons. Some may say it is an answer which begs the question.

Constitutional explanation

7. Is there a better answer? At first blush, the fact that first, heterosexual marriage is something singled out for constitutional protection in the Basic Law (which, in this regard, draws the bottomline for the protection of heterosexual people), and secondly, our legislature, which is free to go beyond the Basic Law protection and grant gay people equal access to marriage, has instead chosen to restrict marriage to heterosexual marriage in the various matrimonial laws it has made, provides the perfect and complete explanation for the difference in treatment. In other words, the difference in treatment is constitutionally backed and legislatively endorsed, and therefore, by definition, it cannot possibly be regarded by the courts as discriminatory in Hong Kong. No justification, or further justification beyond the constitution itself, is required.

8. On the face of it, this is a most attractive argument. After all, the European Court, in rejecting access by same-sex couples to marriage, has repeatedly said that marriage carries with it a special legal and social status, and a corpus of rights and obligations under the national laws. In other words, married heterosexual couples are, by definition, favoured by society in many aspects; likewise, by entering into this State-sanctioned privileged relationship, they also assume various obligations unknown to unmarried couples (heterosexual or same-sex). For instance, our law on divorce and ancillary relief, which creates rights as well as obligations, only covers married couples.

The swimming pool example

9. However, does this constitutional and legal position in Hong Kong that I have just described provide a satisfactory answer in *each and every* case, that is, in all areas of life where different treatments are meted out to married couples and unmarried couples depending on their status of marriage? Ms Rose forcefully submitted in the negative. Her example of charging different entrance fees to a public swimming pool based on

one's marital status is, in my view, instructive. In the absence of good justification, it is difficult to see why a lower entrance fee should be required of people who are married, than that charged on those who are not, including same-sex couples who simply cannot get married even if they want to. Ms Rose cited to us a number of comparable cases arising from the different pensionable ages for men and women in the United Kingdom in the context of sex discrimination to illustrate her point: *James v Eastleigh Borough Council* [1990] 2 AC 751; *R v Secretary of State for Health* [1995] 3 CMLR 376; *R v Secretary of State for Social Security, ex parte Taylor* [2000] ICR 843.

10. How then do we explain this swimming pool example? The answer, in my view, is that barring any good justification that can be offered by the authority running the swimming pool, there is simply no or no apparent connection between the use of a swimming pool and the marital status of the intending swimmer, or, in other words, whether the intending swimmer is married to a person of the opposite sex, or is someone who is living like a married couple with a person of the same-sex, whom he or she cannot legally marry. Indeed the same objection can be raised in relation to unmarried heterosexual couples. In the absence of justification, the law should and does regard the differential treatment as discriminatory.

11. However, even Ms Rose accepted that the logic of her example cannot be carried too far. She accepted the suggestion from the Bench during submission that to give meaning and substance to the repeated acceptance by the European Court that marriage carries with it a special status and a corpus of rights and obligations, there must be certain core rights and obligations concerning some areas of life going with the legal status of marriage, which, almost by definition, require no justification or, can be easily justified – and it does not matter which way one analyses it. She gave the examples of rights and obligations of married couples regarding divorce, adoption and inheritance as falling within this group of core rights and obligations. At one stage, she also included tax.

"Obvious, relevant difference" and context

12. In *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, para 3, Lord Nicholls explained the core question to answer in a case of alleged discrimination :

> " 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."

13. Whether there is an "*obvious*, relevant difference", depends to a large extent on the context. When the context is the use of a swimming pool, there is little if any conceivable relevant difference between a married swimmer and an unmarried one. But if the context, or area of life concerned, is, say, divorce and ancillary relief, the difference between a married couple and an unmarried one (heterosexual or same sex) must, in my view, be "obvious".

A group of core rights and obligations

14. This brings me back to the suggestion made to Ms Rose during submission described above which counsel accepted. There are certainly areas of life which are, whether by nature or by tradition or long usage, closely connected with marriage such that married couples should and do enjoy rights and shoulder obligations which are unique to them as married people. The rights and obligations in these areas of life which go with the status of marriage must be regarded as core rights and obligations unique to a relationship of marriage, so much so that the entailing privileged treatments to married couples as compared with unmarried couples (including same-sex couples) should simply be

considered as treatments that require no justification because the difference in position between the married and the unmarried is self-obvious. Divorce, adoption and inheritance are obvious examples of these areas of life regarding which the status of marriage carries rights and obligations unique to married couples. Without these core rights and obligations, the legal status of marriage simply has little if any substance in law. And the court must be most slow, if ever, to empty marriage of its legal content and meaning. When the context involved is one of those areas of life, the status of marriage provides the obvious, relevant difference between a married couple and one that is not (heterosexual or same-sex).

15. However, when a case falls outside these areas of life involving core rights and obligations unique to the status of marriage, and therefore there is no obvious, relevant difference, using the status of marriage to differentiate people for treatment requires justification. Depending on the facts and depending on the area involved, some treatments would be easier to justify than others. In some cases, the status of marriage would be more relevant to the subject matter than in others. The swimming pool example provides an extreme case where quite plainly barring very strong justification, it would be difficult to imagine how the status of marriage could justify the differential treatment in terms of entrance fees. If the differentiation by reference to the status of marriage cannot be justified, the differential treatment must be regarded as discriminatory, a matter prohibited under article 25 of the Basic Law and article 22 of the Hong Kong Bill of Rights. It would also fall foul of the common law principle of equality.

Why not justification in all cases?

16. One might well ask why not require every difference in treatment based on the status of marriage to undergo the justification test then? It is not difficult to see the attraction of this alternative approach. First, the concept of a group of core rights/privileges (as well as obligations) unique to the relationship of marriage which require no

justification is problematic. The membership of this core group is uncertain. Likewise, the criteria for membership in this core group are ill-defined – they are based more on intuition and usage rather than any elaborate, critical thought process. Secondly, it follows from the first point that this concept of a group of core rights and obligations unique to the relationship of marriage requiring no justification would in practice lead to uncertainty in the law, as well as an unfruitful digression of legal attention to the question of labels and categorisation, when efforts could and should be better spent on the question of justification. Thirdly, it follows from the first two points that in the end, the court may still have to resort to some sort of justification analysis in order to decide the question of labels and categorisation.

17. These are valid and indeed weighty conceptual as well as practical considerations. However, there are still other considerations to take into account. First, as a matter of concept, to accept, as the European Court of Human Rights does, that marriage, or the status of marriage, carries with it a group of core legal rights and obligations unique to married people must be correct. For it accords with society's understanding of marriage as a social and legal institution, carrying with it a special social and legal status, and hence a corpus of rights/privileges as well as obligations in accordance with society's own culture, traditions, history and usage. To require everything to undergo, formally or otherwise, the test of justification may be more straight forward, practical and indeed expedient. However, for so long as society regards marriage and the status of marriage as having some *real* legal and social significance and meaning, this approach of requiring justification in each and every case must, in my view, be resisted on conceptual grounds. By definition, justification presupposes that one is dealing with *comparable* situations. And by definition, marriage means, at least in some essential aspects, there is no comparison between marriage and all other relationships. As a matter of concept, therefore, requiring justification in *every case* is a self-contradicting proposition.

18. Secondly, the court here is not expounding legal principles in a vacuum. We are not here designing the law of marriage (used in a wide sense here) from scratch. This is not a brand-new society where one is free from pre-existing culture, traditions, core values and beliefs, or society's own history. Whilst none of this is static, and fundamental human rights enjoy an overriding status in terms of the protection of individual's freedom and liberty, the court must, when enunciating and developing legal principles, have proper regard to society's own history, traditions, culture, core values and beliefs. Given their nature, the relevance and significance of these matters are very often as broad, general and abstract as they are subtle and incapable of much elaboration. Often they would point towards a particular direction which is simply described as "obvious" or "commonsense", a direction which many would frankly admit as representing nothing other than one's "intuition" or "instinct". The court need not shy from, or be ashamed of, this when what it is doing (where it is appropriate to do so) is simply to reflect society's history, traditions, culture, core values and beliefs – these matters, after all, do mould – albeit to varying extents and degrees and in different ways – all members of society including the court. This is nothing new and indeed it is a major underlying premise for the modern call for diversity on the Bench (in Hong Kong, this must be subject to the requirements in article 92 of the Basic Law).

19. Thirdly, the retention of this group of core rights and obligations in the analysis serves at least one important, albeit incidental, function. That is, it reminds us that it is not every differential treatment that is actionable. Only one that results in less favorable treatment to the complainant may be sued on. The group of core rights and *obligations* reminds one that in considering whether unfavorable treatment is involved, depending on the facts and context, very often one should not only focus on individual rights/privileges, but must also look at the associated or corresponding obligations; in other words, one must consider all relevant rights, privileges and obligations as a whole package.

20. As to practical considerations, first, justification involves reversing the burden from the applicant to prove a case of differential treatment in relevantly comparable situations (or a prima facie case of indirect discrimination), to the authority to justify the differentiation. Depending on the facts, this may make a difference in the litigation outcome and could be unfair and detrimental to good administration. Secondly, the argument of labels and categorisation cuts both ways. If something is obvious and commonsense, and not capable of much elaboration, saying it at the filtering stage based on the concept of a group of core rights and obligations or at a later stage of justification does not matter. Calling it justification would not per se improve the quality of the reasoning. Thirdly, many of the perceived problems of retaining this concept of a group of core rights and obligations unique to the status of marriage would disappear if one were to adopt, as I think one should, the approach that unless the position is obvious, that is, unless a particular right or privilege conferred on a married couple clearly falls within this group of core rights and obligations, one should proceed on the basis that it does not and requires justification for its lawfulness. In my view, a right balance is thereby struck between giving marriage and the status of marriage a real significance in law in terms of the rights/privileges and obligations that are unique to that status, and upholding the fundamental human right to equality, in an administratively and practically feasible way.

21. As for the cases, *Rodriguez* involved housing benefits in Gibraltar where, like Hong Kong, the law only allows heterosexual marriage. *Preddy v Bull* [2013] 1 WLR 3741 was a case where the right to book a double-bedded room at a private hotel in England was in issue. In *Taddeucci and McCall v Italy*, Application No 51362/09, 30 June 2016, the European Court of Human Rights had to deal with Italy's refusal to grant a residence permit to the unmarried same-sex partner from New Zealand of an Italian national. In these cases, the courts all regarded the questions of discrimination based on sexual orientation raised as ones requiring justification. As I read them, although in none of these cases did the courts dwell on the content of the group of core rights and obligations associated with the special status of marriage, it is plain that they all considered the subject matters involved in their

respective cases as not, or not obviously, falling within that core group, and thus required the differences in treatment, based directly or indirectly on sexual orientation, to be justified.

Is immigration within this core group?

22. The workability of this approach that I prefer is illustrated by how I would approach the subject matter involved in the present case, namely, immigration, when deciding whether a prima facie case of differential treatment has been made out, and whether, therefore, the second stage of justification is engaged.

23. The present case concerns immigration. Does immigration belong to this group of areas of life in relation to which the status of marriage carries with it special and privileged rights (and obligations) unique to married couples, which are not open to all other people, including relevantly, unmarried gay couples who cannot get married, and which, therefore, require no justification?

24. A monogamous marriage involves the voluntary union of two individuals otherwise regarded by law (and society) as two different, separate and distinct persons. Marriage provides the means to join together and unite as one the two individuals for many purposes legally and socially. In other words, one-ness, together-ness, joint-ness, mutuality are all hallmarks of marriage. In the context of immigration, it is, therefore, not difficult to see why the status of marriage is often accorded importance in deciding a relevant immigration matter (used in a broad sense here to include all types of entry and stay applications). Thus viewed, one could argue that immigration must belong to this special group of areas of life carrying with it core rights and obligations unique to the status of marriage, and is therefore exempted from the requirement of justification for the entailing difference in treatment between married couples and unmarried couples respectively.

25. However, this analysis overlooks several important facts. First, whilst one-ness, together-ness, joint-ness and mutuality are hallmarks of a heterosexual marriage relationship, they are not, or no longer, exclusive to such a relationship. A same-sex marriage relationship or a civil partnership relationship such as the one involved in the present case, allowed in an increasing number of countries including the United Kingdom, also carries with it such hallmarks. Immigration, by definition, requires one to consider not only the local, but also the relevant overseas situation(s). Furthermore, immigration, particularly immigration in Hong Kong, involves the exercise of a very wide discretion on the part of the authorities, which is typically informed by the unique requirements and prevailing circumstances of the country or place in question. Immigration, also by definition, is affected by many factors beside the status of marriage, and very often, the net result is that people of all sorts of relationships, including unmarried couples as well as couples regarded as unmarried under domestic matrimonial law, are, for a variety of reasons, allowed to enter and stay on various conditions.

26. For instance, in the present case, there is simply no legal impediment to the Director expanding his dependant visa policy to cover married same-sex couples or couples under a civil partnership, or even people who are parties to polygamous marriages (in fact, it does – to a limited extent). It all depends on the needs and circumstances of Hong Kong, which are of course not static.

27. On the other hand, even for married heterosexual couples, in immigration matters, their marriage status may assume a varying degree of importance, all depending on the facts and the relevant policy of the Director, who enjoys a wide discretion in formulating and implementing his policies.

28. In other words, in my view, there is no inherent or otherwise necessary or obvious link between immigration and the status of marriage that requires exempting the differential treatment under a particular

immigration policy of married same-sex couples or couples under a civil partnership from the requirement of justification.

Justification

29. The result in this appeal must, therefore, turn on the justification put forward by the Director for the differential treatment of someone like the applicant under his dependant visa policy. Since the differential treatment is based (indirectly) on an inherently "suspect" ground, that is, sexual orientation (which falls within "other status" in article 22(1) of the Hong Kong Bill of Rights), the court adopts a strict approach to justification : *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, para 77. The justification in the present case, or more precisely, the legitimate aim of the policy, as Ms Monica Carss-Frisk QC for the Director rephrased it during submission, is to strike a balance between maintaining Hong Kong's continued ability to attract people of the right talent and skills to come to Hong Kong to work, and the need for a system of effective, strict and stringent immigration control.

30. Excluding the foreign worker's lawfully married (albeit same-sex) spouse or civil partner under a civil partnership lawfully entered into in a foreign country from coming to Hong Kong to join the worker is, quite obviously, counter-productive to attracting the worker to come to or remain in Hong Kong to work in the first place.

31. Equally plainly, excluding such a spouse or civil partner from entering or remaining in Hong Kong does not advance or help maintain our strict, stringent immigration policy either. Maintaining a strict, stringent immigration policy means, in the present context, controlling both the quantity and quality of the entrants to Hong Kong. In terms of quantity, under the policy, each foreign worker is only entitled to apply to bring one spouse to join him or her in Hong Kong. Whether that spouse is of the same sex or different sex is neither here nor there. In terms of quality, whether the spouse is heterosexual or gay cannot possibly be relevant. Thus analysed, the restriction to heterosexual spouses does not

advance the aim of maintaining a strict or stringent immigration policy either.

32. Yet those two considerations are the only reasons or justification put forward by the Director for the relevant part of the dependant visa policy under challenge. Quite plainly, the challenged part cannot be justified on those two grounds. There is simply no rational connection between the legitimate aim put forward and the means adopted.

33. The need to draw a bright line in immigration matters for the sake of administrative workability and convenience is fully acknowledged. This may well by itself be sufficient justification in the case of a challenge by an unmarried heterosexual couple (who chooses not to get married). For in that case, the differential treatment is not based on sexual orientation or something inherently suspect. The need to draw a clear line entails, by definition, those falling on the wrong side of the line to be excluded, and thus hardship in some individual cases. Given the immigration context, the court would be most reluctant to interfere. However, in the present case, the differentiation is based (indirectly) on sexual orientation. It "strikes at the heart of core-values relating to personal or human characteristics" (*Fok Chun Wa*, para 77). Absent some substantive justification, the need to draw a bright line does not mean a bright line that is otherwise discriminatory in nature or effect on the basis of a core-value relating to personal or human characteristics, can be drawn.

34. Given what has been put forward as justification, and therefore, what has *not* been put forward as such, I say nothing about a policy with a legitimate aim to, for instance, uphold and maintain the traditional concept of (heterosexual) marriage, or the traditional family constituted by traditional (heterosexual) marriage, and the associated values. No such justification or legitimate aim was relied on. None was asserted in the evidence. Learned counsel did not put forward any such justification whether at the hearing below or on appeal before us.

Conclusion

35. For these reasons and for those given by Poon JA which I have not otherwise covered, I agree this appeal must be allowed in terms of the orders and directions that he proposes.

Hon Lam VP :

36. I respectfully agree with the judgments of the Chief Judge and Poon JA. As explained by the Chief Judge, it is important that the law should recognize that there are core characteristics (be it called rights, privileges or even obligations) pertaining to a marriage. For matters related to such core features, difference in treatment for unmarried persons (including those who could not marry under the laws in Hong Kong due to one's sexual orientation) cannot be regarded as discriminatory. It is simply the application of the tenet that different cases should be treated differently.

37. On the other hand, in respect of a measure in other areas of life or subject matters that does not fall into the core sphere of a marriage, the mere use of marriage as a criterion cannot *per se* justify unequal treatment. The justification test has to be applied to assess if the measure is constitutionally sound.

38. This is not the proper occasion for the Court to attempt a definition of the core characteristics of a marriage as we do not have the benefit of very in-depth submissions in this regard. In the circumstances, I refrain from saying more than is necessary. For present purposes, it suffices for us to hold that in the context of Hong Kong as a pluralistic city with high mobility of international population (some of them coming from countries giving legal recognition to same sex marriage or civil partnership) the eligibility of an overseas couple for dependant visa does not fall within the core sphere of a marriage. Hence, the difference in treatment has to be justified.

39. For the reasons given by my Lords, the Director's application of the policy cannot be justified. I therefore agree that the appeal should be allowed.

40. The Basic Law protects freedom of marriage (generally understood as a reference to heterosexual marriage for common law as well as constitutional purposes, see *W v Registrar* (2013) 16 HKCFAR 112 at [63]) under article 37 and the right of equality under article 25. Both rights are constitutionally entrenched and, in the eyes of the law neither right has priority over the other. In the present case, the right of equality is clearly more relevant and it cannot be suggested (and the Director has not suggested) that the institution of marriage as practised in Hong Kong would be endangered simply because a dependant visa could be granted to a person who has undergone a legally recognized same sex marriage or civil partnership overseas. Hence, in the absence of cogent grounds to justify the differential treatment, the policy is in breach of art 25.

Hon Poon JA :

A. INTRODUCTION

41. This appeal raised an important question : whether the Policy,[1] as applied by the Director of Immigration ("the Director"), constitutes discrimination based on sexual orientation against the appellant, QT, who is a same-sex partner of her sponsor, SS, in a civil partnership which they contracted in England under the Civil Partnership Act 2004 ("CPA 2004") because of the differential treatment concerning eligibility by reason of marital status.

42. It arose in this way.

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[1] As set out in section A1 below.

A1. The Policy

43. The Policy is couched in these terms :[2]

> " 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.
>
> 5.An application for admission of a dependant may be favourably considered if :
>
> a. there is reasonable proof of a genuine relationship between the applicant and the sponsor;
>
> b. there is no known record to the detriment of the applicant; and
>
> c. the sponsor is able to support the dependant's living at a standard well above the subsistence level and provide him/her with suitable accommodation in the HKSAR."

44. In applying the Policy, the Director maintains that "spouse" in [4] refers only to husband and wife in a heterosexual and monogamous marriage as it is the only form of valid marriage recognized under the law of Hong Kong. (I will refer to this as "the Eligibility Requirement" below.) So applied, the Policy excludes all unmarried couples, irrespective of whether they are heterosexual or homosexual partners, or in the latter case, whether their relationship is one that is legalized elsewhere either as civil partnership or same-sex marriage. As they are not married in the sense as understood in the law of Hong Kong, they simply do not meet the Eligibility Requirement.

45. The Director justifies the Eligibility Requirement thus :

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[2] See the Guidebook for Entry for Residence as Dependants in Hong Kong issued by the Immigration Department ("the Guidebook").

> " 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 capital 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."

A2. QT's application

46. QT is a British national. Her same-sex partner, SS, is a dual national of South Africa and Great Britain. They met in 2004 and had since developed a stable relationship. In May 2011, they entered into a civil partnership in England pursuant to the CPA 2004. They have since been living as a family. They do not have any children.

47. In mid-2011, SS was offered employment by a company in Hong Kong. She then applied for an employment visa with the Immigration Department on 17 June 2011, including QT as her accompanying dependant. Later on 2 August 2011, QT's application for a dependant visa was withdrawn. SS was issued an employment visa on 26 August 2011. On 23 September 2011, they moved to Hong Kong. SS came on the employment visa whereas QT came as a visitor. SS continues to stay in Hong Kong on the strength of the employment visa

extended from time to time. QT remains as a visitor with her stay extended whenever required.

48. On 25 April 2013, QT applied for an employment visa which was refused on 19 August 2013.

49. On 29 January 2014, QT made a fresh application for a dependant visa with SS as her sponsor. Correspondence between the Immigration Department and QT's solicitors ensued. Eventually by a letter dated 18 June 2014, the Director rejected QT's application on the ground that she was not a "spouse" within the meaning of the Policy, stating effectively that she did not meet the Eligibility Requirement ("the Decision").[3]

B. JUDICIAL REVIEW

50. QT complained that the Policy, as applied by the Director, constituted discrimination against her on account of her sexual orientation. In October 2014, she took out proceedings below to judicially review the Decision.

B1. Grounds of review

51. In her Form 86, QT raised three grounds of challenge :

(1) The Decision is discriminatory and unjustified, and accordingly is *Wednesbury* unreasonable;

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[3] In February 2015, the Director wrote to QT's solicitors, indicating that on humanitarian considerations relating to her health, he was prepared to issue an entry visa permitting her to remain in Hong Kong for 12 months, provided that her travel document is valid without being subject to the conditions of stay currently applicable to her under the "visitor" status. QT however declined to accept it and continued to pursue her application for judicial review. It is because as a visitor, QT will receive less favourable treatments than as a dependant, Ms Rose explained. For example, a dependant who has ordinarily resided in the HKSAR for a continuous period of not less than 7 years may apply for the right of abode in the HKSAR in accordance with the law : see [20] of the Guidebook. A visitor does not enjoy similar treatments.

(2) The Director has misapplied the Policy by construing "spouse" in the way as he does;

(3) The Decision is unconstitutional because it is inconsistent with articles 25, 39 and 41 of the Basic Law and articles 1, 14 and 22 of the Hong Kong Bill of Rights.

52. She sought 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, Cap 115 ("the Ordinance") and/or the Policy purport to authorize the imposition of less favourable conditions of stay on the ground only of the sexual orientation of the persons concerned, they are unconstitutional;

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

B2. Au J's judgment

53. By a judgment handed down on 11 March 2016, Au J dismissed QT's application for judicial review, rejecting all three grounds of review.

54. The learned Judge prefaced his analysis with five basic principles.[4] First, he adopted the general approach to discrimination as enunciated by Ma CJ in *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, at [58] – [59]. Second, he noted the Director is entitled to adopt a strict immigration policy but the court would nevertheless subject

[4] Judgment [22] – [28].

a challenged decision which is said to have offended the core values including sexual orientation to a severe scrutiny, again citing *Fo Chun Wa*, per Ma CJ at [77] – [78]. Third, he acknowledged the widely recognized notion that marriage confers upon the married couple a special legal status with new legal rights and obligations, giving rise to social, personal and legal consequences which could well be different from civil partnership. Fourth, under common law, "spouse" means husband and wife of a heterosexual marriage and excludes same-sex couples. Lastly, he noted that under the law of Hong Kong, marriage is monogamous and heterosexual. He further noted that QT did not seek to contend that the non-recognition of same-sex marriage or civil partnership under the existing Hong Kong laws was unlawful or unconstitutional.

55. For the reasons that he gave, the Judge took the view that QT or those who are parties to a homosexual (or heterosexual) relationship who are not married on the one hand and married persons on the other are in a sufficiently relevant different position to justify the differential treatment under the Policy.[5] He reasoned that :

(1) Immigration control is the proper context in which the question whether the differences in status between married and unmarried persons are sufficient to justify the complained differential treatment.[6]

(2) The Director is entitled to draw a bright line in immigration control. He must also be entitled to take into account considerations relating to clarity, certainty of the line and administrative convenience of implementation.[7]

(3) The Director has to lawfully apply the Policy.[8] He must be entitled to have regard to the consideration that its implementation and application have to be regarded as lawful

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5 Judgment [29] – [48], in particular [41].
6 Judgment [31] – [33].
7 Judgment [36].
8 Judgment [35].

in Hong Kong.[9] To apply the Policy lawfully, the Director should adopt the legal meaning of marriage as recognized in Hong Kong, that is a heterosexual and monogamous marriage. The Director is obliged to follow and give effect to marital status as defined by Hong Kong's matrimonial laws.[10] Thus 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 recognized in Hong Kong who may apply to join the sponsor in Hong Kong as a dependant.[11]

(4) While the Policy will inevitably limit the eligible applicants for dependant visa and hence the potential number of skilled and talented foreigners who may be prepared to come to work in Hong Kong, the Director is entrusted with the discretion to draw the bright line in order to strike the balance to have 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.[12]

56. In his analysis, the Judge placed particular reliance on *Gas v France* (2014) 59 EHRR 22, noting that the analyses and observations by the European Court of Human Rights are equally applicable in the present case with reference to the context of immigration control.[13]

57. The Judge then dealt with the submissions of Mr Timothy Parker, counsel for QT, as to why the differential treatment under the

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9 Judgment [36].
10 Judgment [39].
11 Judgment [40].
12 Judgment [37].
13 Judgment [42] – [48].

Policy was not based on marital status but on sexual orientation.[14] For the reasons that he gave, the Judge rejected each of counsel's submissions. He also distinguished the cases that Mr Parker cited in support, that is, *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 and *Preddy and Hall v Bull* [2013] UKSC 73. He concluded that there is no question of discrimination (direct or indirect) based on sexual orientation.[15]

58. The Judge then dealt with the second and third grounds of review very briefly. In light of his conclusion on the first ground of judicial review, he rejected the second ground.[16] Since there was no discrimination, the third ground did not arise for his consideration.[17]

C. OVERVIEW OF THE PARTIES' STANCE BEFORE THE COURT

C1. QT's submissions

59. In her notice of appeal, QT raised three grounds of appeal, mirroring her three grounds of judicial review :

(1) The Judge erred in finding that she, by reason only of her being in a civil partnership with her same-sex partner, was in a relevantly different position to a straight applicant married to an opposite-sex partner.

(2) The Judge erred in rejecting her contention that the Director misapplied the Policy and that she falls within it.

(3) The Judge erred in declining to consider her constitutional challenge.

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14 Judgment [50] – [96].
15 Judgment [97].
16 Judgment [98] – [99].
17 Judgment [100] – [102].

60. In her oral submissions, Ms Dinah Rose, QC (appearing with Mr Parker) only focused on the first ground of appeal. She simply adopted her written submissions for the other two grounds though without abandoning them. Ms Rose's approach is, with respect, realistic. For as she rightly acknowledged, the first ground of appeal is determinative of this appeal. If she succeeds on the first ground, the Decision is discriminatory based on sexual orientation and is accordingly *Wednesbury* unreasonable. She does not need the other two grounds. If she fails on the first ground, the other two grounds would not take her any further.

61. Ms Rose submitted that the Policy and its application in the Decision is discriminatory on three alternative bases :

(1) According to the interpretation the Director gives to "spouse", all heterosexual married couples benefit from the Policy but all same-sex married couples and civil partners, who are in a relevantly similarly situation, are less favourably treated. This constitutes discrimination on the ground of sexual orientation.

(2) Alternatively, if the Policy is viewed as treating all those who are recognized as married for the purposes of the law of Hong Kong more favourably than those who are not, the Policy treats "unmarried" same-sex couples, who cannot be married under Hong Kong law, in the same way as unmarried heterosexual couples, who can choose to marry or not as they please. The circumstances of a same-sex couple whose marriage or civil partnership cannot be recognized in Hong Kong are significantly different from those of a heterosexual couple who have the choice to marry or not as they please. It is accordingly discriminatory to treat them in the same way.

(3) Alternatively, if the Policy of granting dependant visas only to spouses as defined in the Policy is regarded as a factually-neutral policy of general application, it places same-sex couples at a serious and disproportionate disadvantage by comparison with heterosexual couples and is accordingly indirectly discriminatory.

62. From a series of international authorities, Ms Rose drew the conclusion that in a situation in which same-sex couples are not permitted to marry or in which their partnerships are not legally recognized, it is discriminatory for the State to make access to benefits, such as the dependant visa, conditional on marriage because the effect of such a policy is to exclude same-sex people, who cannot marry, from the benefit entirely because of their sexual orientation, and that would be unlawful unless it can be objectively justified.

63. The burden therefore falls on the Director to show justification. That he has failed to do, Ms Rose argued.

64. Ms Rose made it clear in her oral submissions that despite what was pleaded in the Form 86, her arguments did not extend to cover a same-sex couple settled in a marriage-like relationship. She was content to limit her case to civil partnership and same-sex marriage.

C2. The Director's submissions

65. Ms Carss-Frisk, QC (appearing with Mr Stewart Wong, SC and Ms Grace Chow) for the Director, argued that the Policy is not discriminatory for two reasons :

(1) It is not directly discriminatory as it does not target same-sex couples and applies equally to unmarried opposite sex couples.

(2) It is not indirectly discriminatory because for the purpose of marriage and the incidence of marriage including dependant status under the Policy, QT and SS are not in a comparable position to a married couple or opposite couple.

66. The main plank of Ms Carss-Frisk's submission is that the Policy is not discriminatory because it draws the bright line on marriage and not on sexual orientation. She anchored her submission on the well-established proposition that marriage confers a special status on the married couple with a bundle of rights and obligations. Since the law of Hong Kong does not grant same-sex couples access to marriage, it follows that they do not have access to the core rights that go with marriage, including dependant status which underlies the application for a dependant visa under the Policy.

67. As a fallback position, Ms Carss-Frisk submitted that even if the Policy is discriminatory, it is justified in the way as the Director has done.

D. IDENTIFYING THE PROPER APPROACH

68. This is the first occasion where the question if the Eligibility Requirement in the Policy constitutes discrimination on account of sexual orientation arises for appellate determination. It is, in my view, imperative to identify at the outset a principled approach to be adopted in examining the issues involved to enable one to arrive at the correct answer. And I derive the proper approach from the following analysis.

D1. The principle of equality

69. Discrimination based on sexual orientation, like any other form of discrimination, offends the cardinal principle of equality. Embedded in the rule of law, the principle of equality underpins the exercise of power by any public authority in a democratic society aiming

at good administration and responsible governance : see *Matadeen v Pointu* [1999] 1 AC 98, per Lord Hoffmann at p 109C – D.

70. The principle of equality prohibits discrimination. In *Ghaidan*, supra, Lord Nicholls at [9] condemned discrimination thus :

> " Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced."

71. In like vein, Li CJ said in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 :

> " 1. Equality before the law is a fundamental human right (the right to equality). Equality is the antithesis of discrimination. The constitutional right to equality is in essence the right not to be discriminated against. It guarantees protection from discrimination. The right to equality is enshrined in numerous international human rights instruments and is widely embodied in the constitutions of jurisdictions around the world. It is constitutionally protected in Hong Kong.
>
> 2. Discriminatory law is unfair and violates the human dignity of those discriminated against. It is demeaning for them and generates ill-will and a sense of grievance on their part. It breeds tension and discord in society."

72. While both Lord Nicholls and Li CJ referred to "discriminatory law" because of the context of the particular case before them, discrimination by way of a government decision or policy in different contexts may also arise. When it does, the principle of equality will apply to it with full force.

73. Here, the Director enjoys wide statutory powers on immigration control for Hong Kong under the Ordinance.[18] The Policy is evidently formulated and implemented as part of the overall, stringent immigration control by the Director. While the Policy has its statutory underpinning, for the reasons set out above, the Director must apply it in accordance with the principle of equality. This the Director has very fairly accepted. With respect, he must be correct.

D2. The legal definition of marriage and its impact on a claim of discrimination based on sexual discrimination

74. It is common ground that the only form of marriage recognized by the law of Hong Kong is a heterosexual and monogamous marriage. Section 40 of the Marriage Ordinance, Cap 181 provides that marriage is the voluntary union of a man and a woman for life to the exclusion of all others. The same statutory meaning of marriage applies on the constitutional level as well as a matter of common law. In *W v Registrar* (2013) 16 HKCFAR 112, Ma CJ and Ribeiro PJ at [25] after reciting the statutory definition of marriage in section 40 of the Marriage Ordinance, said :

> " Everyone agrees that 'marriage' in art.37 [of the Basic Law][19] and 'marry' in art.19(2) [of the Hong Kong Bill of Rights][20] bear the same meaning."

75. Their Lordships further observed :

> " 61. The right to marry is accordingly addressed both in our statute-law and in our constitutional instruments. While we accept that the definition of marriage is the same under both regimes…
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> …

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18 See for example, section 7 on general provisions as to immigration control and section 11 on permission to land and conditions of stay.

19 Article 37 of the Basic Law protects the freedom of marriage of Hong Kong residents and their right to raise a family freely.

20 Article 19(2) of the Hong Kong Bill of Rights provides that the right of men and women of marriageable age to marry and to found a family shall be recognized.

> 63. …It is common ground that a marriage for constitutional as for common law purposes is the voluntary union for life of one man and one woman to the exclusion of all others."

76. In the Strasbourg and English cases discussed below, the same definition of marriage, that is, a heterosexual and monogamous marriage, is also used.

77. The authorities universally recognize that marriage confers a special status to the married couple, carrying with it a corpus of rights and obligations. As Lord Hoffmann put it in *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173 at [7] :

> " It is clear that being married is a status. In *Salvesen or von Lorang v Administrator of Austrian Property* [1927] AC 641, 653 Viscount Haldane said: 'the marriage gives the husband and wife a new legal position from which flow both rights and obligations with regard to the rest of the public. The status so acquired may vary according to the laws of different communities.' "

78. Lord Nicholls gave some examples of the rights and obligations that a marriage may entail in *Bellinger v Bellinger* [2003] 2 AC 467 at [42] :

> " Marriage has legal consequences in many directions: for instance, housing and residential security of tenure, social security benefits, citizenship and immigration, taxation, pensions, inheritance, life insurance policies, criminal law (bigamy)."

79. Recognizing the special status of marriage, the European Court of Human Rights ("ECtHR") has consistently held that article 12 of the European Convention on Human Rights ("ECHR") (right to marry) does not impose an obligation on the States to grant same-sex couples access to marriage : see for example *Schalk and Kopf v Austria* (2011) 53 EHRR 20, [49] – [64]. Nor can a right to same-sex marriage be derived

from article 14 of ECHR (right to equality on enjoyment of rights) taken in conjunction with article 8 (right to family) : *Schalk*, supra, [101].

80. Similarly in England, it was held in *Wilkinson v Kitzinger* [2006] HRLR 36 that by withholding from same-sex partners the actual title and status of marriage under the CPA 2004 while by the same statute effectively according to them all the rights, responsibilities, benefits and advantages, thereby removing the perceived inequality of treatment of long term monogamous same-sex relationships, was justified : per Sir Mark Potter at [116] – [122].

81. In short, the Strasbourg and English authorities establish the proposition that a same-sex couple cannot validly complain that they have been discriminated against on the ground of sexual orientation because they are not legally granted the right or access to marry.

82. In Hong Kong, Ma CJ and Ribeiro PJ noted in *W*, supra, at [2] that it was no part of W's case that same-sex marriage should be permitted. As noted, their Lordships proceeded on the common position of the parties that marriage for the constitutional as well as common law purposes is the voluntary union for life of one man and one woman to the exclusion of all others. For the reasons that they articulated, they held that the statutory provisions prohibiting W, a female transsexual person, from marrying a male, was unconstitutional because they unjustifiably infringed her constitutional right to marry. Their Lordships thus made it clear at the outset of their judgment at [2] that nothing in their judgment was intended to address the question of same-sex marriage.

83. As the law in Hong Kong is now understood, same-sex marriage or civil partnership is not legally recognized on all the constitutional, statutory and common law levels. Consistently with the proposition established by the international case law, it would appear that in Hong Kong no claim of discrimination based on such denial of access to marriage on account of sexual orientation can be mounted. That being

the position, Ms Rose readily accepted that Hong Kong does not recognize same-sex marriage or civil partnership. And she did not submit that Hong Kong is under any obligation to do so. The matter of course does not stop there.

84. Ms Rose went on to argue that even if in Hong Kong the denial of the right to marriage to a same-sex couple is entrenched in the Basic Law or authorized by statute, differential treatments based on marital status may still constitute discrimination on account of sexual orientation in other contexts if not justified. She cited *James v Eastleigh Borough Council* [1990] 2 AC 751 and *R v Secretary of State for Health, ex parte Richardson* [1995] 3 CMLR 376 in support.

85. In *James*, the Social Security Act 1975 fixed the pensionable age at 60 for women and 65 for men. The defendant council provided free admittance to its leisure center to people who had reached the pensionable age. The plaintiff, who had retired, and his wife, both of whom were 61, went to the defendant's leisure center. Under the defendant's policy, the wife was admitted free of charge but the plaintiff had to pay an admission fee. He brought proceedings alleging unlawful sex discrimination under the Sex Discrimination Act 1975. He lost in the courts below. The House of Lords however allowed his appeal. The majority held that since the pensionable age fixed by the Social Security Act itself directly discriminated between men and women by treating women more favaourably than men on the ground of their sex, any other differential treatment of men and women adopting that criterion equally involved discrimination on the ground of sex. Relevantly for present purposes, Lord Bridge said at p 766F – H :

> " Statutory pensionable age is still used in some other statutory contexts…But it is impossible to infer from these or any other specific statutory provisions requiring or authorizing discrimination in defined circumstances the existence of a general exception to the prohibition of sex discrimination in the provisions of goods, facilities and services imposed by section 29 of the Sex Discrimination Act 1975 such that discrimination in favour of women and against men between the ages of 60 and 65 is always

> permitted. In the absence of express statutory authority derived from some other enactment, such discrimination is prohibited."

In *James*, the House of Lords did not consider the question of justification because under the English statute no direct discrimination could ever be justified.

86. As noted by Lord Bridge in *James*, statutory pensionable age was used in some other statutory contexts at the time. One of such contexts was access to free medicines on prescription. Under the relevant UK regulations those who were of pensionable age did not have to pay a charge to get prescribed medicine. Accordingly, women of 60 could get free prescribed medicine when men could not until they reached 65. A challenge based on sex discrimination in breach of the EU directive 79/7 that prohibited sex discrimination in relation to certain forms of benefits was made to the Court of Justice of the European Communities in *Richardson*. The Court at [16] – [28] held that (1) while the EU directive 79/7 allowed the States to exclude from the sex discrimination provisions different statutory pensionable ages and the possible consequences thereof for other benefits, the exclusion was limited to those other benefit schemes which were necessarily and objectively linked to the difference in retirement age; but (2) the discrimination in question was not necessarily linked to the difference between the pensionable ages for men and women, thus falling outside the scope of permitted discrimination authorized by the directive.

87. So, as seen from *James* and *Richardson*, even where an encroaching measure in relation to access to certain rights or benefits is lawful or authorized in a defined context, it does not necessarily follow that the same measure may be used as the benchmark to deny access to other rights or benefits in all other contexts without causing discrimination. Depending on the circumstances, it may still constitute discrimination if not justified.

88. Extrapolating the proposition derived from *James* and *Richardson* to the present context, although in Hong Kong denial of the right to marry to same-sex couples alone does not constitute discrimination on account of sexual orientation, it does not necessarily follow that using marital status as a condition to access to other rights or benefits can never be discriminatory. In other words, the Basic Law as well as the statutory and common law position for marriage in Hong Kong is not necessarily an absolute bar to a claim of discrimination on account of sexual orientation when the differential treatment is based on marital status in all contexts.

89. This brings me to the next stage of my analysis : how to assess whether a particular differential treatment by reason of marital status is discriminatory because of sexual orientation in a given context?

D3. Assessing differential treatment

90. It is well-settled that discrimination can take three forms.

91. In *Ghaidan*, supra, Lord Nicholls at [9] famously observed :

> " Like cases should be treated alike, unlike cases should not be treated alike."

His Lordship's remark encapsulates two forms of discrimination.

92. The first form of discrimination arises where those whose relevant circumstances are analogous are, without justification, treated differently.

93. The second form of discrimination arises where those whose relevant circumstances are different are, without justification, treated in the same way. Under this form of discrimination, people whose

circumstances are relevantly different are simply lumped together and treated in the same way without justification : *Thlimmenos v Greece* (2001) 31 EHRR 411, at [42] and [44].

94. 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 : *DH v Czech Republic* (2008) 47 EHRR 3, at [175]; see also *Leung v Secretary for Justice* [2006] 4 HKLRD 211, per Ma CJHC (as the Chief Justice then was) at [46] to [49]. This is indirect discrimination. It may overlap factually with the second form of discrimination but remains a distinct form of discrimination conceptually. It does not necessarily require a discriminatory intent : *DH*, supra, [184].

95. I will discuss the justification test in greater detail in the next section. At this juncture, I will focus on how to assess a particular differential treatment by reason of marital status which is said to be discriminatory based on sexual orientation absent justification. In this regard, a commonly used approach is to first identify the comparators with whom the complainant's situation is compared to see if their situations are analogous or relevantly different. It is only when the situations are analogous will the justification test be engaged.

96. Before Au J, Mr Wong adopted this approach.[21] So did Ms Carss-Frisk before us when she submitted that since QT is in effect seeking the same benefits enjoyed by a married couple, she should be compared with them accordingly. Based on a number of Strasbourg cases, she submitted that unmarried couples including same-sex couples cannot be relevantly comparable with married couples. Thus, the Eligibility Requirement, which draws the bright line on marriage, does not involve a difference in treatment on the ground of sexual orientation.

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[21] Judgment [20].

97. For my part, I have reservations if this two-stage approach should be adopted for present purposes.

(a) In *Fok Chun Wa*, supra, Ma CJ at [58] cautioned that while the two-stage approach is useful, it must not give rise to complex and unnecessary arguments. He had no objection in adopting it as long as one firmly bears in mind :

> " (1) The object of the exercise … '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."

Here, as rightly predicted by the Chief Justice, for my part I cannot comfortably be able to determine if there is discrimination based on sexual orientation under the Eligibility Requirement without going through the justification analysis.

(b) Regarding marriage as different from civil partnership in the present context may suffer from the problem identified by Baroness Hale in *Rodriguez v Minister of Housing of the Government & Another* [2009] UKPC 52, at [17] :

> " The problem with that analysis is that the ground for the difference in treatment … is also the reason why the person treated differently is said not to be in an analogous situation. This can be dangerous. If the ground for the difference in treatment were a difference in sex, it would not be permissible to say that a man and a woman are not in an analogous situation because men and women are different."

(c) Sexual orientation is now regarded as a personal characteristic inherent in an individual which cannot or should not be changed. And it may not be permissible to use the differences inherent in an individual's personal characteristics to determine analogy : *Wilkinson v Kitzinger*, supra, per Sir Mark Potter at [102]. As Baroness Hale explained in *AL (Serbia) v Home Secretary* [2008] 1 WLR 1434, at [27] :

> " There are…dangers in regarding differences between two people, which are inherent in a prohibited ground and cannot or should not be changed, as meaning that the situations are not analogous. For example, it would be no answer to a claim of sex discrimination to say that a man and a woman are not in an analogous situation because one can get pregnant and the other cannot. This is something that neither can be expected to change. If it is wrong to discriminate between them as individuals, it is wrong to focus on the personal characteristics which are inherent in their protected status to argue that their situations are not analogous. That is the essential reason why, in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 the argument that same sex couples were not in an analogous position to opposite sex couples, because they could not have children together, did not succeed."

98. What then is the preferred approach for present purposes?

99. I find what Ma CJ said in *Fok Chun Wa*, supra, instructive. After eschewing a rigid application of the two-stage approach, his Lordship at [58(3)] associated himself with the principled approach of Lord Nicholls in *R (Carson) v Secretary of State for Works and Pensions* [2006] 1 AC 173, at [3] :

> " 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."

100. I also derive guidance from Baroness Hale's judgment in *Rodriguez*, supra. There, it was the policy of the Gibraltar government to grant joint tenancies of government housing to couples only if they were married to one another or have a child in common. The policy excluded same-sex couples who could not marry nor have children together. The Privy Council held that the differential treatment imposed by the policy was unconstitutional under the equality provision in the Gibraltar Constitution. After pointing out the danger of being bogged down in the problems of identifying the proper comparator (which is the first step of the two-stage approach referred to above), Baroness Hale adopted Lord Nicholls's approach in *Carson* cited above : [17] – [18]. She further said at [25] :

> " The benefit of a justification analysis is that it encourages structured thinking. A legitimate aim of the difference in treatment must first be identified. There must then be a rational connection between the aim and the difference in treatment. And the difference must be proportionate to the aim."

101. Guided by Ma CJ's and Baroness Hale's judgments, I would also adopt the principled and structured approach of Lord Nicholls's in *Carson* in assessing if the differential treatment by reason of marital status under the Eligibility Requirement constitutes discrimination on account of sexual orientation as contended by QT.

D4. Other Strasbourg cases

102. Having identified the proper approach for assessing the differential treatment under the Policy, I only need to very briefly deal with the other Strasbourg cases relied on by Ms Carss-Frisk to make good her submission that same-sex couples as unmarried couples cannot be

relevantly comparable with married couples in various contexts. Those cases include *Lindsay v United Kingdom*, Application No. 11089/84, 11 November 1986; *Shackell v United Kingdom*, Application No. 45851/99, 27 April 2000; *Stec v United Kingdom* (2006) 43 EHRR 47; *Burden v United Kingdom* (2008) 47 EHRR 38; *Serife Yiðit v Turkey* (2011) 55 EHRR 25; *Gas v France*, supra; *X v Austria* (2013) 57 EHRR 14; *Boeckel v Germany* (2013) 57 EHRR SE3; *Aldeguer Tomás v Spain*, Application No. 35214/09, 12 September 2016. *Lindsay*, *Shackell*, *Burden*, *Serife Yiðit* and *Aldeguer Tomás* all concerned property rights such as taxation, pensions and statutory tenancies. *Gas*, *X* and *Boeckel* concerned adoption of children.

103. For those cases on property rights, they all fell within article 1 of Protocol 1 of the ECHR. While the ECtHR in those cases held that unmarried couples and married couples were not in an analogous situation, the Court's reasoning was largely based on the margin of appreciation given to Member States in conferring the rights in issue to married couples in light of the special status of marriage. On a closer look, it was in substance a justification analysis. As Baroness Hale observed in *Rodriguez*, supra, at [22] :

> " Mr Singh [for the appellant] rightly points out that all these cases concerned taxation and similar benefits within the ambit of article 1 of Protocol 1 rather than within the ambit of article 8. There is a much wider margin of appreciation for Member States in the former context than in the latter. He also points out that the concept of a margin of appreciation has no relevance to a national court interpreting its own laws. However, the Board would observe that the Strasburg Court's reliance on the margin of appreciation suggests that, despite the references to married and unmarried couples not being in an analogous situation, the Court was in reality finding that to privilege marriage in the context in question could readily be justified. For the reasons given earlier, the Board also considers it more logical to ask whether distinctions between married and unmarried couples can be justified than to regard the discriminatory status itself as placing them in different situations."

104. The ECtHR had in effect also conducted a justification analysis in *Gas* and *Boeckel*. In *Gas*, the Court prefaced its discussion by reciting at [58] – [60] the principles on justification and margin of appreciation. *X* followed and applied *Gas*. In *Boeckel*, the Court at [28] – [31] relied on justification and margin of appreciation in arriving at the decision as it did. What Baroness Hale said in *Rodriguez* above is therefore also applicable to *Gas*, *X* and *Boeckel*.

105. Thus understood, the Strasbourg cases relied on by Ms Carss-Frisk does not detract from the adoption of Lord Nicholls's approach in *Carson* in the present appeal. I would echo Baroness Hale's observation that it would be more logical to ask whether under the Eligibility Requirement the differential treatment based on marital status can be justified than to regard the difference in status itself as placing married couples and same-sex couples in non-analogous situations.

D5. Justification analysis

106. This brings me to the justification analysis, the crux of Lord Nicholl's approach.

107. Ms Rose proposed as the correct test for justification thus : where marriage may lawfully be restricted to members of the opposite sex, the criterion of marriage may be used as the basis for access to benefits only where those benefits pursue objects which are objectively and necessarily linked to the legal status of marriage itself or the rights and obligations that are unique to and inherent in marriage in the sense that they are not shared with other forms of status. In this regard, I agree with the judgment of the Chief Judge at [9] – [21]. I would only add one observation of my own. It seems that according to Ms Rose's test, all differential treatments said to be encroaching on those rights which are not linked to the legal status of marriage itself or the rights and obligations that are unique to and inherent in marriage can never be justified in any context. But whether the encroaching measure can satisfy the justification test must depend on the actual circumstances and context in which the

justification analysis is undertaken. Ms Rose's test seems to me to be too sweeping and too wide. As such, it may pose the risk of eroding the special status of marriage by emptying its contents.

D5.1 A four-step test

108. The principle of equality does not invariably require exact equality. Differences in treatment may be justified if it passes the proportionality test :

(1) The difference in treatment must pursue a legitimate aim.

(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.

See *Yau Yuk Lung*, supra, per Li CJ at [20].

109. Recently in *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, the Court of Final Appeal held that in line with the Strasbourg and English jurisprudence a fourth step is to be incorporated into the proportionality test. Where an encroaching measure had passed the three-step test, the analysis should incorporate a fourth step asking whether a reasonable balance has been struck between the societal benefits of the encroachment and the inroads made into the constitutionally protected rights of the individual, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual : per Riberio PJ at [64] – [79] and [135].

110. What has to be justified is not the encroaching measure in question which puts in place the differential treatment but the discriminatory aspects of the measure : *A v Secretary of State for the Home Department* [2005] 2 AC 68, per Lord Bingham at [68]; *AL*

(Serbia), supra, per Baroness Hale at [38]. And the burden is always on the government to satisfy that the justification test is met : *Yau Yuk Lung*, supra, per Li CJ at [21].

D5.2 Standard of scrutiny

111. The standard of scrutiny to be applied to the third step of the justification test varies according to contexts. It has generated much case law. In *Hysan*, supra, Riberio PJ in section G conducted an admirable study of the relevant cases. In conclusion, his Lordship said :

> " 136. At the third stage, assessing the permissible extent of the incursion into the protected right, two main standards have been applied. The first is the test of whether the intruding measure is "no more than necessary" to achieve the legitimate aim in question. This must be understood to be a test of reasonable necessity. If the Court is satisfied that a significantly less intrusive and equally effective measure is available, the impugned measure may be disallowed.
>
> 137. An alternative standard which may be applied at the third stage is one which asks whether the encroaching measure is "manifestly without reasonable foundation", being a standard closely related to the concept of "margin of appreciation" in ECtHR jurisprudence.
>
> 138. At the supra-national level of the ECtHR, the margin of appreciation doctrine involves the recognition that on certain issues, the Court should allow Member State latitude to decide on the legitimacy of their societal aims and the means to achieve them since they are better placed to make the assessment. Similar considerations have led the Court at a domestic level to allow the legislative and executive authorities latitude or a "margin of discretion" to do the same, applying the "manifestly without reasonable foundation" standard in such cases.
>
> 139. The "manifest" standard has been used in cases where the Court recognizes that the originator of the impugned measure is better placed to assess the appropriate means to advance the legitimate aim espoused. This has occurred in cases involving implementation of the legislature's or executive's political, social or economic policies but the principle is not confined to such cases.

> 140. The location of the standard in the spectrum of reasonableness depends on many factors relating principally to the significance and degree of interference with the right; the identity of the decision-maker; and the nature and features of the encroaching measure relevant to setting the margin of discretion.
>
> 141. The difference between the two standards is one of degree, with the Court in both cases, scrutinising the circumstances of the case and the factual bases claimed for the incursion."

112. Most recently in *Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs*, FACV 12/2016, 11 July 2017, unreported, Ma CJ after referring to the principles set out in Ribeiro PJ's judgment in *Hysan* quoted above, emphasized :

> " 37. As can be seen therefore, the difference in approach of the courts at the third stage varies depending on the particular circumstances of any given case and this is critical to bear in mind when looking at the impugned measure to see whether (a) the stricter test of the measure being "no more than necessary" to deal with its legitimate aim; or (b) the test of the measure merely being "manifestly without reasonable foundation", ought to be applied. One should not of course be pre-occupied with labels and instead adopt a flexible, though principled and structured, approach. Paragraphs 140 to 141 in the passage quoted in the previous paragraph are instructive here.
>
> 38. Though a matter of degree, there are three aspects to consider:-
>
> (1) The nature of the right in question and the degree to which it has been encroached on.
>
> (2) The identification of the relevant decision-maker (in the case of legislation, this will be the Legislature).
>
> (3) Relevance of the margin of appreciation."

113. I will examine more closely the three aspects identified by the Chief Justice in the present context.

(1) Nature of right and extent of encroachment

114. What QT alleged here is that she has been discriminated on account of her sexual orientation. It firmly suggests that the stricter test of "no more than necessary" should be adopted as the standard of scrutiny.

(a) Sexual orientation is now well established by the case law, both international and local, as part of an individual's personal characteristics like race, colour and sex : *AL (Serbia)*, supra, per Baroness Hale at [29]; *Carson*, supra, per Lord Hoffmann at [15] – [17]; *Fok Chun Wa*, supra, per Ma CJ at [77].

(b) Discrimination on account of sexual orientation, like any other form of discrimination on account of personal characteristics, offends the notions of the respect due to the individual. It offends the notion that everyone is entitled to be treated as an individual and not a statistical unit : *Carson*, ibid, per Lord Hoffmann. It seriously invades one's dignity : *National Coalition for Gay and Lesbian Equality*, supra, per Ackermann J at [54]; *Preddy*, supra, per Baroness Hale at [52]. It cannot be justified merely on utilitarian grounds : *Carson*, ibid, per Lord Hoffmann. Justification thus requires weighty reasons : *Preddy*, supra, per Baroness Hale at [53], noting that this is what Strasburg cases do; *AL (Serbia)*, ibid, per Baroness Hale.

(c) Similarly, in Hong Kong, it is well settled that where the encroaching measure is discriminatory on one of the suspect grounds as identified in article 22 of the Hong Kong Bill of Rights, there would have to be "very weighty" reasons justifying the incursion, obviously resulting in a much

narrower margin of discretion : *Hysan*, supra, per Riberio PJ at [111]. And sexual orientation falls within one of the suspected grounds in article 22 : *Yau Yuk Lung*, supra, per Li CJ at [11]. Thus, an encroaching measure based on sexual orientation is subject to the court's severe scrutiny : *Fok Chun Wa*, supra, per Ma CJ at [77] – [78].

115. It is true that QT does not have a right to be granted a dependant visa because it is, on true analysis, a privilege. But the Director accepts that he must administer the Policy in accordance with the principle of equality. So even in considering if QT is eligible to be granted the privilege to remain in Hong Kong as SS's dependant, the Director must not discriminate her on the ground of sexual orientation. Put another way, QT has a right not be discriminated on account of her sexual orientation when the Director considers if she is eligible under the Policy. If she were so discriminated, she would be unjustifiably counted as ineligible simply because of her sexual orientation. She would be unjustifiably denied of the opportunity to be considered by the Director if she might be granted the privilege to remain in Hong Kong as SS's dependant simply because of her sexual orientation. Viewed in this light, the extent of encroachment on QT's right based on sexual orientation under the Policy is not unsubstantial.

(2) The Director as the decision maker and the margin of appreciation

116. These two aspects can be conveniently dealt with together.

117. It has been consistently held by the courts that the Director is entitled to exercise stringent control over immigration matters and he enjoys a wide margin of appreciation as to how to formulate and administer immigration policies. As Elias LJ in *AM v Entry Clearance Officer* [2009] UKHRR 1073 observed :

> " 65. …This is an area of social policy concerning control of who should be allowed to enter into the country and in what circumstances. As I have noted, the courts are particularly reluctant to interfere in such areas.
>
> 66. …[The] courts have frequently recognized that 'bright line' rules are generally acceptable in such cases notwithstanding that they might produce some hardship."

118. The Policy is self-evidently part of the Director's overall immigration policies. However, that does not detract from the adoption of a stricter test of "no more than necessary" in the present context.

(a) Although the court usually accords a wide margin of appreciation to the government on socio-economic policies, which as seen include immigration policy, where the encroaching measure imposed by such policies offends Hong Kong's core values including differential treatment on account of sexual orientation, the court will still scrutinize it with intensity. As Ma CJ explained in *Fok Chun Wa*, supra :

> " 77. …The proposition that the courts will allow more leeway when socio-economic policies are involved, does not lead to the consequence that they will not be vigilant when it is appropriate to do so or that the authorities have some sort of carte blanche. After all, 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 a disregard for core-values. This requires a little elaboration. Where, for example, the reason for unequal treatment strikes at the heart of core-values relating to personal or human characteristics (such as race, colour, gender, ***sexual orientation***,[22] religion, politics, or social origin), the courts would extremely rarely (if at all) find this acceptable. These

[22] Emphasis supplied by me.

> characteristics involve the respect and dignity that society accords to a human being. They are fundamental societal values…
>
> 78. Where core values relating to personal characteristics are involved, the court will naturally subject the relevant legislation or decision to a particularly severe scrutiny…"

(b) The concept of margin of appreciation refers to that area of discretion which the courts will accord to the legislature or a decision-maker. It reflects the separate constitutional and institutional responsibilities of the judiciary and other organs of the government : *Hysan*, per Ribeiro PJ at [117]; *Fok Chun Wa*, supra, per Ma CJ at [40]. However, when it comes to the right of an individual to equal respect, including not to be discriminated on account of sexual orientation, the courts are the guardians of such rights. The courts will examine the issues of justification very carefully : *Carson*, supra, per Lord Hoffmann at [16]. In fact, the courts are duty bound to do so : *Fok Chun Wa*, supra, per Ma CJ at [77].

119. Ms Carss-Frisk submitted that the lesser degree of scrutiny, namely, "manifestly without reasonable foundation" should be adopted. She took two points.

120. First, as part of his stringent immigration policy overall, the Director should be given a wide margin of appreciation in formulating and administering the Policy. I have just explained why notwithstanding that, a stricter test of "no more than necessary" should be adopted.

121. Second, the Policy as applied by the Director at worst amounts to indirect discrimination. A laxer degree of scrutiny would suffice. However, that is flatly contradicted by authorities, which show that even for indirect discrimination based on sexual orientation, the courts will subject the encroaching measure to severe scrutiny : see for example, *Rodriguez*, supra, and *Preddy*, supra, per Baroness Hale at [53]. For my part, I cannot see any logical basis to render the scrutiny of the invasion of rights relating to personal characteristics, such as sexual orientation, dependent on the form of discrimination. If it is discrimination, be it direct or indirect, the gravamen of the encroachment and the offense it caused to the complainant's dignity would just be the same. The same standard of scrutiny must apply.

E. THE PRESENT CASE

122. Applying Lord Nicholls's approach to the present case, I now come to the differential treatment in the Eligibility Requirement.

E1. Indirect discrimination

123. It is the Director's case that the Policy enables a sponsor to bring in his/her closest dependants to live in Hong Kong and to care for and support them in Hong Kong. Of all the dependants that a sponsor may have, only two categories are eligible for consideration if a dependant visa should be granted. The sponsor's spouse is one category. The sponsor's unmarried dependant child under the age of 18 is the other. Both of them are regarded by the Director as the sponsor's closest dependants for the purpose of the Policy. Whether a spouse or a dependant child under 18, dependency on the sponsor underlies the applicant's eligibility for the purpose of the Policy.

124. In the case of a spouse, interdependency is part and partial of his/her marriage with the sponsor. As a married couple, the applicant and his/her sponsor are engaged in the closest form of interpersonal

relationship. It is characterized by love, intimacy, stability, companionship, the sense of belonging to each other, mutual care and support.

125. An unmarried couple, whether heterosexual or homosexual, in a stable, long term and committed relationship can have exactly the same sort of interdependent relationship as a married couple. In terms of dependency, their situation is analogous to that of a married couple. They are however excluded under the Eligibility Requirement because the Director draws the bright line at marriage. Since all unmarried couples, heterosexual or homosexual, are similarly excluded, the Director has not singled out same-sex couples for differential treatment. I accordingly reject Ms Rose's argument that the Policy, as applied by the Director, amounts to direct discrimination on the ground of sexual orientation.

126. However, under the Eligibility Requirement, a heterosexual unmarried couple may make themselves eligible by getting married if they so wish. But a homosexual unmarried couple cannot do so because they cannot marry in the sense as understood according to the law of Hong Kong. They will never be able to meet the Eligibility Requirement, however much they want to avail themselves of the Policy. In this way, the Eligibility Requirement puts homosexual unmarried couples as a group at a serious disadvantage as compared to heterosexual unmarried couples. As demonstrated by authorities, this may constitute indirect discrimination on the ground of sexual orientation if not justified.

127. In *Preddy*, supra, the defendants, who owned and ran a private hotel, believed 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 what they believed to be sin. Based on those principles, they operated a policy to restrict occupancy of the three double-bedded rooms in their hotel to married couples. 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 proceedings complaining direct discrimination on the ground of sexual orientation or indirect discrimination. The Supreme Court held that as a civil partnership was indistinguishable from the status of marriage in the United Kingdom 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. The Court also held that if the discrimination were not direct the policy would (per Baroness Hale, Lord Kerr and Lord Toulson) or did (per Lord Neuberger and Lord Hughes) 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 a marriage, when the defendants failed to justify.

128. *Rodriguez*, supra, is another authority on the point. To recap, it was the policy of the Gibraltar government to grant joint tenancies of government housing to couples only if they were married to one another or have a child in common. The policy excluded same-sex couples who could not marry nor have children together. The Privy Council held that the differential treatment imposed by the policy was unconstitutional under the equality provision in the Gibraltar Constitution. Baroness Hale said at [19] :

> " In this case we have a clear difference in treatment but not such an obvious difference between the appellant and others with whom she seeks to compare herself. The appellant and her partner have been denied a joint tenancy in circumstances where others would have been granted one. They are all family members living together who wish to preserve the security of their homes should one of them die. The difference in treatment is not directly on account of their sexual orientation, because there are other unmarried couples who would also be denied a joint tenancy. But even if…these are the proper comparator, the effect of the policy upon this couple is more severe than on them. It is also more severe than in most cases of indirect discrimination, where the criterion imposed has a disparate impact upon different groups. In

> this case, the criterion is one which this couple, unlike other unmarried couples, will never be able to meet. They will never be able to get married or to have children in common. And that is because of their sexual orientation. Thus it is a form of indirect discrimination which comes as close as it can to direct discrimination. Indeed, Mr Singh puts this as a Thlimmenos case: they are being treated in the same way as other unmarried couples despite the fact that they cannot marry or have children in common…"

129. Ms Rose also relied on *Taddeucci and McCall v Italy*, Application No. 51362/09, 30 June 2016. There, the applicants had formed a same-sex couple since 1999. They lived in New Zealand with the status of unmarried couple until December 2003 when they decided to settle in Italy on grounds of the first applicant's poor health. During their first period of residence in Italy, the second applicant had a student's temporary residence permit. He subsequently applied for a residence permit for family reasons, which was rejected in October 2004. Proceedings ensued in which the applicants invoked article 8 (right to family life) and article 14 (right to equality on enjoyment of rights). By a majority of 6:1, the ECtHR held that the applicants' right to family under article 8 was engaged; that with regard to eligibility for a residence permit for family reasons, the applicants were treated in the same way as persons in a significantly different situation from theirs, namely, heterosexual partners who had decided not to regularize their situation;[23] and that the differential treatment was not justified. In his partly dissenting opinion, Judge Sicilianos queried the majority's reasoning, noting that it was unprecedented in the Court's case law and that the same argument could be raised in respect of other rights, thereby seriously undermining the special status of marriage.

130. Ms Rose asked us to apply *Taddeucci* because, according to her, the facts are similar to the present case. Ms Carss-Frisk submitted that the majority was wrong and asked us to follow Judge Sicilianos's judgment.

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[23] Hence a form of *Thlimmenos* discrimination.

131. For present purposes, I need not dwell on counsel's submissions on the correctness or otherwise of *Taddeucci*. I say this for two reasons. First, *Taddeucci* does not add much to what *Preddy* and *Rodriguez* had decided in terms of principle. And I do not think it is Ms Carss-Frisk's submission that the two English cases were wrongly decided. So even if the majority in *Taddeucci* was wrong as she contended, it does not take her case any further. As to Judge Sicilanos's concern that the special status of marriage might be seriously undermined, I think the check on any possible floodgate lies in (1) the recognition that there are certain core rights pertaining to marriage and that differential treatment based on those core rights cannot be regarded as discriminatory; and (2) the justification analysis. When the justification analysis is engaged, not every right pertaining to marriage said to have been infringed by reason of discrimination on account of sexual orientation will be affected. It will happen only if the encroaching measure does not pass the justification test. And it will only happen after the court has, under the guidance of a rich jurisprudence in this area of the law, critically examined all the issues in a structured manner as mandated by the justification analysis.

132. Applying the principle enunciated in *Preddy* and *Rodriguez*, the Eligibility Requirement based on marital status may constitute indirect discrimination on account of sexual orientation against homosexual unmarried couples in a stable, long term and committed relationship, if not justified.

133. This brings me to the justification proffered by the Director.

E2. Justification by the Director

134. To recap, the justification advanced by the Director is this :

> " 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 capital 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."

E2.1 Legitimate aim

135. The Director must first prove that the Eligibility Requirement serves a legitimate aim.

136. It is common ground that the avowed aim of striking the balance as described is a legitimate one. It must be right.

137. Hong Kong is a regional hub of services and a world city. As one of the most important international financial centers, Hong Kong is committed to attract not only capital but also talented and skilled people (which is in itself an invaluable form of resources) to come to work and live here. Its ability to continue to attract talented and skilled people to live and work here is essential to its success, especially against a backdrop of increased globalization and intense competition from other places. The best way to achieve this of course is to open up the applications for dependant visas to all, irrespective of their sexual orientation. It is better to include rather than exclude homosexual couples whom otherwise Hong Kong would like to attract. However, given Hong Kong's unique geographical, economic and societal circumstances as rightly pointed out by the Director, there is an obvious need to exercise

stringent immigration control. We simply cannot afford such an open-ended policy. Hence the need to strike the balance between these two competing factors.

E2.2 Rationality

138. The Director must next prove that the Eligibility Requirement is rationally connected to the legitimate aim of striking the balance as described. In this regard, it is not sufficient for the Director to justify the Policy generally. He must justify the discriminatory aspect of the Eligibility Requirement based on marital status.

139. As rightly submitted by Ms Rose, the Director's avowed aim of balancing (a) the encouragement of talented people to live and work in Hong Kong with (b) the maintenance of stringent immigration control applies just as much to talented homosexual people as it does to talented heterosexual people. Simply put, the Director's avowed aim of striking the balance is applicable to all potential talented people that Hong Kong wishes to attract irrespective of their sexual orientation. Yet the Eligibility Requirement only permits heterosexual married people to bring their spouses with them. Thus analyzed, the Eligibility Requirement is inconsistent with the Director's avowed aim.

140. The Director draws the bright line at marriage for two main reasons. First, the Directors says he is obliged to and follow and give effect to the legal definition of marriage in Hong Kong in setting the Eligibility Requirement. This is a point which Au J accepted and emphasized repeatedly in his judgment.[24] In fact, the Judge said :[25]

> " 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 recognized in Hong Kong, it would amount to requiring the Director to at least indirectly recognize civil partnership or same-sex marriage as valid in Hong

[24] See [55(3)] above.

[25] Judgment [68].

> 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."

141. Ms Rose submitted that the Judge erred in so holding as the Director has no legal obligation to follow and give effect to Hong Kong matrimonial law in administering the Policy. Ms Carss-Frisk accepted that the Judge might have gone too far but she submitted that the Director is entitled to adopt the statutory definition of marriage in administering the Policy. As the statutory definition is sanctioned by the Basic Law, it is a powerful justification.

142. This requires a closer look of the nature of the dependant visa. As said, a dependant visa is no more than a privilege conferred by the Director on the applicant. It enables the applicant to stay in Hong Kong in the capacity as a dependant with conditions attached. It does not have the legal effect of the Director recognizing the validity of the union or relationship between the applicant and the sponsor, be it heterosexual or homosexual, under Hong Kong law.

143. In setting the Eligibility Requirement, the Director is not legally obliged to follow and give effect to marital status as defined in Hong Kong law, even if it is sanctioned by the Basic Law. In fact, the Director does not do so in every scenario. For it is the Director's own case that for polygamous marriages, he allows the sponsor to bring with him any one of his spouses at his own choosing.

144. Although it may be viewed as an exception, how the Director deals with the applicants to polygamous marriages contradicts his case in two significant ways. First, contrary to his stated position, the Director is not legally obliged to follow and give effect to Hong Kong matrimonial law. If he were, he could not have allowed applications in cases of polygamous marriages. Second, it cannot be seriously suggested that by granting a dependant visa to a spouse to a polygamous marriage, the Director has thereby recognized the validity of such marriage. It destroys

the argument of recognition of any form of marriage other than what is legal under Hong Kong law by way of backdoor.

145. The Director's stated objective of following and giving effect to Hong Kong matrimonial law would have stronger force had it been his case on justification that he wished to uphold the institution of marriage in Hong Kong. For there are authorities to support the proposition that protection of traditional marriage is capable of being a legitimate and weighty aim. But that is simply not his case before us.

146. The second reason why the Director draws the bright line rule at marriage is administrative workability and convenience. In my view, the Director is entitled to do so, subject always to the principle of equality. Under the bright line rule, the Director is entitled to lay down a rule that is clear, certain and administratively convenient in implementing the Policy : *Fok Chun Wa*, supra, per Ma CJ at [73]. For marriage, it is a universally recognized institution. There is no ambiguity in it as a requirement for eligibility under the Policy. Marriage can be proved objectively and with ease. Usually, it is done by producing the requisite documentary evidence, such as marriage certificate. For unmarried homosexual couples whose relationship is legalized in the form of civil partnership or same-sex marriage, the same degree of administrative workability and convenience, in terms of definition, existence and proof of the relationship, applies to them as it does to marriages. So excluding them by reason of administrative workability and convenience is not rational.

147. For unmarried couples, heterosexual and homosexual alike, whose relationship is not legalized, the position is markedly different. Unlike legalized relationships which can be proved with ease by production of the relevant certificates, non-legalized relationships may be difficult to prove. The evidence presented by the applicant may be difficult to verify. Establishing their relationship objectively may hence be difficult. It is also difficult to objectively assess if their professed relationship possesses the character of dependence as in the case of a

marriage, civil partnership or same-sex marriage. The process of vetting the application may become very onerous. The Director is entitled to draw the bright line to exclude unmarried heterosexual couples and unmarried homosexual couples who have not legalized their relationship so as to relieve himself of such unnecessary burdens in administering the Policy.

148. For the above reasons, I hold that in the case of civil partnership and same-sex marriage, the Director has failed to satisfy that the Eligibility Requirement is rationally connected to the avowed aim of striking the balance as described. The Director has therefore failed to justify the indirect discrimination on account of sexual orientation that QT suffers from the Eligibility Requirement.

E2.3 Necessity and the fourth step

149. That being my conclusion on rationality, the remaining two steps of the justification analysis do not arise for consideration. On necessity, I would only say that apart from a bare assertion, the Director has not explained why, in the case of civil partnership and same-sex marriage, the discriminatory aspect of the Eligibility Requirement is no more than necessary to achieve the avowed aim of striking the balance as described.

F. DISPOSITIONS

150. In the circumstances, I would respectfully differ from Au J. I would allow QT's appeal and set aside the Judge's judgment.

151. As to the actual relief to be granted, I think the parties should be able to come up with a proposed draft order by consent after reading our judgment. I would therefore direct them to submit a proposed draft order by consent within 28 days after handing down of this judgment for our consideration, or failing consent, they should submit their respective

proposed draft orders within the same time limit for our consideration. The order would then be finalized on paper.

152. Costs should follow the event. I would propose to make an order nisi that QT shall have the costs below and on appeal, to be taxed if not agreed, with a certificate for two counsel; and that QT's own costs are to be taxed in accordance with the legal aid regulations.

153. Last but not least, I would like to thank counsel for their very able assistance.

Cheung CJHC :

154. Accordingly, we allow this appeal in terms of the orders and directions proposed by Poon JA.

(Andrew Cheung)	(Johnson Lam)	(Jeremy Poon)
Chief Judge of the High Court	Vice President	Justice of Appeal

Ms Dinah Rose QC and Mr Timothy Parker, instructed by Vidler & Co., assigned by the Director of Legal Aid, for the applicant (appellant)

Ms Monica Carss-frisk QC, Mr Stewart Wong SC and Ms Grace Chow, instructed by Department of Justice, for the respondent (respondent)

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