HCAL 258/2015

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 258 OF 2015

BETWEEN

LEUNG CHUN KWONG	Applicant
and	
SECRETARY FOR THE CIVIL SERVICE	Putative 1st Respondent
COMMISSIONER OF INLAND REVENUE	Putative 2nd Respondent

Before: Hon Chow J in Court
Date of Hearing: 15-16 December 2016
Date of Judgment: 28 April 2017

J U D G M E N T

INTRODUCTION

1. Two questions arise for determination in this application for judicial review, namely:-

(1) whether Mr Leung, a civil servant who has entered into a same-sex marriage with Mr Adams in New Zealand, is entitled to the same benefits and allowances that the Government provides to the "spouses" of other married civil servants whose marriages are to persons of the opposite gender; and

(2) whether Mr Leung's same-sex marriage with Mr Adams is a "marriage" for the purposes of the *Inland Revenue Ordinance*.

BACKGROUND FACTS

2. The basic facts giving rise to the present application can shortly be stated as follows.

(a) *Personal background*

3. Mr Leung (the applicant) is a Chinese national and a permanent resident of the Hong Kong Special Administrative Region.

4. He joined the Government as an Immigration Officer on 2 January 2003, and is currently a Senior Immigration Officer.

5. According to Mr Leung, throughout his adult life, he has self-identified as a gay person and has only ever engaged in same-sex romantic relationships. In around 2005 he met Mr Adams, in August 2013 they started living together, and in late 2013 they decided to marry each other.

6. In view of the fact that the law regulating marriages in Hong Kong did not allow or provide for persons of the same sex to celebrate or contract a marriage in Hong Kong, Mr Leung and Mr Adams decided to marry in Auckland, New Zealand, where such marriage was legally permissible. On 18 April 2014, Mr Leung and Mr Adams were married in New Zealand.

(b) *The Benefits Decision*

7. As a civil servant, Mr Leung's contract of employment with the Government is, and at all material times was, subject to the Civil Service Regulations ("CSRs").

8. Pursuant to CSR 4, the Secretary for Civil Service ("the Secretary") is authorised to amend, supplement, apply, interpret and make exceptions to the CSRs. For the purposes of administering the CSRs, it is the policy of the Secretary to interpret and apply the CSRs in a manner that is consistent with the existing relevant laws of Hong Kong.

9. Under CSRs 900 to 925 and 950 to 954, Mr Leung is entitled to certain medical and dental benefits provided by the Government. Such benefits are also extended to Mr Leung's "family", which is defined in CSR 900(2) to mean –

> "the officer's spouse and children (including children of divorced/legally separated officers, step-children, adopted children and illegitimate children) who are unmarried and under the age of 21. In the case of children aged 19 or 20, they must also be in full time education or in full time vocational training, or dependent on the officer as a result of physical or mental infirmity."

10. CSR 513 provides as follows:-

> "Every officer is required to inform his Department immediately of the birth, adoption, marriage and death of each dependent child … and of any change in his marital status, including marriage, divorce, or the death of his wife…"

11. On 27 March 2014, Mr Leung wrote to the Civil Service Bureau ("the CSB") stating that he intended to enter into a same-sex marriage in New Zealand, and asked whether he was required to update his marital status under CSR 513 having regard to the fact that "same sex marriage is not recognized in HKSAR".

12. On 30 April 2014, the Secretary replied to Mr Leung stating that his intended same-sex marriage in New Zealand fell outside the meaning of "marriage" under the CSRs, and such marriage would not constitute "a change in marital status" on his part which would require reporting under CSR 513.

13. There were further emails passing between Mr Leung and the Secretary on this matter. It is not necessary to summarise the contents of those emails in this judgment save to mention that by an email to the Secretary dated 28 October 2014, Mr Leung stated as follows:-

> "… I was shocked with the previous reply given by your Bureau that I do not require to report my same sex spouse under the CSR. According to your advice, not only that it denies my right to update my marital status and having my spouse as emergency contact, it also denies my access to benefits such as my spouse should be entitled to medical and dental services [sic]. All of these are in violation of the [Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation] promoted by the Government. The only ground for the denial was merely on the ground of my sexual orientation, which is morally wrong and irrational."

14. Mr Leung ended by asking the Secretary to look into the matter and advise (i) whether he was required to update his marital status as stipulated under CSR 513 as he was legally married with his same-sex spouse, and (ii) whether his same-sex spouse was entitled to benefits which other heterosexual spouses enjoyed.

15. Mr Leung's email of 28 October 2014 was substantively answered by the Secretary by an email dated 17 December 2014, in which the first decision (the "Benefits Decision") under challenge in this application for judicial review was embodied. The Secretary's reply, so far as material, was as follows:-

> "We would like to reiterate that for the purpose of administering CSR 513, 'marriage' refers to a 'formal ceremony recognised by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others' as provided under section 40 of the Marriage Ordinance (Cap.181). Since the same sex marriage as mentioned in your case falls outside the definition of 'marriage' as referred to under CSR 513, such marriage does not constitute a 'change in marital status' on your part for the purpose of the CSR which requires reporting under CSR 513.
>
> As explained above, same sex marriage falls outside the scope of 'marriage' under the Marriage Ordinance (Cap.181) and is not recognised for the purpose of administering staff benefits under CSRs by the Government. In this respect, we wish to clarify that there is no violation of the COP for not granting your same sex partner the benefits since the 'benefits' under Section 5 of the COP applicable to married persons refer only to the marriages as recongised in Hong Kong."

(c) *The Tax Decision*

16. In or around May 2015, Mr Leung sought to e-file his income tax return for the year of assessment 2014/15 with the Inland Revenue Department ("IRD"). However, when he sought to enter the name of Mr Adams as his spouse in the IRD's e-filing system, an error message (namely, "Your spouse name prefix must be different from your own name prefix [547-E-1039]") appeared.

17. Mr Leung raised this matter with the IRD by email on 1 June 2015, claiming that (i) in the IRD's guideline for completing tax returns it was stated that "spouse" meant "lawful husband or wife under a valid marriage recognized by Hong Kong law or other legal marriage recognized by the law of the place where it was entered into", (ii) he and his spouse was legally married in New Zealand under their law and their marriage were valid, and (iii) accordingly he met the criteria of the IRD's guideline.

18. An assessor on behalf of the Commissioner of Inland Revenue ("the Commissioner") replied to Mr Leung by an email dated 9 June 2015, in which the second decision (the "Tax Decision") under challenge in this application for judicial review was embodied. The reply, so far as material, was as follows:-

> "Insofar as same-sex marriage is concerned, the position of the Department can be found in paragraph 5 of Departmental Interpretation and Practice Notes No.18 (Revised) 'Assessment of Individuals under Salaries Tax and Personal Assessment', which is reproduced below for your easy reference:-
>
> > 'Same-Sex Marriages
> >
> > 5. A same-sex marriage is not regarded as a valid marriage for the purposes of the (Inland Revenue) Ordinance. Although the definition of 'marriage' in section 2(1) does not expressly oust one between persons of the same sex, it does make reference to a marriage between a 'man' and any 'wife'. Under section 2, 'husband' means a married man and 'wife' means a married woman. 'Spouse' is defined under the same section as a husband or wife. Marriage in the context of the Ordinance is thus intended to refer to a heterosexual marriage between a man and a woman. Parties in a same-sex marriage cannot be 'husband/wife' and they would be incapable of having a 'spouse'.'
>
> As such, the Department's online tax filing system is designed in such a manner that it will not accept a taxpayer to enter a person with the same sex as his/her spouse."

19. On 14 September 2015, the IRD received from Mr Leung a completed 2014/15 Tax Return – Individuals in paper form, in which Mr Leung elected for joint assessment with Mr Adams. The Commissioner considered that Mr Leung was not entitled to elect for joint assessment, as he and Mr Adams were not husband and wife for the purposes of the IRO. The Commissioner therefore assessed Mr Leung for salaries tax for the year of assessment 2014/15 on individual basis.

20. As confirmed by the Commissioner, the total salaries tax liabilities of Mr Leung and Mr Adams (as separately assessed) have not been adversely affected by the refusal of the IRD to recognize Mr Leung's same-sex marriage with Mr Adams as a valid marriage for the purpose of the IRO, in that Mr Leung and Mr Adams would not obtain any reduction of total tax liabilities even if they were allowed to elect for joint assessment as a married couple.

21. In passing, I should mention that Mr Leung also raised his aforesaid complaints with the Equal Opportunities Commission and the Ombudsman. It is not necessary to set out the details of his complaints to, or the responses given by, the Equal Opportunities Commission and the Ombudsman in this judgment because they are not relevant to the proper resolution of the legal issues raised in this application.

(d) *The application for judicial review*

22. On 25 December 2015, Mr Leung filed a Form 86 to apply for leave to apply for judicial review of the Benefits Decision and the Tax Decision. In his Form 86, Mr Leung also sought an extension of time to bring the application.

23. On 17 March 2016, Au J directed that there be a rolled up hearing of (i) the application for an extension of time to apply for leave to apply for judicial review, (ii) the application for leave to apply for judicial review (in the event that an extension of time was granted), and (iii) the substantive application for judicial review (in the event that leave to apply for judicial review was granted).

24. The above applications came before this court on 15 and 16 December 2016. As confirmed by Ms Lisa Wong SC (appearing, together with Mr Johnny Ma, for the Secretary and the Commissioner) at the hearing, Mr Leung's application for an extension of time to apply for leave to apply for judicial review was not opposed.

25. Mr Leung's challenges against the Benefits Decision and Tax Decision are based primarily on constitutional grounds. In particular, it is contended that those decisions are discriminatory against him based on his sexual orientation and in breach of his right to equality under (i) Article 25 of the Basic Law ("BL 25"), (ii) Articles 1(1) and 22 of the Hong Kong Bill of Rights ("BOR 1(1)" and "BOR 22" respectively), and (iii) common law.

26. In addition:-

(1) in support of his challenge against the Benefits Decision, Mr Leung relies on – (i) BOR 14 (protection of privacy, family, home, etc), (ii) the *Sex Discrimination Ordinance*, Cap 480 ("the SDO"), (iii) the Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation ("the COP") (see paragraph 4(1) of the Form 86), and (iv) BL 37 (freedom of marriage and right to raise a family) (see paragraphs 94 and 175 of the Form 86); and

(2) in support of his challenge against the Benefits Decision, Mr Leung relies on (i) Section 2(1) of the *Inland Revenue Ordinance*, Cap 112 ("the IRO"), and (ii) BOR 14 (see paragraph 4(2) of the Form 86).

27. In what follows, I shall first examine Mr Leung's case based on the right to equality (or not to be discriminated against) which lies at the heart of this application for judicial

review. I shall deal with the other grounds relied upon by Mr Leung more briefly towards the end of this judgment.

THE BENEFITS DECISION UNLAWFULLY DISCRIMINATES AGAINST MR LEUNG BASED ON HIS SEXUAL ORIENTATION

(a) The Court's approach to the right to equality

28. The constitutional right to equality is set out in the following provisions in the Basic Law and the Hong Kong Bill of Rights:-

(1) BL 25

"All Hong Kong residents shall be equal before the law."

(2) BOR 1(1) (Entitlement to rights without distinction)

"The rights recognised in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

(3) BOR 22 (Equality before and equal protection of law)

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

29. The right to equality had been considered by the Hong Kong courts on a number of previous occasions. In *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, the constitutionality of the offence of homosexual buggery between men otherwise than in private under Section 118F(1) of the *Crimes Ordinance*, Cap 200, was challenged on the ground that it amounted to discrimination based on sexual orientation. At paragraphs 19 to 22 of the judgment of the Court of Final Appeal, Li CJ set out the court's basic approach for determining whether a person's right to equality (or not to be discriminated against) had been infringed, as follows:-

> "19 In general, the law should usually accord identical treatment to comparable situations. As Lord Nicholls observed in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 566C:
>
> > 'Like cases should be treated alike, unlike cases should not to be treated alike.'
>
> 20 However, the guarantee of equality before the law does not invariably require exact equality. Differences in legal treatment

> may be justified for good reason. In order for differential treatment to be justified, it must be shown that:
>
> (1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.
>
> (2) The difference in treatment must be rationally connected to the legitimate aim.
>
> (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim.
>
> The above test will be referred to as 'the justification test'. In the present case, the Court has had the benefit of submissions on its appropriate formulation. There is no material difference between the justification test and the test stated in *R v Man Wai Keung (No. 2)* [1992] 2 HKCLR 207 at 217 which was used by the Court in *So Wai Lun v HKSAR* (2006) 9 HKCFAR 530 at para. 20.
>
> 21 The burden is on the Government to satisfy the court that the justification test is satisfied. Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will scrutinize with intensity whether the difference in treatment is justified. See *Ghaidan v Godin-Mendoza* at 568G (Lord Nicholls).
>
> 22 In requiring differential treatment to be justified, the view has been expressed that the difference in treatment in question is an infringement of the constitutional right to equality but that the infringement may be constitutionally justified. See the Court of Appeal's judgment in the present case at 208B-C (Ma CJHC) and in *Leung v Secretary for Justice* [2006] 4 HKLRD 211 at 234G-H. This approach is not appropriate. Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality. Unlike some other constitutional rights, such as the right of peaceful assembly, it is not a question of infringement of the right which may be constitutionally justified."

30. As subsequently explained by Ma CJ in paragraph 57 of his judgment in the Court of Final Appeal in *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, the above passages have sometimes been taken as specifying a two-stage test:-

(1) The first stage is to identity the comparators: the person complaining is comparing his position with someone who is said to be in a comparable position. The question is asked: are these persons in comparable positions?

(2) The second stage assumes that the first stage is passed (in other words, the court regards the comparators as being in comparable or analogous positions), and the

question is: can the differences in treatment between the comparators be justified using the *Yau Yuk Lung* justification test.

31. As further explained by Ma CJ, while the two-stage approach can in some cases be neatly applied, it should not be regarded as if it were a statute and treated as such. In particular, it should not give rise to complicated and long-drawn out (but ultimately unproductive) arguments as to whether this step or that step has been overcome, or obscure the real issues in a case. There is no objection in adopting the two-stage approach as long as one firmly bears in mind the following (see paragraph 58 of *Fok Chun Wah*):

> "(1) The object of the exercise (when considering issues of equality) is ultimately to ask a simple question and here, I would respectively adopt the way in which this was put by Lord Hoffmann in *Carson* in 186H (para 31), 'is there enough of a relevant difference between X and Y [the comparators] to justify differential treatment?'
>
> (2) In the majority of cases where equality issues are involved, it will be necessary for the Court to look at the materials which go to the three facets of the justification test before this crucial question is answered. It will be rare case, I daresay, where the court will comfortably be able to answer this question without any recourse to the issue of justification at all. Seen in this way, it may matter not at all whether the court's approach is seen as a two-stage one or not.
>
> (3) Here, I associate myself with the approach of Lord Nicholls of Birkenhead in *Carson* in 179C-E (para 3):-
>
> > '3. For my part, in company with all your Lordships, I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 [of the European Convention on Human Rights – the equipment of Article 22 of the Bill of Rights] does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in article 14. If this prerequisite is satisfied, the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact.'"

32. In other words, the question to ask is whether there is enough of a relevant difference between the comparators to justify differential treatment. In some cases, the relevant differences between the comparators are so obvious that differential treatment can be justified

without going through the *Yau Yuk Lung* justification test. Where, however, the relevant differences between the comparators cannot be seen so clearly, the three facets of the justification test should be considered.

33. Mr Nigel Kat SC (appearing, together with Mr Azan Marwah, for Mr Leung) further argues, in reliance on the recent judgment of the Court of Final Appeal in *Hysan Development Company Limited v Town Planning Board*, FACV 21 and 22 of 2015 (26 September 2016), that there is a fourth element to the justification test, namely-

> "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" (see paragraph 135 *per* Ribeiro PJ).

34. The rationale for adding the fourth element in the proportionality analysis appears to be the concern that the traditional three-step inquiry is "anchored in an assessment of the law's purpose" but fails to take full account of the "severity of the deleterious effects of a measure on individuals or groups" (see *Alberta v Hutterian Brethren of Wilson Colony* [2009] 2 SCR 567, at paragraph 76 *per* MaLachlin CJ, quoted by Ribeiro PJ at paragraph 71 of his judgment in *Hysan*).

35. At paragraph 78 of *Hysan*, Ribeiro PJ further stated that:-

> "While in the great majority of cases the result arrived at after undertaking the first three inquiries is unlikely to be changed by it, a four-step analysis should, in my view, be explicitly adopted in Hong Kong. Without its inclusion, the proportionality assessment would be confined to gauging the incursion in relation to its aim. The balancing of societal and individual interests against each other which lies at the heart of any system for the protection of human rights would not be addressed. This requires the Court to make a value judgment as to whether the impugned law or governmental decision, despite having satisfied the first three requirements, operates on particular individuals with such oppressive unfairness that it cannot be regarded as a proportionate means of achieving the legitimate aim in question. But that should not cause the Court to shy away from the fourth question since such a value judgment is inherent in the proportionality analysis."

36. Although the Court of Final Appeal in *Hysan* was concerned with the proper approach to the proportionality analysis in the context of encroachment of private property rights protected under BL 6 and 105 by town planning laws and regulations, it seems to me that the fourth element in the proportionality analysis is, in principle, also relevant to the question of whether a differential treatment can be justified when considering a discrimination complaint.

37. One other matter should be borne in mind when considering the issue of justification. As pointed out by Ma CJ in *Fok Chun Wa*, at paragraphs 77 and 78, where 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, religion, politics, or social origin), the court will subject the relevant legislation or decision to a particularly severe scrutiny.

(b) *What the Benefits Decision decided?*

38. On behalf of the Secretary, Ms Wong argues that –

> "what the Benefits Decision decided is that the expression 'the officer's spouse' in the definition of 'family' in CSR 900(2) refers to one's wife or husband under a marriage recognised by the marriage law of Hong Kong and that [Mr Leung] and Mr Adams' marriage was not such a marriage" (see paragraph 11 of her Note of Oral Submissions dated 16.12.2016, "the Note").

39. Ms Wong's arguments runs, essentially, as follows:-

(1) The present application is an application for judicial review of the Benefits Decision, and not CSR 900(2) which, insofar as material, defines "family" as including "the officer's spouse" only for the purposes of CSRs 900-925 and 950-954.

(2) The case presented by Mr Leung to the Secretary was that (i) he had entered into a marriage with Mr Adams that was lawful and Mr Adams had become his spouse under the law of New Zealand; and (ii) Mr Leung and Mr Adams should *thereby* be recognised as married, and Mr Adams as Mr Leung's spouse, for the purposes of the CSRs that benefit an officer's spouse.

(3) Mr Leung's claim to "equal treatment" under the CSRs was essentially premised upon Mr Adams having attained the status of his spouse by virtue of their marriage in New Zealand.

(4) Hence, all that the Secretary was invited by Mr Leung to decide was whether Mr Adams had, for the purposes of the CSRs that benefit an officer's spouse, become Mr Leung's spouse by virtue of their marriage in New Zealand.

(5) By the Benefits Decision, the Secretary decided that (i) the expression "the officer's spouse" in the definition of "family" in CSR 900(2) referred only to one's wife or husband under a marriage recognised by the marriage law of Hong Kong, (ii) the marriage between Mr Leung and Mr Adams was not a marriage recognised by the marriage law of Hong Kong, and (iii) hence, Mr Adams was not to be

regarded as Mr Leung's spouse for the purposes of the CSRs that benefit an officer's spouse (see paragraphs 2, 3, 4 and 11 of the Note)

40. In short, the distinction sought to be drawn by the Secretary is between a decision on "status" and a decision on "entitlement to benefits".

41. I accept that, in his initial email to the CSB dated 27 March 2014, Mr Leung was merely seeking a direction on whether he was required to update his marital status under CSR 513 in view of his impending same sex marriage in New Zealand, and the Secretary's response was that Mr Leung was not required to do so because his impending marriage fell outside the meaning of "marriage" under the CSRs. On the face of the matter, the focus of the inquiry and response was on Mr Leung's marital status after his intended same-sex marriage and the status of his intended same-sex marriage partner under CSR 513.

42. However, in Mr Leung's email to the Secretary dated 28 October 2014, he made it clear that he was seeking to update his marital status so that his same-sex marriage partner (ie Mr Adams) would be entitled to receive benefits, including medical and dental benefits, provided by the Government which formed part of his (Mr Leung's) service entitlements under the CSRs. Mr Leung also expressly complained that the denial of benefits to his same-sex marriage partner was on the ground of his sexual orientation, which he considered to be in violation of the COP and morally wrong and irrational.

43. It is equally clear from the Secretary's reply email dated 17 December 2014 that the Secretary understood that Mr Leung's concern was not just the updating of his marital status, but whether his same-sex marriage partner would be entitled to receive benefits provided by the Government under the CSRs. In that email, the Secretary, while reiterating that Mr Leung's same sex marriage was outside the definition of "marriage" as referred to in CSR 513, also stated that the denial of "benefits" to Mr Leung's same-sex marriage partner did not violate the COP.

44. In other words, the Secretary was, by the email dated 17 December 2014, communicating to Mr Leung his decision that Mr Leung's same-sex marriage partner would not be entitled to receive benefits provided by the Government under the CSRs. Although the Secretary's reason for coming to that decision was that Mr Leung's same-sex marriage was outside the definition of "marriage" as referred to in CSR 513, it would, in my view, be too narrow a reading of that email to regard it as being merely a decision on (i) the meaning of the expression "the officer's spouse" in the definition of "family" in CSR 900(2), (ii) whether Mr Leung's same-sex marriage

was a "marriage" for the purposes of the CSRs that benefit an officer's spouse, and (iii) whether Mr Leung's same-sex marriage partner was to be regarded as his "spouse" for the purposes of the CSRs that benefit an officer's spouse.

45. In my view, having regard to the background and exchange of emails leading to the Secretary's email dated 17 December 2014, the Benefits Decision as embodied in that email was intended, and understood, to be a decision that Mr Adams would be denied the benefits available to an officer's spouse under CSRs 900-925 and 950-954 because the same-sex marriage between Mr Leung and Mr Adams in New Zealand was not legally recognised as a marriage under Hong Kong law and therefore Mr Adams was not recognised as Mr Leung's spouse for the purposes of those regulations.

(c) *The differential treatment is based on sexual orientation*

46. The Benefits Decision manifests a difference in treatment accorded to Mr Leung, who has entered into a same-sex marriage with Mr Adams in New Zealand, when compared to other civil servants who have entered into valid and legally recognised heterosexual marriages (whether in Hong Kong or overseas) under Hong Kong law. On the face of the matter, the differential treatment is based simply on the marital status of the officer in question.

47. On behalf of the Secretary, Ms Wong argues that the true eligibility criterion for the spousal benefits under the relevant CSRs is a legal marital status (see paragraph 15 of the Note). It is further argued that the special status conferred by marriage is well recognised and it is legitimate to use the status of marriage as a criterion in relation to benefits and fiscal treatment (see paragraph 16 of the Note).

48. That a special legal, and social, status is conferred by marriage cannot be denied.

(1) In *Re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, which raised the question of the constitutionality of a fixed rule which denied unmarried couples from the process of being assessed as potential adoptive parents, Lord Hoffmann stated the following at paragraph 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.'"

(2) In the joint judgment of Dame Elizabeth Butler-Sloss P and Robert Walker LJ in *Bellinger v Bellinger (Attorney General intervening)* [2002] Fam 150, a case concerning the validity of a marriage between a transsexual female and a male person, the following was said at paragraph 99:-

> "We are however concerned with legal recognition of marriage which, like divorce, is a matter of status and is not for the spouses alone to decide. It affects society and is a question of public policy. For that reason, even if for no other reason, marriage is in a special position and is different from the change of gender on a driving licence, social security payments book and so on. Birth, adoption, marriage, divorce or nullity and death have to be registered… Status is not conferred only by a person upon himself; it has to be recognised by society."

(3) When that case reached the House of Lords ([2003] 2 AC 467), Lord Hope of Craighead observed, at paragraph 58 of the judgment, that "… the law of marriage exists in order to define the circumstances in which the public status that follows from a valid marriage may be acquired."

(4) In his recent judgment in *QT v Director of Immigration* [2016] 2 HKLRD 583, Au J referred to the above cases in footnote 9 and stated in paragraph 26 that being married is a special legal status which gives the married couple new legal rights and obligations with regard to the rest of the public.

49. A combination of two factors means, however, that the special legal status of being married as recognised by Hong Kong law would not be achievable by Mr Leung.

50. First, it is clear, and not in dispute, that Hong Kong law does not recognise same-sex marriages. This can be seen clearly from the following statutory provisions:-

(1) Section 40 of the *Marriage Ordinance* (Cap 181) –

> "(1)Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage.
>
> (2) The expression 'Christian marriage or the civil equivalent of a Christian marriage' implies a formal ceremony recognized by the law as involving the voluntary union for life of one man and one woman to the exclusion of all others."

(2) Section 20(1)(d) of the *Matrimonial Causes Ordinance* (Cap 179) –

> "A marriage which takes place after 30 June 1972 shall be void on any of the following grounds only –
>
> (d) that the parties are not respectively male and female."

51. In the joint judgment of Ma CJ and Ribeiro PJ in *W v Registrar of Marriages* [2013] 3 HKLRD 90, at paragraph 63, reference was made to the 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" (see also paragraph 25 of that judgment). Further, at paragraph 65, it was stated that "[i]t is in the nature of the institution of marriage that it must be subject to legal regulation, for instance, as to marriage having to be monogamous and between a man and a woman …".

52. For the purpose of the present discussion, it is not necessary to consider the fact that, in some contexts and for certain specific purposes, a polygamous heterosexual marriage to which a male person is a party and valid under his personal law may be recognised under various statute laws in Hong Kong (for example, Section 2(1) of the *Pension Ordinance* (Cap 89), Section 2(1) of the *Pension Benefits Ordinance* (Cap 99), and Section 2(1) of the *Surviving Spouses' and Children's Pension Ordinance* (Cap 79)), because no such marriage is involved in the present case.

53. Second, due to his sexual orientation, Mr Leung cannot, or cannot be expected to, enter into a heterosexual marriage.

54. Seen in this light, the difference in treatment accorded to Mr Leung should, in my view, be regarded as being based, at least indirectly, on his sexual orientation. Support for this view can be found in:-

(1) the decision of the Privy Council in *Rodriguez v Minister of Housing of Gibraltar* [2009] UKPC 52; and

(2) the decision of the UK Supreme Court in *Bull v Hall* [2013] UKSC 73.

55. In *Rodriguez v Minister of Housing of Gibraltar*:

(1) The tenant of a government flat who lived there with her same-sex partner challenged a Gibraltar government policy under which joint tenancies in respect of a government flat would only be granted to couples if they were married to one another or had a child in common.

(2) The challenge was advanced on the basis that the policy was contrary to (i) Section 7 of the Constitution of Gibraltar (protection of privacy of home and other property), and (ii) Section 14 thereof (protection from discrimination on prohibited grounds, including race, caste, place of or social origin, political or other opinions

or affiliations, colour, language, sex, creed, properly, birth or other status, or such other grounds as the European Court of Human Rights might, from time to time, determine to be discriminatory).

(3) Under the legislation there in force, if one of a married couple died and the deceased was, prior to his/her death, a tenant of a government flat, the surviving spouse would have a statutory right to be granted a new tenancy in respect of the flat. However, this right was denied to the survivor of a same-sex couple who were unable to marry or enter into a civil partnership in Gibraltar (at that time).

(4) In so far as the granting of joint tenancies to couples was concerned, the relevant Gibraltar government policy was as follows:-

> "Applications for joint tenancies are generally approved if the application is made by a married partner, parent, adult child or common law partner of the tenant. The protection of the family and in particular children is considered of prime importance… In the case of common law partners approval is only granted if the common law partner of the tenant and the tenant have at least one minor child in common living with them … The reason for granting joint tenancies to common law partners with children in common is to protect the interests of the children by providing each of the parents with equal tenancy rights and in the spirit of protection of the family… Similar applications by common law heterosexual partners who do not have children in common are not favourably considered."

(5) It was held by the Privy Council that the policy was discriminatory. Delivering the opinion of the Board, Lady Hale stated at paragraph 19 as follows:-

> "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, as Dudley J found, 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. As Ackermann J put it in the South African Constitutional Court decision in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [2000] 4 LRC 292, at para 54, the impact of this denial

'constitutes a crass, blunt, cruel and serious invasion of their dignity'."

(6) In short, the relevant policy amounted to a form of "indirect discrimination", because homosexual couples would not be able to get married or have children in common and therefore the effect of the policy would be more severe on them than on other unmarried, heterosexual, couples.

(7) The Board also considered that the policy could not be "justified" and was therefore in contravention of Sections 7 and 14 of the Constitution of Gibraltar. I shall come back to the issue of justification later in this judgment.

56. In *Bull v Hall*:-

(1) A same-sex couple who had entered into a civil partnership in the UK (which has been legally permissible since the coming into force of the *Civil Partnership Act 2004* on 5 December 2005) complained that they were unlawfully discriminated against by devoted Christian hotel keepers who refused to rent a double-bedded room to them because they sincerely believed that "the only divinely ordained sexual relationship is that between a man and a woman within the bonds of matrimony". Accordingly, their booking rule provided that double accommodation would be let to heterosexual married couples only, but twin bedded and single rooms would be let to any person regardless of marital status or sexual orientation.

(2) The issues were –

(a) whether there was direct or indirect discrimination on the ground of sexual orientation under Regulation 3 of the *Equality Act (Sexual Orientation) Regulations 2007* made under the *Equality Act 2006;*

(b) whether the discrimination, if indirect, could be justified; and

(c) whether the Regulations were incompatible with the hotel keepers' right to manifest their religious beliefs under Article 9 of the *European Convention on Human Rights.*

(3) The UK Supreme Court held (i) by a majority (Lord Neuberger and Lord Hughes dissenting) that there was "direct" discrimination on the ground of sexual orientation, notwithstanding the fact that the hotel keepers would apply the same policy to refuse to let double bedded rooms to unmarried opposite sex couples, and (ii) unanimously that there was (at least) "indirect" discrimination on the ground of sexual orientation.

(4) It was further held, unanimously, that (i) if hotel keepers' policy amounted to indirect discrimination it could not be justified, and (ii) the limitation of the hotel keepers' right to manifest their religious beliefs by the Regulations was a proportional means of achieving the legitimate aim of protection of the right of the same-sex couple not to be discriminated against on the ground of their sexual orientation.

57. Much of the judgment of the UK Supreme Court concerned the distinction between "direct" and "indirect" discrimination, and the question of whether the fact that the same-sex couple had entered into a civil partnership turned the case into one of direct discrimination. The niceties of the distinction between direct and indirect discrimination, which appears in Regulation 3 of the *Equality Act (Sexual Orientation) Regulations 2007* but not in BL 25, BOR 1(1) or BOR 22, are not important for our present purpose because those equality provisions in the Basic Law and Hong Kong Bill of Rights could be violated by either direct or indirect discrimination (see the opinion of Lady Hale in *Rodriguez v Minister of Housing of Gibraltar* quoted in paragraph 55(5) above).

58. The practice of the hotel keepers in *Bull v Hall* was (at least) indirect discrimination based on sexual orientation because, as observed by Lady Hale at paragraph 33 of her judgment –

> "It is not disputed that, if this is not direct discrimination, it is indirect discrimination within the meaning of regulation 3(3). The policy of letting double-bedded rooms only to married couples, while applied to heterosexual and homosexual people alike, undoubtedly puts homosexual people as a group at a serious disadvantage when compared with heterosexuals, as they cannot enter into a status which Mr and Mrs Bull would regard as marriage. It undoubtedly put both Mr Preddy and Mr Hall at a disadvantage."

59. The following observations of Lord Toulson at paragraph 68 of his judgment in *Bull v Hall* also explain why it is not an answer for the Secretary to say in the present case that Mr Leung and Mr Adams are treated no differently from other unmarried couples in the civil service: -

> "… it is true that in the case of unmarried heterosexuals it is not their sexual orientation which causes Mr and Mrs Bull to treat them differently from married heterosexuals, but the fact that the couple have not chosen to marry. But it is a *non sequitur* to reason from this that the differential treatment of persons in a civil partnership from that of married heterosexuals (or, similarly, of same sex married couples from opposite sex married couples) is not due to their sexual orientation, when that is the very factor which separates them."

60. In all, I am of the view that the differential treatment in the present case is based, indirectly, on sexual orientation.

(d) *The differential treatment cannot be justified*

61. On behalf of the Secretary, Ms Wong argues that:-

(1) Mr Leung and Mr Adams should be treated as an "unmarried couple";

(2) as such, they are not in an analogous, or relevantly similar, situation to a legally married couple;

(3) there is no requirement to treat non-analogous situations in the same or similar way; and

(4) anyhow, it is legitimate to accord differential treatment based on the special status of marriage in relation to benefits and fiscal treatment (see paragraphs 90 to 96 of the Skeleton Submissions for the Putative Respondents dated 12 December 2016, "the Respondents' Submissions").

62. The above argument is premised on the contention that the true eligibility criterion for the spousal benefits under the relevant CSRs is the legal marital status of the officer in question according to the law of Hong Kong (see paragraphs 88 to 89 of the Respondents' Submissions).

63. For the reasons explained above, although the differential treatment is, on the face of the matter, based on the legal marital status of the officer, I consider that it should also be regarded as being based, indirectly, on sexual orientation. The question which arises is whether it is justifiable to accord differential treatment in respect of the "spousal" benefits under the CSRs based on sexual orientation.

64. Ms Wong argues that such differential treatment is justifiable for essentially three reasons:-

(1) in the absence of any legislation to recognise same-sex unions and regulate the rights and obligations of same-sex couples, it is legitimate and justified for the Secretary to act in line with the prevailing marriage law of Hong Kong in the administration of the CSRs;

(2) any decision to the contrary would require the Secretary to have regard to same-sex marriages despite their invalidity under Hong Kong law, or to at least

indirectly recognise same-sex marriages as valid in Hong Kong "through the backdoor", which cannot be right; and

(3) the Secretary's policy is rationally connected to and is no more than reasonably necessary to achieve the legitimate aims of not undermining the integrity of the institution of marriage as understood in Hong Kong and of ensuring overall consistency with Hong Kong matrimonial laws hence safeguarding "public order (*ordre public*)" (see paragraphs 104 to 109 of the Respondents' Submissions).

65. I am not persuaded that these reasons provide sufficient justification for the differential treatment in the present case. The first and second reasons can be taken together. The line as drawn by the Secretary between those who are legally married under Hong Kong law and those who are not begs the question of whether it is legitimate or justifiable to accord differential treatment based on sexual orientation, because homosexual couples are, by definition, unable to be legally married, or recognised as legally married, under Hong Kong law. There is, so far as I can see, nothing illegal or unlawful for the Secretary to accord the same spousal benefits to homosexual couples who are legally married under foreign laws. Neither can I see anything inherently wrong or impermissible, from a legal point of view, for the Secretary to have regard to, or indirectly recognise, an overseas same-sex marriage which is legally valid under the law of the place at which the marriage is contracted or celebrated. Wholly different considerations arise in respect of "unmarried" couples which the court is not concerned with in the present case.

66. In so far as the third reason is concerned, I am unable to see how the denial of "spousal" benefits to homosexual couples who are legally married under foreign laws could or would serve the purpose of not undermining the integrity of the institution of marriage in Hong Kong, or protecting the institution of the traditional family. As stated by Lady Hale at paragraph 26 of the opinion of the Board in *Rodriguez v Minister of Housing of Gibraltar*:

> "No-one doubts that the 'protection of the family in the traditional sense' is capable of being a legitimate and weighty aim: see *Karner v Austria* (2003) 38 EHRR 528, para 40. Privileging marriage can of course have the legitimate aim of encouraging opposite sex couples to enter into the status which the State considers to be the most appropriate and beneficial legal framework within which to conduct their common lives. Privileging civil partnership could have the same legitimate aim for same sex couples. But, to paraphrase Buxton LJ in the *Court of Appeal's decision in Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533, [2003] Ch 380, at para 21, it is difficult to see how heterosexuals will be encouraged to marry by the knowledge that some associated benefit is being denied to homosexuals. They will not be saying to one another "let's get married because we will get this benefit and our gay friends won't". Moreover, as Baroness Hale

said in the same case in the House of Lords [2004] UKHL 30, [2004] 2 AC 557, at para 143:

> 'The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to 'everyone', including homosexuals, by article 8 since Dudgeon v United Kingdom (1981) 4 EHRR 149. If it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships … Society wants its intimate relationships, particularly but not only if there are children involved, to be stable, responsible and secure. It is the transient, irresponsible and insecure relationships which cause us so much concern.'"

67. At this juncture, I should also deal with two decisions relied upon by Ms Wong in support of the Secretary's case on justification, namely:-

(1) the decision of the House of Lords in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; and

(2) the recent decision of Au J in *QT v Director of Immigration* [2016] 2 HKLRD 583.

68. In *Ghaidan v Godin-Mendoza*:-

(1) The survivor of a homosexual (unmarried) couple challenged a law which denied him the entitlement to become a statutory tenant by succession upon the death of his partner who was, prior to his death, a protected tenant of a dwelling-house.

(2) Under paragraph 2(1) of Schedule 1 to the *Rent Act 1977*, the surviving "spouse" (if any) of the original tenant of a dwelling-house was entitled, after the death of the original tenant, to become the statutory tenant if and so long as he or she occupied the dwelling-house as his or her residence. Paragraph 2(2) of that schedule further provided that for the purpose of paragraph 2, a person who was living with the original tenant "as his or her wife or husband" was to be treated as the spouse of the original tenant. In other words, the benefit of a statutory tenancy was given not only to the "spouse" of the original deceased tenant, but extended to a person who, although not strictly a spouse, was living with the original tenant as his or her wife or husband.

(3) It was held by the House of Lords that paragraph 2(2) of Schedule 1 to the *Rent Act 1977*, on its ordinary meaning, treated survivors of homosexual partnerships less favourably than survivors of heterosexual partnerships without any rational or fair ground for such distinction, thereby infringing Articles 8 and 14 of the European Convention on Human Rights, and that (Lord Millet dissenting)

paragraph 2(2) was to be read as extending the benefit of statutory tenancy to same-sex partners by reason of Section 3 of the *Human Rights Act 1998*.

69. *Ghaidan v Godin-Mendoza* is, properly understood, a straight forward case of discrimination based on sexual orientation. Parliament expressly provided that the status of a "spouse" (as that term is ordinarily understood) was not a pre-requisite to a statutory tenancy arising in favour of the survivor of an unmarried couple. That being the position, to differentiate between the survivors of homosexual couples and heterosexual couples would plainly be differentiation based on sexual orientation.

70. Ms Wong places particular reliance on the following observations of Baroness Hale of Richmond:

> "138 We are not here concerned with a difference in treatment between married and unmarried couples. The European Court of Human Rights accepts that the protection of the 'traditional family' is in principle a legitimate aim: see *Karner v Austria [2003] 2 FLR 623* , 630, para 40. The traditional family is constituted by marriage. The Convention itself, in article 12, singles out the married family for special protection by guaranteeing to everyone the right to marry and found a family. Had paragraph 2 of Schedule 1 to the Rent Act 1977 stopped at protecting the surviving spouse, it might have been easier to say that a homosexual couple were not in an analogous situation. But it did not. It extended the protection to survivors of a relationship which was not marriage but was sufficiently like marriage to qualify for the same protection. It has therefore to be asked whether opposite and same sex survivors are in an analogous situation for this purpose.
>
> 143 … What is really meant by the 'protection' of the traditional family is the *encouragement* of people to form traditional families and the *discouragement* of people from forming others. There are many reasons why it might be legitimate to encourage people to marry and to discourage them from living together without marrying. These reasons might have justified the Act in stopping short at marriage. Once it went beyond marriage to unmarried relationships, the aim would have to be encouraging one sort of unmarried relationship and discouraging another."

71. It is important to note, however, that when Baroness Hale said that the protection of the traditional family was, in principle, a legitimate aim which might justify differential treatment of "married" and "unmarried" couples, she was there referring generally to married and married couples. She was not saying that homosexual married couples whose marriages were valid under foreign laws but not recognised in the UK should be treated or regarded as "unmarried" couples. In any event, whether a differential measure can be regarded as contributing to the protection of the

traditional family must depend on the nature of the measure in question. As earlier mentioned, I am unable to see how the differential measure in the present case (namely, making available benefits to spouses whose marriages are legally recognised under Hong Kong law but denying the same to homosexual married couples whose marriages are valid under foreign laws but not recognised here) would serve to protect the traditional family.

72. *QT v Director of Immigration* concerned the question of whether it was permissible for the Director of Immigration to differentiate between (i) a "heterosexual spouse" and (ii) a "homosexual civil partner" of a sponsor who was working in Hong Kong under his dependant policy which permitted a "spouse", who did not have any right of residence in Hong Kong, to join the sponsor in Hong Kong as his/her dependent.

73. The Director's justification for the differential treatment in that case was that "it pursues the legitimate aim of striking a balance between (1) maintaining Hong Kong's continued ability to attract people with the right talent and skills to come to Hong Kong to work (by giving them the choice of bringing in their closest dependants to live with them in Hong Kong and to care for and support them in Hong Kong); and (2) the need for a system of effective, strict and stringent immigration control in the light of Hong Kong's small geographical size, huge population, substantial intake of immigrants, relatively high per capita income and living standard, and local living and job market conditions, which bring constant and high pressure on Hong Kong's society as a whole in particular the labour market, social benefits system, housing, education and infrastructure."

74. Au J held that the two classes of persons, namely, (i) unmarried parties to a homosexual (or heterosexual) relationship, and (ii) married persons were in sufficiently different positions considered in the proper context and with reference to the Director's justification such as to justify differential treatment under the dependant policy. In coming to this conclusion, Au J placed considerable reliance on the fact that, in the context of immigration control, the Director was entitled to draw a bright line, and in doing so, he was also entitled to take into account considerations relating to clarity, certainty of the line and administrative convenience of its implementation, and have regard to Hong Kong's matrimonial laws which only recognised heterosexual and monogamous marriages (see paragraphs 36 to 41 of the judgment in *QT*).

75. In my view, *QT* is plainly distinguishable from the present case because: (i) the differential treatment in *QT* is in the context of immigration control in respect of which, according to well established authorities, the Director has been entrusted with a broad discretion under

Article 145 of the Basic Law; and (ii) of the particular justification advanced by the Director in that case. No similar considerations arise in the present case.

76. I am also unable to see how the aim of ensuring overall consistency with Hong Kong matrimonial laws can legitimately justify the imposition of discriminatory measures relating to conferral of civil service benefits based on sexual orientation.

77. Having reached the above conclusions, it is not necessary for me to deal with the fourth element in the proportionality analysis which, as earlier mentioned, must also be satisfied when considering whether a differential treatment can be justified in the context of a discrimination complaint.

78. In all, I am of the view that the Benefits Decision unlawfully discriminate against Mr Leung based on his sexual orientation.

THE TAX DECISION DOES NOT ENGAGE THE RIGHT TO EQUALITY

(a) <u>What the Tax Decision decided?</u>

79. It is clear, from Mr Leung's attempt to input Mr Adams' name as his spouse in the e-tax return and also from his complaint to the Commissioner as contained in his email dated 1 June 2015 (namely, that he could not enter his spouse's name with a name prefix that was the same as his), that what Mr Leung was seeking was "recognition" of his same-sex marriage with Mr Adams as a marriage for the purposes of the IRO. That was why, in that email, Mr Leung relied on the Commissioner's guideline for completing a tax return, and in a subsequent email to the Commissioner dated 9 June 2015 he relied on the definition of "marriage" in Section 2 of the IRO, in support of his contention that his same-sex marriage was a "marriage" for the purposes of the IRO and should be recognised as such.

80. There is, in my view, a real distinction between (i) a contention that Mr Leung's same-sex marriage with Mr Adams "is" a marriage for the purposes of the IRO, and (b) a contention that the same-sex marriage should be "treated" as a marriage (even though it is not) for the purposes of the IRO. The former raises essentially a question of construction of statute, whereas the latter raises essentially a question of right.

81. In the Commissioner's email to Mr Leung dated 9 June 2015 in which the Tax Decision was embodied, the Commissioner was making a determination that Mr Leung's same-sex marriage was not a marriage for the purposes of the IRO. The Commissioner was not saying to Mr Leung that his same-sex marriage could not, or would not, be "treated" as a marriage, although I believe it is pretty obvious that such would have been the Commissioner's response had Mr Leung directly raised that matter with the Commissioner. This having been said, I do not consider that it is permissible to reconstitute the Tax Decision in order to read it as a decision refusing to treat Mr Leung's same-sex marriage as a valid marriage for the purposes of the IRO, however desirable it may be for the court to reach a decision on whether such (reconstituted) decision would amount to an unlawful discrimination against Mr Leung.

82. Although, as a consequence of the Tax Decision, Mr Leung was not permitted to elect joint assessment with Mr Adams as a married couple for the year of assessment of 2014/15, no prejudice was caused to them. As mentioned in the evidence filed on behalf of the Commissioner and as admitted by Mr Leung, it would have made no difference to their total salaries tax liabilities for that year of assessment even if such election could be made (see paragraph 45 of the affidavit of Kung Chun Fai Frederick and paragraph 80 of the first affirmation of Mr Leung).

(b) *The Tax Decision is correct as a matter of construction of statute*

83. The expression "marriage" in the IRO is defined to mean –

(a) any marriage recognized by the law of Hong Kong; or

(b) any marriage, whether or not so recognized, entered into outside Hong Kong according to the law of the place where it was entered into and between persons having the capacity to do so,

but shall not, in the case of a marriage which is both potentially and actually polygamous, include marriage between a man and any wife other than the principal wife.

84. The above definition of "marriage" should be read together with, and in the light of, the following definitions in Section 2(1) of the IRO:-

(1) "husband" means "a married man whose marriage is a marriage within the meaning of this section";

(2) "wife" means "a married woman whose marriage is a marriage within the meaning of this section"; and

(3) "spouse" means "a husband or wife".

85. To construe the expression "marriage" in the IRO as covering same-sex marriages would run counter against the well established meaning of that word for common law and constitutional purposes as involving the voluntary union for life of one man and one woman to the exclusion of all others (see *W v Registrar of Marriages*, at paragraph 63 *per* Ma CJ and Ribeiro PJ).

86. In my view, the Commissioner's decision that Mr Leung's same-sex marriage with Mr Adams is not a marriage for the purposes of the IRO is correct as a matter of construction of the IRO. This was also the view reached by Au J in *QT v Director of Immigration* (see paragraphs 77 to 83 of his judgment).

(c) The right to equality is not engaged

87. As pointed out by Ms Wong, the present application is an application for judicial review of the Tax Decision, not the definition of the word "marriage" in the IRO, or the provisions in the IRO that provide for joint assessment of married couples and the married person's allowance, or any other provisions in that Ordinance.

88. The Tax Decision, to the effect that Mr Leung's same-sex marriage is not a "marriage" for the purposes of the IRO, is correct as a matter of construction of that Ordinance. Whether the equality provisions in the Basic Law or the Hong Kong Bill of Rights would require a different interpretation to be given to that word in the IRO, or the relevant provisions in the IRO to be struck down or amended, do not arise for determination in Mr Leung's present challenge against the Tax Decision, and I express no view on those questions.

89. I accept Ms Wong's submissions that the issue raised by Mr Leung in his challenge against the Tax Decision is one of construction of the definition of "marriage" in the IRO, and if the Commissioner's interpretation is correct that should be the end of the matter (see paragraphs 22 and 23 of the Note).

90. In all, Mr Leung fails in his challenge against the Tax Decision in so far as it is contended that it violates his right to equality (or not to be discriminated against based on sexual orientation) under BL 25, BOR 1(1), BOR 22, or common law.

OTHER GROUNDS

91. Having reached the conclusion that the Benefits Decision amounts to unlawful discrimination against Mr Leung based on his sexual orientation, it is not necessary for me to consider his other grounds of complaint against the Benefits Decision. I would merely observe that:-

(1) The complaint based on the SDO cannot get off the ground, because the SDO is concerned with discrimination on the ground of "sex", and not "sexual orientation" (see *Smith v Gardner Merchant Ltd* [1998] 3 All ER 852; *MacDonald v Advocate General for Scotland* [2003] UKHL 34, at paragraphs 6-7 *per* Lord Nicholls).

(2) The complaint based on BL 37 likewise has no substance –

(a) Whether to recognise same-sex marriages as legally valid marriages is, ultimately, a social policy decision for the legislature, and not for the court.

(b) There is, so far as I can see, nothing in either the Basic Law or the Hong Kong Bill of Rights which requires that Hong Kong law must recognise same-sex marriages as legally valid marriages. In this regard, Mr Kat has expressly confirmed, on behalf of Mr Leung, that he does not challenge the law or constitutional order of marriage in Hong Kong (see paragraph 4(f)(i) of his Supplemental Note – Further and Possible Contrary Arguments of Law dated 31 December 2015, and paragraph 4 of Mr Kat's Skeleton Argument dated 8 December 2016).

(c) It may also be noted that it is clearly established, in the jurisprudence of the European Court of Human Rights, that neither Articles 8, 12 nor 14 of the European Convention on Human Rights ("ECHR"), relating respectively to the "right to respect for his private and family life", the "right to marry and to found a family" and the "right to enjoyment of the rights and freedoms … without discrimination on any ground", requires that a right to marry or form some other legal union be recognised for same-sex couples (see *Schalk v Austria* (2011) 53 EHRR 20 at paragraphs 61-64 and 99-109; *X v Austria* (2013) 57 EHRR 14 at paragraph 106; *Boeckel v Germany* (2013) 57 EHRR SE 3 at paragraph 28; *Gas v France* (2014) 59 EHRR 22 at paragraph 66; *Hamalainen v Finland*

(2014) 37 BHRC 55 at paragraphs 71-75; *Oliari v Italy (Application Nos 18766 and 36030/11, 21 July 2015)* at paragraphs 177 and 189-194).

(d) In *W v Registrar of Marriages*, Ma CJ and Ribeiro PJ, at paragraphs 63 and 64 of their judgment in the Court of Final Appeal, referred to Article 12 of the ECHR which secured the fundamental right of a man and woman to marry and found a family, and said that the same plainly applied to Hong Kong under both BL 37 and BOR 19(2).

(e) I do not therefore consider that the Benefits Decision can in any way be said to infringe Mr Leung's right to marry or raise a family under BL 37.

92. In so far as the Tax Decision is concerned:-

(1) I have already dealt with the issue relating to the true construction of Section 2(1) of the IRO.

(2) I do not see how the Commissioner's decision that Mr Leung's same-sex marriage with Mr Adams is not a "marriage" for the purposes of the IRO can be said to amount to an "arbitrary or unlawful interference with his privacy, family, home or correspondence, [or an] unlawful attack on his honour and reputation" under BOR 14.

DISPOSITION

93. In the absence of opposition to Mr Leung's application for an extension of time to apply for leave to apply for judicial review of the Benefits Decision and the Tax Decision, I grant the necessary extension of time.

94. I also grant Mr Leung leave to apply for judicial review of the Benefits Decision and the Tax Decision, because I consider the application to be reasonably arguable.

95. I allow Mr Leung's application for judicial review of the Benefits Decision, but reject his application in respect of the Tax Decision. I shall leave it to the parties to agree on the precise form of the order to give effect to this judgment, with liberty to apply in the event of disagreement. Given the implications of this judgment on the administration of the CSRs in relation to spousal benefits by the Secretary and to allow him sufficient time to consider whether he

wishes to make any application to this court or make other interim arrangements as may be necessary, I would direct that, subject to any further order of the court, the order to be made in this application shall only take effect on 1 September 2017.

96. I make an order *nisi* that the Secretary and the Commissioner shall pay 60% of Mr Leung's costs of this application, to be taxed on a party and party basis if not agreed, with certificate for two counsel. The deduction is made on account of the following matters:

(1) Mr Leung has succeeded in his application in respect of the Benefits Decision, but failed in respect of the Tax Decision, based on his right to equality under BL 25, BOR 1(1), BOR 22, and common law; and

(2) Mr Leung has also failed in his challenge against the Benefits Decision and/or Tax Decision on various other grounds.

97. Mr Leung's own costs are to be taxed in accordance with Legal Aid Regulations.

98. There is one other matter that I must to say before ending this judgment. The Form 86 in this case, as rightly criticised by Ms Wong, is exceedingly lengthy, protracted, repetitive and convoluted. It totally fails to satisfy the basic requirements of a proper form 86 as mentioned by Litton PJ in *Lau Kong Yung v Director of Immigration* (1999) 2 HKCFAR 300 at 340E-G, whose observations have recently been endorsed by the Court of Appeal in *Designing Hong Kong Limited v The Town Planning Board*, CACV 184/2015 (16 February 2017), at paragraph 68(2), and is an unhelpful document.

99. Lastly, it remains for me to thank counsel for the assistance that they rendered to the court at the hearing of this interesting application, as well as The International Commission of Jurists, who were granted leave to intervene by the order of Au J dated 7 December 2016 and filed written submissions on 8 December 2016 relating to the approach taken by the European Court of Human Rights on various issues raised in this application.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Mr Nigel Kat, SC and Mr Azan Marwah, instructed by Daly & Associates, assigned by Director of Legal Aid, for the applicant

Ms Lisa Wong, SC and Mr Johnny Ma, instructed by Department of Justice, for the 1st and 2nd respondents

Hogan Lovells, for The International Commission of Jurists