

HONG KONG CASE UPDATE: SHAM TSZ KIT V SECRETARY FOR JUSTICE

Hong Kong Court Refused to Grant a Wholesale Recognition of Right to Marry for Same-Sex Couples

To Our Clients and Friends:

Two judgments were handed down by the Court of First Instance (CFI) of the High Court of Hong Kong on 18 September 2020 concerning two separate judicial review applications seeking to advance the equality of rights of members of the LGBT community. The CFI granted the relief sought concerning certain statutes on intestacy and inheritance in one of these two cases (please see our Client Alert “*Hong Kong Case Update: Ng Hon Lam Edgar v Secretary for Justice*”), but it rejected the declaratory relief seeking the recognition of same-sex marriage in Hong Kong generally in the case *Sham Tsz Kit v Secretary for Justice* [2020] HKCFI 2411 (*Sham* case), which judgment (Judgment) we will discuss in this Client Alert.

It appears that whilst the Hong Kong court is prepared to consider whether certain specific statute or policy of the government may constitute unlawful discrimination on the basis of sexual orientation, it is not prepared to grant a wholesale recognition to same-sex marriage under the laws of Hong Kong at this stage.

BACKGROUND

Mr Sham, a male Hong Kong permanent resident, and his same-sex partner got married in the United States in November 2013. The applicant submitted that they would have married in Hong Kong if the laws had allowed it. He contended that it was highly unfair and discriminatory against same-sex couples that the current Hong Kong law does not recognize same-sex marriage, thereby depriving same-sex couples of the rights and benefits currently enjoyed by opposite-sex couples.[1]

On 22 November 2018, he commenced a judicial review application to challenge the constitutionality of two statutory provisions, namely s 4 of the Marriage Ordinance (Cap 181) and s 20(1)(d) of the Matrimonial Causes Ordinance (Cap 179).[2]

Mr Sham put forward three alternative grounds of judicial review:

- **Ground 1:** the “exclusion of same-sex couples from the institution of marriage constitutes a violation of the right to equality” as protected under the Hong Kong Bill of Rights (BOR) and the Basic Law (BL).
- **Ground 2:** “the laws of Hong Kong, in so far as they do not allow same-sex couples to marry and fail to provide any alternative means of legal recognition of same-sex partnerships” constitute a violation of the right to privacy and the right to equality as protected by the BOR and/or the BL.

- **Ground 3:** “the laws of Hong Kong, in so far as they do not recognize foreign same-sex marriages, constitute a violation of the right to equality” as protected under the BOR and the BL.[3]

Since another case, *MK v Government of the HKSAR* [2019] 5 HKLRD 259 (*MK case*), raised the same or similar issues under Grounds 1 and 2, the court stayed the proceedings of the *Sham* case pending the determination of the *MK* case.

On 18 October 2019, the court dismissed the judicial review made in the *MK* case, which effectively ruled against Grounds 1 and 2, holding that:

- It is not a violation of any constitutional rights for same-sex couples to be denied the right of marriage under the laws of Hong Kong.
- The government is subject to no positive legal obligation to provide an alternative legal framework giving same-sex married couples the same rights and benefits enjoyed by opposite-sex married couples.[4]

In view of the determination of the *MK* case, the court lifted the stay of proceedings in the *Sham* case in so far as it applies to Ground 3 on 22 November 2019. It was argued in support of Ground 3 in the trial that, the recognition by the laws of Hong Kong of foreign opposite-sex marriages but not foreign same-sex marriages constitutes differential treatment on the prohibited ground of sexual orientation, and the differential treatment is not justified as it does not pass the four-step justification test.[5]

THE DECISION

In determining the *Sham* case, the CFI adopted the two-stage approach endorsed by the Court of Final Appeal (CFA) of Hong Kong in two recent decisions, *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127 (*Leung case*) and *QT v Director of Immigration* (2018) 21 HKCFAR 324 (*QT case*). Please see our Client Alert “Hong Kong Case Update: *Ng Hon Lam Edgar v Secretary for Justice*” for an explanation of the two-stage approach.

The CFI held that:

- Whether foreign opposite-sex marriages and foreign same-sex marriages are relevant comparators depends on the subject matter being considered and the relevant context. It cannot be said in a vacuum, and there is no general rule, that the two groups of persons in foreign opposite-sex marriages and foreign same-sex marriages are in an analogous or a comparable position.[6]
- Similarly, whether any differential treatment is based on a prohibited ground and whether such differential treatment (if any) can be justified upon an analysis through the four-step justification test depends on specific facts and context.[7]

The CFI therefore rejected the general declaration sought that the non-recognition of foreign same-sex marriages under Hong Kong law violates the constitutional right to equality. Upon the invitation of the applicant’s Counsel, (so as to allow any appeal to be pursued on all grounds in one-go), the CFI also lifted the stay of proceedings in so far as it relates to Grounds 1 and 2 of the judicial review and dismissed them for the reasons given in the *MK* case.[8]

COMMENT

As with the decision made the *MK* case (which followed, *inter alia*, the CFA decisions in the *Leung* case and the *QT* case), the CFI endorsed in the *Sham* case that whilst the right to marriage of opposite-sex couples is protected by the constitution, no such protection is accorded to same-sex couples. Same-sex marriages remain invalid marriages in Hong Kong as the law stands now.

It is apparent that the Hong Kong court is open to consider challenges against specific legislation, or policies or decisions of the government or other public bodies on the ground of unlawful discrimination based on sexual orientation.[9] In fact, the CFI pointed out in the Judgment, some specific government policies and/or statutes may be held unconstitutional upon challenge.[10] However, the court is not prepared to grant a general declaration to the effect that same-sex marriages have the same legal recognition as opposite-sex marriages regardless of the subject matter under consideration and the relevant context.[11]

[1] §§ 4-6, the Judgment.

[2] § 7, the Judgment.

s 40 of the Marriage Ordinance (Cap 181) states that “(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 (基督教婚禮或相等的世俗婚禮) 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.”

s 20(1)(d) of the Matrimonial Causes Ordinance (Cap 179) provides that “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.”

[3] § 8, the Judgment.

[4] § 10, the Judgment.

[5] §§ 11 and 12, the Judgment. Please see our Client Alert “Hong Kong Case Update: *Ng Hon Lam Edgar v Secretary for Justice*” for an explanation of the four-step justification test.

[6] §§ 21 and 22, the Judgment.

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[7] §§ 23 to 25, the Judgment.

[8] §§ 27 and 28, the Judgment.

[9] See § 57 of the judgment of the *MK* case.

[10] § 26, the Judgment.

[11] § 26, the Judgment.



Gibson Dunn's lawyers are available to assist in addressing any questions you may have regarding these developments. Please contact the Gibson Dunn lawyer with whom you usually work, or the authors and the following lawyers in the Litigation Practice Group of the firm in Hong Kong:

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