

Client Alert

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No clear cut victory for LGBT community with conflicting cases on same-sex rights

Same-sex visa rights confirmed by highest Hong Kong court – *QT v Director of Immigration (2018)*

The Court of Final Appeal (**CFA**) has confirmed that same-sex couples who are lawfully married or in a civil partnership overseas are eligible for dependant visas, even though same-sex marriage / civil partnership is not recognised in Hong Kong. The CFA agreed with the Court of Appeal's decision that the Director of Immigration's refusal to award a dependant visa to a same-sex couple was indirectly discriminatory, in breach of Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights.

Key Takeaways

- **LGBT rights:** Whilst the case has been hailed as a huge step forward for LGBT rights in Hong Kong, the outcome could arguably have been very different had the Director of Immigration relied on other arguments to justify the indirect discrimination. In *Leung Chun Kwong v Secretary for the Civil Service (2018)* (see in more detail below) the Secretary of Civil Service successfully defended an appeal by an employee, Mr. Leung, based on the exact same grounds by arguing the differential treatment was justified to protect the special status of marriage. It therefore remains to be seen whether the decision has any impact on increased recognition of LGBT rights in other areas.
- **Confirmation of change in immigration policy:** The Director of Immigration (**Director**) has released a statement confirming the government is now reviewing its dependant immigration policy to give effect to the CFA decision. Pending completion of the said policy review, the Immigration Department will continue to implement its interim arrangement for same-sex visa dependant applications, granting successful applicants permission to remain in Hong Kong for 12 months or in line with their sponsors' limit of stay (if applicable), whichever is shorter. During this period, the dependant may take up employment, establish or join in business or study in Hong Kong without the need for prior permission from the Director. The Immigration Department will complete a full policy review within a reasonable time. This should bring some clarity and certainty for same-sex couples seeking a dependant visa. It confirms the change in Hong Kong immigration policy and may lead to an increase in visa applications.

Background

QT and her partner, SS, had entered into a civil partnership in England which provides same-sex couples with the same legal rights as a marriage. SS was later offered employment by a company in Hong Kong. She applied for an employment visa with the Immigration Department, including QT as her accompanying dependant. QT's dependant visa application was rejected by the Director on the grounds that QT was not a "spouse" within the meaning of Hong Kong's Immigration Policy (**Policy**), and therefore did not meet the Eligibility Requirement.





QT applied for judicial review of the Director's decision in the Court of First Instance, which rejected her application. QT appealed to the Court of Appeal (CA), arguing that the decision not to grant her dependant visa was discriminatory and unjustified, in breach of Article 25 of the Basic Law (which provides that all Hong Kong residents will be equal before the law) and Article 22 of the Hong Kong Bill of Rights (which prohibits discrimination on any grounds). Treating same-sex couples who were legally married or in a civil partnership differently to heterosexual married couples put them at a serious and disproportionate disadvantage which was indirectly discriminatory.

QT's appeal was successful (for more detail see our update [here](#)) and so the Director appealed to Hong Kong's highest court, the CFA.

Court of Final Appeal Decision

The Director argued that the difference in treatment under the Policy was justified as it (i) encouraged skilled and talented individuals to join the Hong Kong workforce, accompanied by their dependants whilst at the same time (ii) maintaining strict immigration control. The Director claimed that it needed to be able to draw a "bright line" between those who do and those who do not qualify for dependant visas to promote legal certainty and administrative convenience. These were the same arguments the Director had pursued in the CA.

The CFA agreed with the CA that the Director's differential treatment based on the above arguments was not justified. Rejecting a dependant visa application because the couple are in a same-sex marriage / civil partnership does not promote the legitimate aim of strict immigration control. Whether or not a person is gay or heterosexual has no bearing on whether they are skilled or talented. Indeed, presumably SS has been granted a visa in Hong Kong because she has desirable talents or skills.

The "bright line" argument was also rejected. QT and SS are just as easily able to produce a civil partnership certificate that proves they are in a genuine same-sex partnership legally recognised overseas.

Status of marriage argument

The Director sought to introduce a new justification for the Policy at the CFA hearing, arguing that the Policy protected the special status of marriage which would be undermined if spousal benefits were conferred on same-sex couples. This submission was made based on the *Leung Chun Kwong v Secretary for the Civil Service (2018)* case (discussed in more detail below) which was published three days before the start of the Director's appeal.

The CFA refused to consider the status of marriage argument as part of the appeal, based on the late submission of the argument, as QT had not had time to consider or respond to the new argument. The CFA would only consider the immigration control and bright line argument when making its decision.

Civil Service's denial of same-sex benefits and joint tax assessment was justified – *Leung Chun Kwong v Secretary for the Civil Service (2018)*

The Civil Service's decision not provide an employee's same-sex partner access to spousal benefits, and refusal to assess the pair jointly for tax



purposes, was found by the CA to be indirectly discriminatory but the discrimination could be justified to uphold the special status of marriage in Hong Kong.

Key Takeaways

- **LGBT rights:** The case will be disappointing for advocates of LGBT rights not just because it denies same-sex couples rights in this context, but because of the Court's very clear reasons for doing so. The Court completely and unapologetically rejects the idea that Hong Kong is ready to legally recognise same-sex relationships. The decision in many ways is at odds with the recent *QT v Director of Immigration (2018)* decision set out above, however, as the judges themselves point out, the two cases were decided on different grounds. Mr. Leung will likely appeal the decision to the CFA, so it remains to be seen what the final outcome will be.

Background

Mr. Leung was employed as an immigration officer by the Civil Service, with his employment contract being subject to the Civil Service Regulations (**CSRs**). Mr. Leung married his partner, Mr. Adams, in New Zealand in 2014.

Under the CSRs, Mr. Leung and his "family" are entitled to certain welfare benefits, including medical and dental care, provided by the Hong Kong government. The definition of "family" in the CSRs referred to "the officer's spouse" After getting married in New Zealand, Mr. Leung applied to the Civil Service Bureau to change his marital status and obtain these welfare benefits for Mr. Adams. The Secretary for the Civil Service (**Secretary**) did not recognise the change of status and denied the benefits to Mr. Adams, stating that same-sex marriage fell outside the meaning of "marriage" under the CSRs. The Secretary claimed that, under the CSRs, "marriage" should be taken to mean "marriage" as set out in section 40 of the Marriage Ordinance, "a formal ceremony recognised by the law as involving the voluntary union of life of one man and one woman".

Separately, Mr. Leung applied to have his income jointly assessed with Mr. Adams as a married couple for tax purposes. The Commissioner of Inland Revenue rejected his application, stating that same-sex marriage was not regarded as a valid marriage for the purposes of the Inland Revenue Ordinance (**IRO**).

Mr. Leung applied for judicial review of both decisions, arguing they were discriminatory against him based on his sexual orientation and in breach of his right to equality under (i) Article 25 of the Basic Law (that all Hong Kong residents shall be equal before the law) (ii) Article 1(2) and 22 of Hong Kong Bill of Rights (which prohibits discrimination of any kind but binds government and public authorities only) and (iii) common law. The cases were heard together by the same judge.

Court of First Instance Decision

The Court of First Instance (**CFI**) found that the benefits decision amounted to unlawful indirect discrimination but the tax decision was lawful. For more detail on the CFI decision, see our alert [here](#).

The Civil Service appealed the benefits decision and Mr. Leung appealed the tax decision.



Court of Appeal Decision

The CA held that the benefits and tax decisions were indirectly discriminatory based on sexual orientation, but that this could be justified to uphold the special status of marriage, overturning the CFI's decision in relation to the spousal benefits.

IRO interpretation

Mr. Leung argued that the definition of marriage in the IRO could be construed to include same-sex marriage lawfully contracted outside of Hong Kong. The definition of "marriage" in the IRO included "...any marriage, whether or not so recognised, entered into outside Hong Kong according to the law of the place where it was entered into...".

Secondly Mr. Leung argued that the tax decision was unconstitutional as it discriminated against same-sex marriages. Tax does not fall within the "core rights" and obligations linked to marriage, which means the differential treatment must be justified.

The CA held that when considering the IRO as a whole, it was clear the definition of "marriage" in the IRO was intended to cover heterosexual marriage only. The IRO repeatedly refers to a "husband and wife" being able to elect for joint tax assessment. This interpretation of the IRO is consistent with the meaning "marriage" understood at all levels in Hong Kong law.

The CA then considered whether the right to joint tax assessment and the right to spousal benefits decisions were indirectly discriminatory under the Basic Law and Bill of Rights and if so, whether they could be justified.

Justification for different benefits and tax treatment

The CA held that the differential treatment Mr. Leung had received in relation to spousal benefits and joint tax assessment may constitute indirect discrimination based on sexual orientation. The CA then considered whether the indirect discrimination could be justified.

The CA held that the Civil Service restricting spousal benefits and joint tax assessment to heterosexual married couples was no more than necessary to protect the special status of marriage in Hong Kong. The Court relied heavily on this "special status" argument and the "immense public interest" involved in protecting the institution of marriage, citing recent studies in which the majority of respondents did not support, or were indifferent to, recognising same-sex marriage in Hong Kong. The Court considered that it was not its place to make such significant inroads into the status of marriage, especially when the "prevailing socio-moral views still regard heterosexual marriage as the only acceptable form of marriage".

The CA also noted that the extension of benefits in this case would likely lead to similar extensions in other areas such as public housing, social welfare, employment and pension benefits etc. The CA held that the hardship done to Mr. Leung and Mr. Adams as individuals had to be balanced against the implications of opening the "floodgates" to other claims.

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