

HCAL 2647/2018

[2020] HKCFI 329

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

CONSTITUTIONAL AND ADMINISTRATIVE LAW LIST NO 2647 OF
2018

BETWEEN

INFINGER, NICK

Applicant

and

THE HONG KONG HOUSING
AUTHORITY

Respondent

Before: Hon Chow J in Court

Date of Hearing: 27 September 2019

Date of Judgment: 4 March 2020

J U D G M E N T

INTRODUCTION

1. The principal issue which arises for determination in this application for judicial review is whether the Hong Kong Housing Authority (“**the Housing Authority**”)’s policy to exclude same-sex couples from eligibility to apply for Public Rental Housing (“**PRH**”) as “Ordinary Families” under the “General Application” category (“**the Spousal Policy**”) is unlawful and/or unconstitutional for being in violation of Article 25 of the Basic Law (“**BL 25**”) and/or Article 22 of the Hong Kong Bill of Rights (“**BOR 22**”).
2. For reasons which I shall explain in this judgment, my answer to this question is “yes”.

BASIC FACTS

3. The basic facts which are relevant for a proper determination of this application for judicial review can be shortly stated.
4. The Applicant, a male person, married his husband (“**the Partner**”), another male person, in Richmond, Canada, in January 2018.
5. Both the Applicant and the Partner reside in Hong Kong and are Hong Kong permanent residents.
6. By a letter dated 9 March 2018, the Applicant, through his solicitors, wrote to the Housing Authority enclosing a duly completed and signed application form (“**the PRH Application**”) for PRH. The application was made as an “Ordinary Family” application, in which the Partner was described as the only family member of the Applicant, and was accompanied by, inter alia, a copy of the Certificate of Marriage between the Applicant and the Partner dated 29 January 2018 issued by the Vital Statistics Agency of the Province of British Columbia, Canada.
7. On 24 August 2018, the Housing Authority wrote to the Applicant, stating as follows:

“In the Application, the Applicant, a male, applied together with a male named [XXX] as the Applicant’s ‘family member’. In the column ‘Relationship with the Applicant’, [the Partner] was described as the Applicant’s husband. In accordance with paragraph 2.3.3 of the Hong Kong Housing Authority’s ‘Application Guide for Public Rental Housing’ (revised in February 2015) (‘the Application Guide’), the relationship between the Applicant and family members must be either husband or wife, parent and child, grandparent and grandchild. As under the Shorter Oxford English Dictionary, ‘husband’ means ‘a married man especially in relation to his wife’ and ‘wife’ means ‘a married woman especially in relation to her husband’, the relationship between the Applicant and [the Partner] falls outside the meaning of husband and wife in the said paragraph 2.3.3 of the Application Guide.

Hence, the Applicant is not eligible for application for PRH as ordinary family. A formal rejection letter will be sent to you in due course.”

The Housing Authority’s decision that the Applicant is not eligible to apply for PRH as an Ordinary Family shall hereinafter be referred to as the “**Eligibility Decision**”.

8. On 7 September 2018, the Housing Authority wrote further to the Applicant, stating as follows:

“Regarding your application for Public Rental Housing as ordinary family, we regret to inform you that it has not been accepted for registration due to the reason below. Your application form and all documents are now returned to you.

In your application, you as the applicant, a male, apply together with a male named [XXX] as your ‘family member’. In the column ‘Relationship with Applicant’, [the Partner] was described as your ‘husband’. In accordance with paragraph 2.3.3 of the Hong Kong Housing Authority’s ‘Application Guide for Public Rental Housing’ (revised in February 2015) (‘the Application Guide’), the relationship between the applicant and family members must be either husband or wife, parent and child, grandparent and grandchild. As under the Shorter Oxford English Dictionary, ‘husband’ means ‘a married man especially in relation to his wife’ and ‘wife’ means ‘a married woman especially in relation to her husband’, the relationship between you as the applicant and [the Partner] falls outside the meaning of husband and wife in the said paragraph 2.3.3 of the Application Guide.”

The Housing Authority’s decision not to accept the PRH Application for registration as an Ordinary Family application shall hereinafter be referred to as the “**Registration Decision**”.

APPLICATION FOR JUDICIAL REVIEW

9. On 22 November 2018, the Applicant made the present application for leave to apply for judicial review of the Eligibility Decision, Registration Decision and Spousal Policy. In the Form 86, at §§48 to 50, the Applicant advances the following grounds of judicial review:

(1) The Eligibility Decision, Registration Decision and Spousal Policy are illegal and/or unconstitutional since they constitute unjustified discrimination against the Applicant and the Partner on the ground of sexual orientation and therefore violate BL 25 and/or BOR 22.

(2) For the same reason, the Eligibility Decision, Registration Decision and Spousal Policy are *Wednesbury* unreasonable since they violate the principle of equality.

(3) Further or alternatively, the Eligibility Decision, Registration Decision and Spousal Policy are illegal and/or unconstitutional as an unjustified restriction of the Applicant's right, and that of the Partner, to respect for their private and family life without distinction as to sexual orientation under BOR 14 in conjunction with BOR 1(1).

10. BL 25 states as follows:

“All Hong Kong residents shall be equal before the law.”

11. BOR 1(1), 14 and 22 state as follows:

“1(1) The rights recognized 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.

14(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

14(2) Everyone has the right to the protection of the law against such interference or attacks.

22 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.”

12. On 23 November 2018, the court granted the Applicant leave to apply for judicial review on consideration of papers alone.

DISCUSSION

(i) The Housing Authority's objective and role

13. The Housing Authority was established by the Housing Ordinance, Cap 283 (“**the Ordinance**”), in 1973. The Secretary for Transport and Housing, being the principal official of the Government responsible for housing policy, is the Chairman of the Housing Authority, while the Director of Housing, being the head of the Government’s executive department for housing, is the Vice-Chairman of the Housing Authority. All other members of the Housing Authority are appointed by the Chief Executive under Section 3(2) of the Ordinance.

14. Section 4(1) of the Ordinance provides that the Housing Authority “shall exercise its powers and discharge its duties under this Ordinance so as to secure the provision of housing and such amenities ancillary thereto as the Authority thinks fit for such kinds or classes of persons as the Authority may, subject to the approval of the Chief Executive, determine.” Under Section 4(3) of the Ordinance, in each financial year, the Housing Authority is required to submit to the Chief Executive for her approval a programme of its proposed activities and estimates of the income and expenditure of the Authority for the next financial year.

15. According to Mr Hui Bing Chiu, Assistant Director (Housing Subsidies) of the Housing Department^[1]:

(1) Despite the wide terms of Section 4(1) of the Ordinance, the role, function and objective of the Housing Authority is, and has always been, to implement the Government's public housing policy, which is to provide affordable housing to low-income families with housing needs, and to help low to middle-income families gain access to subsidized home ownership. The focus of the Housing Authority's function and objective has always been on meeting the Government's policy objective of addressing the housing needs of low-income families and elderly.

(2) For all intent and purposes, the Housing Authority is responsible for developing and implementing public housing programmes which seek to achieve the Government's public housing policy objectives with the approval of the Chief Executive and the executive support provided by the Housing Department.

(3) In performing its functions, the Housing Authority takes into account, and acts consistently so far as possible without being dictated thereby, relevant and applicable Government policies in other areas as well.

(ii) The Housing Authority's policy on eligibility to apply for PRH and allocation of PRH units

16. In view of the limited supply of PRH units as well as the huge demand for PRH, the Housing Authority maintains an application system to provide eligible applicants with PRH. The current system is outlined in the Application Guide for Public Rental Housing (revised in February 2015) (“**the Application Guide**”) issued by the Housing Authority.

17. There are two major categories of application for PRH, namely:

(1) General Application; and

(2) Application by Non-elderly One-person Applicants.

18. The “General Application” category is further divided into the following sub-categories of application:

- (a) Ordinary Families;
- (b) Single Elderly Persons Priority Scheme;
- (c) Elderly Persons Priority Scheme; and
- (d) Harmonious Families Priority Scheme.

19. Under both the General Application category and the Application by Non-elderly One-person Applicants category, applicants need to fulfil the general eligibility criteria set out in §2.1 of the Application Guide, which prescribe limits on age, place of residence, ownership of domestic property, and total monthly income and net assets value, amongst others.

20. Further specific eligibility criteria applicable to applicants under the Ordinary Families category are set out in §2.3 of the Application Guide, as follows:

“2.3.1 Such applications must fulfil the general eligibility criteria stated in Item 2.1 and the specific conditions set out in Items 2.3.2 to 2.3.4 below.

2.3.2 Family members aged under 18 must apply together with his/her parents or legal guardian.

2.3.3 The relationship between the Applicant and family members, and between family members must be either husband and wife, parent and child, grandparent and grandchild. Applicant may apply with his/her single sibling.

2.3.4 Applicants who apply with their child/grandchild, only one of their married children or grandchildren together with the child/grandchild’s nuclear family can be included in the application.

2.3.5 If any person included in the application has been pregnant for 16 weeks or more, the unborn child will be counted as a member of the household.

2.3.6 When applications are registered, HD will process the applications according to the order of registration date, family size and the choice of district.”

21. On the other hand, applicants under the Non-elderly One-person Applicants category need only to fulfil the general eligibility criteria set out in §2.1 of the Application Guide (see §2.7.1 of the Application Guide). However, the Non-elderly One-person Applicants category has a separate Quota and Points System for determining priority for allocation of PRH units which is set out in §2.7.2 of the Application Guide, the details of which it is not necessary to recite in this judgment.

22. Generally, the Housing Department will process PRH applications in the order of the date of receipt of the applications. It is also the Housing Authority's policy to give priority to general applicants over non-elderly one-person applicants. The Housing Authority has set an average waiting time ("AWT") target for providing the first flat offer to general applicants at around 3 years. This AWT target is not applicable to non-elderly one-person applicants. Notwithstanding the Housing Authority's aforesaid AWT target for general applicants, due to the limited PRH resources and huge demand for PRH, as at the end of December 2018, the AWT for general applicants was 5.5 years, with about 150,200 general applications waiting on the queue. By way of comparison, it may be noted that there were about 117,400 non-elderly one-person applications under the Quota and Points System at as the end of December 2018. I am told by Mr Tim Parker (for the Applicant) that the waiting time for a non-elderly one-person applicant to be offered a PRH unit is substantially longer than that for a general applicant. Whether this is in fact the position is not clear on the evidence. Another difference between the two categories of application relied upon by Mr Parker is that, in the case of a tenancy of a PRH unit granted to a general applicant as an "Ordinary Family", upon the death or moving out of the tenant, the surviving spouse who is an authorized member of the PRH unit and is residing in the premises may take over the tenancy unconditionally. This option is not available in respect of a tenancy of a PRH unit granted to a non-elderly one-person applicant.

(iii) The proper approach to determining the lawfulness of an alleged discrimination

23. The leading authorities in Hong Kong on the issue of discrimination based on sexual orientation are the judgments of the Court of Final Appeal in (i) *QT v Director of Immigration* (2018) 21 HKCFAR 324, and (ii) *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127.

24. The proper approach to the determination of whether an alleged discrimination is unlawful or unconstitutional is stated in §19 of the judgment of the Court of Final Appeal in *Leung Chun Kwong*, as follows:

“In every alleged case of discrimination, the correct approach is, first, to determine whether there is differential treatment on a prohibited ground and, only if this can be demonstrated, then, to examine whether it can be justified. Differential treatment which is justified does not constitute unlawful discrimination. However, where differential treatment is not justified it is unlawful discrimination.”

25. The first stage requires the complainant to demonstrate that “he or she has been treated differently to a person in a comparable position and that the reason for this difference in treatment can be identified as a prohibited ground, such as race, religion or sexual orientation”[\[2\]](#).

26. After this has been demonstrated, in order to determine whether the differential treatment is lawful or unlawful, the court applies the 4-step justification test, namely:

“(i) does the differential treatment pursue a legitimate aim; (ii) is the differential treatment rationally connected to that legitimate aim; (iii) is the differential treatment no more than necessary to accomplish the legitimate aim; and (iv) has a reasonable balance been struck between the societal benefits arising from the application of differential treatment and the interference with the individual’s equality rights”[\[3\]](#).

27. *QT* concerned a challenge by a same-sex couple who had entered into a civil partnership in England under the UK's Civil Partnership Act against the decision of the Director of Immigration not to recognize their relationship for the purpose of his Dependant Visa Policy, under which the "spouse" of a sponsor who had been admitted into the HKSAR to take up employment could apply for entry into Hong Kong as a dependant of the sponsor. For this purpose, the Director's policy was to confine the meaning of "spouse" based on the concept of monogamous marriage between one male and one female. *QT* argued that the policy constituted unlawful discrimination based on sexual orientation. The Director sought to resist the challenge on two bases: (i) there was no discrimination which needed to be justified because the status of marriage was special and different from the status conferred by a civil partnership so that the respective dependants obviously occupied unlike positions which he was entitled to treat differently without having to go through any justification exercise, and (ii) alternatively, the difference in treatment was justified. The Director also argued that the challenge raised an issue concerning the Government's social or economic policy, and the court should not interfere unless satisfied that the policy was manifestly without reasonable foundation.

28. The Court of Final Appeal rejected the first argument of the Director that no justification of his policy was required on the grounds, *inter alia*, that (i) the argument was circular as it put forward the challenged differentiating criterion as its own justification (*It is hardly satisfactory to answer the question: "Why am I treated less favourably than a married person?" by saying: "Because that person is married and you are not"* [4]); (ii) the identification of comparators did not of itself permit a proper conclusion to be reached as to whether a given difference in treatment was or was not discriminatory in the context of qualification for dependant visas (*when one considers in general terms the inter-personal relationships between two civil partners on the one hand and between a married couple on the other, each being a status recognised under UK law, it is hard to see any basis for the Director concluding that they are obviously different comparators* [5]).

29. In relation to the issue of justification, the legitimate aims which the Director put forward as being pursued by his policy were: (i) the encouragement of persons with needed skills and talent to join Hong Kong's workforce, accompanied by their dependants, (ii) the maintenance of strict immigration control, and (iii) the ability to draw a bright line between those who did and those who did not qualify for dependant visas thereby promoting legal certainty and administrative workability and convenience. The Court of Final Appeal held, however, that:

(1) the Director's policy was not rationally connected with either the aim of encouragement of talents or immigration control[6];

(2) in so far as the aim of facilitating the administration of immigration control by laying down a clear bright line to determine "which categories of person can be allowed in Hong Kong and on what conditions or restrictions" was concerned, it begged "*the question of why the line was drawn, not how clearly it was drawn*". Given that the Director's policy could not be justified as a measure rationally connected to the avowed "talent" and "immigration control" objectives, it could not be saved by the "bright line" aim either. Further, even purely at the level of convenience, it was just as convenient for QT and his partner to produce their civil partnership certificate as it was for other heterosexual couples to produce their marriage certificates. Thus excluding them on the basis of administrative convenience was irrational[7].

30. Lastly, the Court of Final Appeal considered the issue of "standard of review". Rejecting the Director's contention that the standard of "manifest unreasonableness" should apply because determining who should be admitted into Hong Kong as a dependant involved the formulation of social or economic policy in respect of which the executive branch of government was acknowledged to have a wide margin of discretion, the Court of Final Appeal held that -

“where a person is subjected to differential treatment on any of the suspect grounds, including sexual orientation, the government’s margin of discretion is much narrowed and the court will subject the impugned measure to ‘particularly severe scrutiny’. That does not mean that the measure can never pass muster, but it will require the government to provide ‘very weighty reasons’ or ‘particularly convincing and weighty reasons’ to justify the challenged difference in treatment, applying the standard of reasonable necessity.”[\[8\]](#)

31. *Leung Chun Kwong* concerned a challenge by a homosexual civil servant who had entered into a same-sex marriage with his partner in New Zealand against (i) the decision of the Secretary for Civil Service to refuse to update his marital status such that his same-sex partner would become entitled to various spousal medical and dental benefits, and (ii) the decision of the Commissioner of Inland Revenue that he was not entitled to elect for joint tax assessment. Both decisions were made essentially on the basis that Leung’s same-sex marriage with his partner could not be recognized and his partner could not be regarded as his spouse for the purposes of claiming civil service benefits or electing for joint tax assessment. The respondents conceded that, in the context of financial spousal benefits, a same-sex married couple and an opposite-sex married couple were relevantly analogous, and Leung was treated differently to a heterosexual married man on the ground of his sexual orientation. The Court of Final Appeal considered that the concession was properly made because, in the context of financial spousal benefits, a same-sex married couple and an opposite-sex married couple were relevantly analogous having regard to, amongst other matters, the fact that both types of relationship had the same readily identifiable characteristics of “publicity” and “exclusivity”[\[9\]](#).

32. The respondents argued, nevertheless, that the differential treatment was justified. The respondents articulated the legitimate aim relied upon in various, slightly, different ways, namely, (i) protecting and/or not undermining the concept and/or the institution of marriage, being the voluntary union for life of one man and one woman to the exclusion of all others, as understood in and under the laws of Hong Kong, (ii) protecting and not undermining the institution and unique status of marriage as understood and recognised in Hong Kong, and (iii) protecting the coherence of the law of Hong Kong on the subject of marriage[10], but accepted that there was no difference in substance between the three ways in which the legitimate aim was articulated[11].

33. The Court of Final Appeal accepted that the protection of the traditional family constituted by heterosexual marriage was a legitimate aim[12], but held that the restriction of the financial spousal benefits to opposite-sex married couples was not rationally connected to that legitimate aim. The Court of Final Appeal's reasons for coming to that conclusion appear in the following passages of its judgment:

“[65] Here, as we have already noted, the relevant context is the conferment of financial benefits on spouses in the contexts of employment and taxation. Traditionally, those benefits were not conferred in order to protect the institution of marriage or even to encourage people to marry one other. Instead, they were provided to acknowledge the economic reality of the family unit with one member of a couple, usually the male, being the principle breadwinner for the family and, in the case of employment within the civil service, to encourage the recruitment and retention of staff. Medical and dental benefits were therefore extended to a civil servant's spouse and dependent children as a perquisite of employment. Joint tax assessment helped to lessen the overall tax burden on a couple living together and meeting expenses traditionally from one source of earned income. It was (and is) no part of the Secretary's or Commissioner's functions that they were responsible for protecting (much less promoting) the institution of marriage. The Secretary's principal responsibility was (and is) the efficient administration of government and that of the Commissioner was (and is) the raising of revenue through the taxation system.

[66] In these circumstances, having concluded that the appellant has been subject to differential treatment because he is in a same-sex marriage rather than an opposite-sex marriage, one looks to see how denying the appellant spousal employment benefits (the Benefits Decision) and the right to elect for joint assessment (the Tax Decision) is rationally connected to the legitimate aim of protecting or not undermining the institution of marriage in Hong Kong.

[67] It is here that the respondents' case faces great difficulty. How is it said that allowing Mr Adams medical and dental benefits weakens the institution of marriage in Hong Kong? Similarly, how does permitting the appellant to elect for joint assessment of his income tax liability under the IRO impinge on the institution of marriage in Hong Kong? It cannot logically be argued that any person is encouraged to enter into an opposite-sex marriage in Hong Kong because a same-sex spouse is denied those benefits or to joint assessment to taxation.

[68] As Lady Hale said, in *Rodriguez v Minister of Housing* (a Privy Council appeal from Gibraltar):

'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 Mendoza* [2002] EWCA Civ 1533, [2002] 4 All ER 1162 at [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'.'

[69] Similarly, in her speech in the House of Lords in *Ghaidan v Godin-Mendoza*, Baroness Hale observed

'The traditional family is not protected by granting it a benefit which is denied to people who cannot or will not become a traditional family. 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. ... But, as Buxton LJ [2003] Ch 380, 391, para 21 pointed out, it is difficult to see how heterosexuals will be encouraged to form and maintain such marriage-like relationships by the knowledge that the equivalent benefit is being denied to homosexuals. 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.'

[70] Lord Pannick QC submitted that the Benefits Decision and the Tax Decision were rationally connected to the aim of protecting and not undermining the institution and unique status of marriage as understood and recognised in Hong Kong and invited the Court to uphold the Court of Appeal's analysis concluding that the differential treatment was rationally connected to that legitimate aim. That analysis is variously addressed in the judgments of the Court of Appeal ...

[71] With great respect, we cannot agree with the Court of Appeal's analysis. Restricting these financial benefits to opposite-sex married couples on the ground that heterosexual marriage is the only form of marriage recognised in Hong Kong law is circular and therefore proceeds on the fallacious basis rejected by the Court in *QT* at [42]. It amounts to the application of a self-justifying reasoning process and denies equality to persons of different sexual orientation who are accepted to be in a relevantly analogous position. Ultimately, a line is merely drawn without any further attempt to justify it.

[72] In any event, we are unable to accept the proposition that heterosexual marriage would be undermined by the extension of the employment and tax benefits to same-sex married couples. Whilst the Court recognised in *QT* (at [76]) that a person’s marital status might well be relevant to the allocation of rights and privileges and that “the relevance and weight to be attributed to that status is taken into account in considering whether a particular difference in treatment is justified as fair and rational”, we are satisfied that this is not such a case. Heterosexual marriage is not promoted by the differential treatment in question.

[76] Nor is it necessary to restrict the spousal employment and tax benefits to those in an opposite-sex marriage as recognised under Hong Kong law in order to draw a ‘bright line’ in order to achieve administrative workability. As explained in Section D.3 above, the appellant in this case can demonstrate without any difficulty that he and Mr Adams are parties to a same-sex marriage having the characteristics of publicity as a formal marriage and exclusivity that distinguish it from a mere relationship. There is therefore no administrative difficulty posed by the appellant’s case and the “bright line” argument provides no rational justification for upholding the Benefits Decision or the Tax Decision.

[77] For these reasons, we conclude that the respondents are unable to justify the differential treatment in the present case in respect of the Benefits Decision and the Tax Decision.”

34. As will be seen below, the Housing Authority’s original case on justification, based the need to uphold and protect the unique status of heterosexual marriage and the traditional form of family constituted thereby, has been evolved to meet the Court of Final Appeal’s rejection of the justification case put forward by the respondents in the *Leung* case.

(iv) *Differential treatment based on sexual orientation*

35. The Spousal Policy of the Housing Authority to exclude same-sex couples from being eligible to apply for PRH as Ordinary Families is embodied in §2.3.3 of the Application Guide. On an ordinary and natural interpretation of §2.3.3 of the Application Guide, the Applicant and the Partner cannot be regarded as “family members” because they are not “husband and wife”. It follows that under the existing policy of the Housing Authority:

- (1) the Applicant is not eligible to apply for PRH as an Ordinary Family with the Partner as a member of his family; and
- (2) the Applicant is only eligible to apply under the Non-elderly One-person Applicants category.

36. It is clear that the Spousal Policy treats heterosexual couples and homosexual couples (including the Applicant and the Partner) differently for the purpose of determining eligibility to apply for PRH as “Ordinary Families”. Having regard to the Housing Authority’s declared aim of provision of PRH, namely, to address the housing needs of low-income families, the two groups cannot, in my view, be said to be relevantly different for the purpose of eligibility for PRH. Hence, there is, in the present case, differential treatment based on sexual orientation.

(v) *Differential treatment not justified*

37. Such differential treatment is unlawful unless it can pass the 4-step justification test. On behalf of the Housing Authority, Mr Abraham Chan, SC, argues that:

- (1) The ultimate, legitimate, aim of the Spousal Policy is the fair and rational allocation of highly scarce, zero-sum PRH resources.
- (2) In view of the insufficient PRH supply to meet all demand, there must be some differential line(s) drawn, and many diverse factors inform this policy judgment.
- (3) Serving this ultimate aim, as a differential basis, is the “Family Aim” to support traditional family formations constituted by heterosexual marriage with regard to their housing needs. Mr Chan develops this Family Aim as involving 3 aspects:
 - (a) to support existing traditional families constituted by heterosexual married couples (in and of themselves);
 - (b) to support existing traditional families constituted by heterosexual married couples together with their existing children;

(c) to support the institution of traditional family by protecting / prioritising the supply of PRH to (i) heterosexual unmarried couples whose marriage plans may be influenced by housing availability; and (ii) heterosexual married couples whose plans to have children may be influenced by housing availability[13].

(4) The Family Aim in the 3 aspects mentioned above align with the Government's broader policies in related areas, including its population policy, under which the Government has identified the aging population as an imminent demographic challenge for Hong Kong, and has made "fostering a supportive environment ... to form and raise families" through improved housing provision an immediate responsible priority[14].

38. Mr Chan also argues that the Spousal Policy is justified by the separate but complementary administrative aim to ensure administrative effectiveness in implementing the overall PRH policy of the Housing Authority.

39. At this stage, it may be noted, as stated in §§16-18 of Mr Chan’s Skeleton Submissions dated 20 September 2019, that the Housing Authority has abandoned 2 other alleged legitimate aims of the Spousal Policy previously put forward, namely, (i) the need for consistency between the Spousal Policy and the prevailing marriage system in Hong Kong as reflected by the socio-moral values and family ethics regarding marriage of the community generally (“**the Social Consensus Ground**”), and (ii) the concern that recognition of a same-sex married couple as a “family” will accord to them a privilege traditionally reserved to married couples, which will in turn erode and dilute the unique status of heterosexual marriage as the only form of marriage recognised under the Basic Law (“**the Status Erosion Ground**”). The reformulation of the Housing Authority’s case on justification is said to have been prompted by a reconsideration of the Spousal Policy in light of the recent judgment of the Court of Final Appeal in *Leung Chun Kwong*, the result of which was that the policy should be maintained but for different, or updated, reasons[15].

40. Before I consider whether the Spousal Policy can pass the 4-step justification test, there are a few points of principle that could first conveniently be dealt with.

41. First, while Mr Parker accepts that the protection of the institution of marriage or the traditional family in Hong Kong can be a legitimate aim vis-à-vis unmarried couples, he submits that it cannot be regarded as a legitimate aim where the comparators are same-sex married couples. This submission must be rejected in view of what the Court of Final Appeal said in §61 of its judgment in *Leung Chun Kwong*, where the differential treatment was also between same-sex and opposite-sex married couples:

“There can be no doubt, therefore, that the protection of the institution of marriage in Hong Kong, being the voluntary union for life of one man and one woman to the exclusion of all others, is a legitimate aim and that differential treatment directed to that aim may be justified if the other elements of the justification test are satisfied.”

42. Second, Mr Chan has, in the course of his submissions, repeatedly emphasized the fact that competition for PRH is a zero-sum contest: the allocation of a PRH unit to a person necessarily reduces the number of PRH units available, and correspondingly deprives another potentially eligible person of the same benefit. It is undoubtedly the case that PRH resources are highly limited, and it is a factor which may properly entitle the body who has been entrusted with the function and responsibility of distribution or allocation of such limited resources to have a wider margin of discretion in the performance of its function and responsibility. This factor should not, however, be overly emphasized. In the nature of things, most public resources are limited, and the zero-sum argument can be made in most cases involving the conferment of benefits amongst different groups of persons. If a group of persons is excluded from being eligible to apply for the benefits in question, the resources available to the remaining, competing, groups would naturally be enlarged or increased. Ultimately, the court must still consider whether the exclusion of the benefits from any particular group infringes the core right to equality, with the scarcity of the public resources involved being taken into account in the overall assessment of whether the impugned measure is a proportional means to achieve a legitimate aim.

43. Third, Mr Chan argues that the appropriate standard of review in the 3rd step of the justification test in this case should be the “manifestly without reasonable foundation” standard instead of the “reasonable necessity” standard, and the intensity of review should be reduced even though the differential treatment is based on sexual orientation, because the present case raises issues concerning priorities in allocating scarce resources in the exceptionally difficult and “polycentric” context of PRH allocation. In both *QT* and *Leung Chun Kwong*, which involved discrimination based on sexual orientation (being one of the suspect or prohibited grounds), the Court of Final Appeal considered that the appropriate standard of review should be the “reasonable necessity” standard, and the court should subject the impugned measures to “particularly severe scrutiny”[\[16\]](#). At §105 of the judgment in *QT*, the Court of Final Appeal referred to the judgment of Ma CJ in *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409, where the Chief Justice stated the following at §§77-79:

“[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 any 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, religion, politics, or social origin), the courts would extremely rarely (if at all) find this acceptable. These 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. Lord Pannick QC (for the respondents) used the term ‘inherently invidious’ to describe any decision which offended these core values. While I would, for myself, not have used this expression, it nevertheless conveys the necessary sentiment.

[79] It is convenient here also to remind ourselves that where the subject matter of the challenge has to do with fundamental concepts, in contradistinction to rights associated with purely social and economic policies, the courts will be particularly vigilant to protect the rights associated with such concepts, and consequently much less leeway or margin of appreciation will be accorded to the authority concerned. These fundamental concepts are those which go to the heart of any society... Here, the courts have been vigilant to ensure that the proportionality or justification test is satisfied...”

44. Neither *QT* nor *Leung Chun Kwong* concerned the allocation of highly scarce public resources such as PRH, which raises particularly acute socio-economic considerations which the Government is undoubtedly in a much better position than the court to assess. This having been said, the yardstick of reasonable necessity is not a strict, bright line, but occupies a continuous spectrum which should be viewed as a “sliding scale” in which the cogency of the justification required for interfering with a right will be proportionate to its perceived importance and the extent of the interference (see *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372, at §§83 and 86). The concept of reasonable necessity is inherently elastic, so is the intensity of review applied by the court in any given case. It is not, in my view, helpful to focus excessively on the label of the standard that should be applied. Instead, the court should take into account both the fact that this case concerns differential treatment based on sexual orientation as well as the factual context in which the issue arises in its assessment of the proportionality of the differential treatment under the Spousal Policy. This approach is consistent with the exposition by Riberio PJ in *Hysan* of the applicable standard that the court should adopt in assessing proportionality:

“[106] In principle, the choice of the standard for the Court’s intervention depends on the extent of the appropriate margin of discretion, determined by factors which affect the proportionality analysis in the circumstances of the particular case. In cases calling for a wide margin of discretion, the ‘manifest’ threshold may well be apposite, whereas cases admitting of a narrow or no margin of discretion are more appropriately analysed on the basis of ‘reasonable necessity’. Which standard or threshold to choose therefore depends on the appropriate width of the margin.

[107] As we have seen, in the ECtHR context the scope of the margin of appreciation is held to vary according to the context with a number of factors being relevant. The same applies in domestic cases where such factors principally relate to (i) the significance of and degree of interference with the right in question; and (ii) the identity of the decision-maker as well as the nature and features of the encroaching measure relevant to setting the margin of discretion.

[108] A theme of the foregoing discussion has been the inter-related and inter-dependent qualities of the various elements of a proportionality analysis. While there would be no point in attempting to construct a formal hierarchy of constitutional rights, a sliding scale has been recognized in which the cogency of the justification required for interfering with a particular right will be proportionate to the perceived importance of that right and the extent of the interference.

[119] It should be noted that the difference between the two standards is one of degree. Once it is recognized that the former threshold is a standard of reasonable necessity, it becomes clear that it is located on the same ‘reasonableness’ spectrum as the standard which asks whether a measure is ‘manifestly without reasonable foundation’. That may be why that phrase is sometimes referred to in the authorities as a measure of the “intensity” of judicial scrutiny rather than as a ‘standard’.

[122] It is perhaps worth re-iterating that while for the purposes of elucidation, two differently named standards are referred to: ‘reasonable necessity’ and ‘manifestly without reasonable foundation’, they indicate positions on a continuous spectrum rather than wholly independent concepts.”

In the circumstances of this case, I consider that the appropriate standard for assessing proportionality should be somewhere in the middle of the continuous spectrum of reasonableness, and the intensity of review should be set accordingly.

45. Fourth, Mr Chan argues that comparatively less weighty justifications will be required in cases of indirect rather than direct discrimination. Two cases are relied upon by Mr Chan: *Burnip v Birmingham City Council* [2012] EWCA Civ 629, at §28; and *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545, at §19. Neither case concerned discrimination based on sexual orientation.

(1) *Burnip* concerned a case of discrimination on grounds of congenital disability in the context of housing benefits. At §28 of the judgment, Henderson J accepted that congenital disabilities of the kind suffered by the applicants in that case might in principle fall within the category of grounds for discrimination which could be justified only by very weighty reasons, but drew a distinction between (i) a case of “positive discrimination”, where weighty reasons might well be needed for justification, and (ii) “cases of indirect discrimination, or cases where the discrimination lies in the failure to make an exception from a policy or criterion of general application, especially where questions of social policy are in issue”, where the proportionality review should be made by reference to the usual standard instead of an enhanced standard.

(2) *Humphreys* concerned a case of discrimination on grounds of sex in the context of tax benefits. Baroness Hale of Richmond, JSC (with whom the other members of the Supreme Court agreed) stated at §19 of her judgment that: “It seems clear from *Stec* [17], however, that the normally strict test for justification of sex discrimination in the enjoyment of the Convention rights gives way to the ‘manifestly without reasonable foundation’ test in the context of state benefits. The same principles were applied to the sex discrimination involved in denying widow’s pensions to men in *Runkee v United Kingdom* [2007] 2 FCR 178, para 36. If they apply to the direct sex discrimination involved in the *Stec* and *Runkee* cases, they must, as the Court of Appeal observed, at para 50, apply a fortiori to the indirect sex discrimination with which we are concerned.” At §22, Baroness Hale further stated: “the fact that the test is less stringent than the ‘weighty reasons’ normally required to justify sex discrimination does not mean that the justifications put forward for the rule should escape careful scrutiny. On analysis, it may indeed lack a reasonable basis.”

46. Two observations may be made:

(1) While *Burnip* does provide some support to the proposition advanced by Mr Chan, *Humphreys*, properly read, is less clear. In any event, I do not accept, as a matter of principle, that less weighty justification, or a lower standard or intensity of review, should be applied in a case of indirect discrimination. Most discrimination cases that have found their way to this court involve indirect, as opposed to positive or direct, discrimination. The vice is, however, the same. There was also no suggestion in the judgment of the Court of Final Appeal in either *QT* or *Leung Chun Kwong* that the standard or intensity of review should vary depending on whether the discrimination was direct or indirect.

(2) In choosing the appropriate standard of review and the application of the appropriate standard in this case, two countervailing considerations come into play: the differential treatment here is based on sexual orientation, but the policy choice is made in the context of allocation of highly scarce public resources. As earlier mentioned, both considerations should be given proper weight and taken into account when deciding whether the relevant policy is justified.

47. Fifth, Mr Chan argues that the “protection of the family in the traditional sense” is a “weighty and legitimate reason” for a difference in treatment, relying on the statement of the European Court of Human Rights in *Kozak v Poland* (2010) 51 EHRR 16, at §98. That case concerned discrimination based on sexual orientation in the context of the right to succeed to a municipality flat which had previously been rented to the deceased partner of the applicant. The European Court of Human Rights went on to state, at §99, that “having regard to the state’s narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation, a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in the traditional sense”. It seems clear, therefore, that notwithstanding the weighty consideration that should be accorded to the protection of the traditional family, the European Court of Human Rights continued to adopt a high standard of review in that case involving discrimination based on sexual orientation.

48. Sixth, Mr Chan prays in aid BL 145, which imposes an obligation, and prerogative, upon the Government to “formulate policies on the development and improvement of [the social welfare system] in light of the economic conditions and social needs”. The ability of the Government to formulate policies in respect of the social welfare system is respected, but it cannot seriously be argued that this article of the Basic Law authorizes the Government to pursue an unlawful or discriminatory policy.

49. Lastly, Mr Chan makes the point that any entitlement of the Applicant to social welfare is not absolute under BL 36 and 145, but is inextricably bound and subject to other socio-economic considerations. It is undoubtedly true that entitlement to social welfare is not absolute under our system. However, this case is not about whether the Applicant has any absolute right to social welfare. This case is about whether the Housing Authority, having established a scheme for PRH, has introduced a policy for determining eligibility thereunder which is discriminatory and thus unlawful.

50. Returning to the case of justification advanced by Mr Chan on behalf of the Housing Authority, there can, of course, be no quarrel with the declared aim of fair and rational allocation of the scarce PRH resources, or the proposition that some lines must be drawn to determine eligibility for PRH. The question is whether the line which has been drawn is fair, reasonable and lawful.

51. In so far as justification of the differential treatment based on the Family Aim is concerned, my views are as follows:

- (1) In relation to the 1st step of the justification test, the Family Aim, in the 3 aspects mentioned in §37(3) above, can properly be regarded as a legitimate aim.

(2) In relation to the 2nd step of the justification test, I accept that the availability of adequate housing is beneficial to, and in this sense supports, existing traditional families constituted by heterosexual marriage (with or without children). I also accept that the knowledge that adequate housing would be available could have a positive impact on the marriage plans of heterosexual unmarried couples, as well as on the plans of heterosexual married couples to have and raise children. Since the Spousal Policy, which excludes same-sex married couples from being eligible to apply for PRH as Ordinary Families, would have the consequence of enlarging the pool of available PRH units to opposite-sex married couples, the differential treatment under the Spousal Policy may be regarded as being rationally connected to the Family Aim.

(3) In relation to the 3rd step of the justification test, there is a dearth of evidence on the effect or impact of the differential treatment under the Spousal Policy on the advancement of the Family Aim. There is no, or no reliable, evidence on the number of same-sex married couples in Hong Kong who can satisfy the general eligibility criteria under §2.1 of the Application Guide, or how many of them may apply for PRH as Ordinary Families but for the Spousal Policy. The Housing Authority has also failed to provide any impact analysis based on raw data or (in their absence) reasonable models and assumptions, of by how much the AWT may be lengthened if same-sex married couples in Hong Kong are permitted to apply for PRH as Ordinary Families. There is, I consider, no or no sufficient materials before the court which would permit it to conclude that the Spousal Policy makes any significant or real difference to the overall availability of PRH to traditional families constituted by heterosexual marriage, or unmarried couples intending to form traditional families, who are in need of such form of housing. Applying the appropriate standard or intensity of review referred to §44 above, I am not satisfied that the differential treatment under the Spousal Policy is a proportionate means of achieving the Family Aim. I should add that I would reach the same conclusion even if the appropriate standard of review should be that of “manifestly without reasonable foundation”.

(4) In relation to the 4th step of the justification test, for the same reason, I am not satisfied that a fair balance has been struck in that the differential treatment under the Spousal Policy has resulted in an unacceptably harsh burden on same-sex couples lawfully married overseas (including the Applicant).

(5) The Housing Authority’s reliance on other Government policies, including its population policy, is nothing to the point if the Spousal Policy, on analysis, gives rise to an unlawful discrimination based on sexual orientation.

52. If, as I consider it to be the case, the Spousal Policy cannot be justified as a measure in the pursuit of the Family Aim, it plainly cannot be justified as a measure to ensure the administrative effectiveness in implementing the Housing Authority's PRH policy, which is to address the housing needs of low-income families. There is no reason to believe that low-income families constituted by same-sex couples have any lesser need for housing than low-income families constituted by opposite-sex couples without children. In any event, I am unable to see why it would be more administratively inconvenient or difficult to verify the validity or genuineness of a foreign same-sex marriage when compared to a foreign opposite-sex marriage. I am also not impressed by the argument that "there are differing, complicated, and rapidly evolving concepts of same-sex marriage and civil partnership/union across various foreign jurisdictions, including those ... involving substantially different legal and governmental systems than those of Hong Kong"[18]. Any case of genuine difficulty can be investigated and resolved on a case by case basis in accordance with the Housing Authority's existing mechanism or procedure for verification of the validity or genuineness of an opposite-sex marriage. I would add that the present case only concerns a foreign, monogamous, same-sex marriage. Other than the fact that the Applicant's marriage with the Partner are between two persons of the same sex, the Housing Authority has not been able to point to any difference between their marriage and other foreign opposite-sex marriages which it would accept for the purpose meeting the eligibility criterion under §2.3.3 of the Application Guide. The question of whether the court should reach the same conclusion on the lawfulness of the differential treatment under the Spousal Policy in respect of other forms of union, such as civil partnership, does not arise for determination in this case.

53. While I would not completely rule out the possibility that administrative efficiency may justify a discriminatory measure, it would, I consider, require a very strong and clear case before the court would be driven to accept such a result, particularly where one is concerned with discrimination based on suspect grounds (such as sexual orientation). This is not such a case.

54. Overall, I conclude that the Housing Authority is unable to justify the differential treatment under the Spousal Policy in the present case. In view of the above conclusion, it is not necessary for me to consider the other grounds of judicial review raised by the Applicant referred to in §9(2) and (3) above.

DISPOSITION

55. The Housing Authority's application for leave to file and serve the 3rd Affirmation of Hui Bing Chiu by its summons dated 5 September 2019 is allowed, on the ground that the evidence contained in that affirmation is relevant to the issue of justification, and it does not appear to me that the Applicant has suffered any substantial prejudice as a result of the late production of that affirmation. Service of the said affirmation is dispensed with. The costs of and occasioned by the summons shall be treated as part of the costs of the application for judicial review.

56. The application for judicial review is allowed. The court grants:

(1) a declaration that the Spousal Policy of the Housing Authority to exclude same-sex couples who have entered into lawful and monogamous marriages overseas from eligibility to apply for Public Rental Housing as Ordinary Families under the General Application category is unlawful and unconstitutional for being in violation of BL 25 and BOR 22; and

(2) an order of *certiorari* to bring up the Eligibility Decision and Registration Decision to the High Court and quash those decisions.

57. The PRH Application is remitted to the Housing Authority for fresh consideration in accordance with this judgment. In the event that the Housing Authority accepts the PRH Application, its priority should be restored to the date on which the application was originally made (ie 9 March 2018).

58. The Housing Authority shall pay the Applicant the costs of the application for leave to apply for judicial review as well as the costs of the substantive application for judicial review, including all reserved costs (if any), to be taxed if not agreed with certificate for 2 counsel. Mr Parker has asked for the Applicant's costs to be taxed on an indemnity basis. Although I have found against the Housing Authority in this case, I do not consider its opposition to the present application for judicial review, or its conduct in dealing with the PRH Application, to be unreasonable, or are such as would merit an order for taxation on an indemnity basis. Accordingly, the Applicant's costs shall be taxed on a party-and-party basis.

59. The Applicant's own costs are to be taxed in accordance with legal aid regulations.

(Anderson Chow)

Judge of the Court of First Instance

High Court

Mr Tim Parker and Mr Geoffrey Yeung, instructed by Vidler & Co, assigned by Director of Legal Aid, for the Applicant

Mr Abraham Chan, SC and Mr John Leung, instructed by Woo, Kwan, Lee & Lo, for the Respondent

[1] See §13 of the 2nd Affidavit of Hui Bing Chiu filed on 27 March 2019.

[2] See §20 of the judgment of the CFA in Leung Chun Kwong.

[3] See §22 of the judgment of the CFA in Leung Chun Kwong.

[4] See §42 of the judgment of the CFA in QT.

- [5] See §46 of the judgment of the CFA in QT.
- [6] See §§90 and 93 of the judgment of the CFA in QT.
- [7] See §§97-99 of the judgment of the CFA in QT.
- [8] See §108 of the judgment of the CFA in QT.
- [9] See §§40-46 of the judgment of the CFA in Leung Chun Kwong.
- [10] See §§49-51 of the judgment of the CFA in Leung Chun Kwong.
- [11] See §59 of the judgment of the CFA in Leung Chun Kwong.
- [12] See §61 of the judgment of the CFA in Leung Chun Kwong.
- [13] See Mr Chan’s “Spousal Policy Justification Framework” dated 27 September 2019.
- [14] See §17 of Mr Chan’s Skeleton Submissions.
- [15] See §§3 and 17 of Mr Chan’s Skeleton Submissions.
- [16] See §108 of the judgment of the CFA in QT and §79 of the judgment of the CFA in Leung Chun Kwong.
- [17] *Stec v United Kingdom* (2006) 43 EHRR 1017.
- [18] See §54 of Mr Chan’s Skeleton Submissions.