



# Court of Final Appeal

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## LEUNG CHUN KWONG v. SECRETARY FOR THE CIVIL SERVICE AND ANOTHER [2019] HKCFA 19; FACV 8/2018 (6 June 2019)

[Press Summary \(English\)](#)

[Press Summary \(Chinese\)](#)

FACV No. 8 of 2018

[\[2019\] HKCFA 19](#)

IN THE COURT OF FINAL APPEAL OF THE  
HONG KONG SPECIAL ADMINISTRATIVE REGION  
FINAL APPEAL NO. 8 OF 2018 (CIVIL)  
(ON APPEAL FROM CACV NO. 126 OF 2017)

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BETWEEN

LEUNG CHUN KWONG	Appellant
and	
SECRETARY FOR THE CIVIL SERVICE	1 <sup>st</sup> Respondent
COMMISSIONER OF INLAND REVENUE	2 <sup>nd</sup> Respondent
and	
INTERNATIONAL COMMISSION OF JURISTS	Intervener

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Before: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Tang NPJ and Mr Justice Gleeson NPJ

Date of Hearing 7 May 2019

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JUDGMENT

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The Court:

**A. Introduction**

1. This appeal concerns equality under the law and involves an application of the legal principles identified and applied in this Court's recent decision in *QT v Director of Immigration*.<sup>[1]</sup> It arises in the context of a claim to entitlement to spousal medical and dental benefits under the Civil Service Regulations ("CSRs") and to opt for joint assessment of salaries tax under the [Inland Revenue Ordinance](#).<sup>[2]</sup> As will be seen, the appellant claims he has been unlawfully discriminated against on the basis of his sexual orientation.

**A.1 The parties**

2. The appellant is a Hong Kong permanent resident of Chinese nationality. He commenced employment as an immigration officer with the Government of the Hong Kong Special Administrative Region in 2003 and, as such, is subject to the CSRs. He is homosexual and, in 2005, met his partner, Mr Scott Adams. The couple began cohabiting in 2013 and, on 18 April 2014, they were married in New Zealand. Same-sex marriage is legal in New Zealand and, upon their marriage there, the couple were issued with a New Zealand Marriage Certificate formally acknowledging their marriage and its registration by the Registrar of Births, Deaths and Marriages of New Zealand.

3. The 1<sup>st</sup> respondent is the Secretary for the Civil Service ("the Secretary"), whose responsibilities include the administration of the regulations which apply to civil servants, including the appellant. The 2<sup>nd</sup> respondent is the Commissioner of Inland Revenue ("the Commissioner"), who is responsible for administering the scheme of taxation in Hong Kong under the IRO.

4. The International Commission of Jurists ("ICJ") appeared as intervener in this appeal and served written submissions in support of the appeal.<sup>[3]</sup>

**A.2 The challenged decisions**

5. Under the CSRs,<sup>[4]</sup> a civil servant is entitled to the provision by the Government of various medical and dental benefits. These benefits are extended to a civil servant's family, as defined in CSR 900(2), including his "spouse". CSR 513 requires a civil servant:

"to inform his Department immediately of ... any change in his marital status, including marriage, divorce, or the death of his wife ...".

In anticipation of his marriage to Mr Adams, the appellant wrote to the Civil Service Bureau to inquire if he was required to update his marital status pursuant to CSR 513, having regard to the fact that same-sex marriage is not recognised in Hong

Kong. He was informed that his intended marriage to Mr Adams would not constitute a change in marital status for those purposes.

6. Following his marriage, the appellant wrote to the Secretary to complain that he had been denied the right to update his marital status and that his spouse was denied access to the spousal medical and dental benefits under the CSRs. The Secretary's reply dated 17 December 2014 maintained that the appellant's same-sex marriage with Mr Adams was not a marriage within the meaning of Hong Kong law, so that Mr Adams was not the appellant's spouse for the purposes of the CSRs and that accordingly, Mr Adams was not entitled to the spousal benefits. This was the decision of the Secretary referred to in the courts below as the "Benefits Decision".

7. Under [section 10](#) of the IRO, the salaries tax of spouses is to be paid separately unless they elect to be jointly assessed.<sup>[5]</sup> In May 2015, the appellant sought to file his income tax return for the year of assessment 2014/2015 online, using the e-filing system of the Inland Revenue Department ("IRD"), but was unable to enter Mr Adams' name, in order to make an election for joint tax assessment, as it had the same prefix as his own name. The appellant raised this issue with the IRD by email and referred to the IRD's guideline stating 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". He claimed that, since he and Mr Adams were legally married in New Zealand, he was validly married to Mr Adams.

[8.](#) On 9 June 2015, the Commissioner replied to the appellant stating that a same-sex marriage was not regarded as valid for the purposes of the IRO because:

"Although the definition of 'marriage' in [section 2\(1\)](#) [of the IRO] 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 [IRO] 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'."

Accordingly, the Commissioner maintained that the appellant was not entitled to elect for joint assessment with Mr Adams because their same-sex marriage did not fall within the meaning of [section 2\(1\)](#) of the IRO. This was the decision of the Commissioner referred to in the courts below as the "Tax Decision".

[9.](#) On 14 September 2015, the appellant filed a paper tax return for the year of assessment in question, in which he sought to elect for joint assessment with Mr Adams. This election was refused by the Commissioner on the ground that the appellant and Mr Adams were not husband and wife for the purposes of the IRO and the appellant's income was assessed on an individual basis.<sup>[6]</sup>

### ***A.3 The proceedings below***

10. The appellant challenged the Benefits Decision and the Tax Decision by way of judicial review proceedings. It was his contention that the decisions unlawfully discriminated against him on the ground of his sexual orientation.

11. In the Court of First Instance, by his judgment dated 28 April 2017, Chow J allowed the appellant's application for judicial review of the Benefits Decision but dismissed his application for judicial review of the Tax Decision.<sup>[7]</sup> The Judge held that the Benefits Decision constituted differential treatment of the appellant on the basis of his sexual orientation.<sup>[8]</sup> As such, it required to be but was not, he held, justified by the 1<sup>st</sup> respondent and so amounted to unlawful discrimination.<sup>[9]</sup> In respect of the Tax Decision, the Judge held that, as a matter of statutory construction of the IRO, the appellant's right to equality was not engaged and that his marriage was not a "marriage" for the purposes of the IRO.<sup>[10]</sup>

12. Against that judgment, the 1<sup>st</sup> respondent appealed and the appellant cross-appealed to the Court of Appeal. By its judgment dated 1 June 2018, the Court of Appeal allowed the 1<sup>st</sup> respondent's appeal and dismissed the appellant's cross-appeal.<sup>[11]</sup> The Court of Appeal allowed the 1<sup>st</sup> respondent's appeal, holding that, although the Benefits Decision might constitute indirect discrimination against same-sex married couples on the ground of sexual orientation, it was justified as being no more than reasonably necessary to achieve the legitimate aim of protecting and not undermining the status of marriage as understood in Hong Kong.<sup>[12]</sup>

13. The Court of Appeal dismissed the appellant's cross-appeal against the Tax Decision. It upheld Chow J's decision as to the statutory construction of the IRO, namely that "marriage" for the purposes of that ordinance meant only an opposite-sex marriage and not a same-sex marriage. The Court of Appeal nevertheless also held that the Tax Decision might constitute indirect discrimination but that the construction of [section 10](#) of the IRO confining the availability of election to joint assessment to heterosexual married couples was justified for similar reasons to the Benefits Decision to achieve the legitimate aim of protecting and not undermining the status of marriage as understood in Hong Kong.<sup>[13]</sup>

#### ***A.4 Leave to appeal to this Court***

14. The Court of Appeal granted the appellant leave to appeal<sup>[14]</sup> to this Court in respect of the following questions of great general or public importance:

(1) "Question 1:

(a) Is the legitimate aim of protecting and/or not undermining the concept and/or 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, rationally connected to the difference in treatment, between a person who is a party to such a marriage and a person who is a party to a same-sex marriage entered into outside Hong Kong according to the law of the place in which it was entered, for the purpose of conferral of spousal benefits under the Civil Service Regulations;

(b) Are the local legal landscape and societal circumstances including prevailing socio-moral values of society on marriage relevant to the issue of proportionality and/or justification; and

(c) Has the First Respondent justified the difference in treatment?"

(2) “Question 2:

(a) Is the legitimate aim of protecting and/or not undermining the concept and/or 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 rationally connected to the difference in treatment, between a person who is a party to such a marriage and a person who is a party to a same-sex marriage entered into outside Hong Kong according to the law of the place in which it was entered, for eligibility for joint assessment under [section 10](#) of the [Inland Revenue Ordinance \(Cap.112\)](#) (“IRO”);

(b) Are the local legal landscape and societal circumstances including prevailing socio-moral values of society on marriage relevant to the issue of proportionality and/or justification; and

(c) Has the Second Respondent justified the difference in treatment?”

### ***B. The applicable principles***

15. It is unnecessary to set out the legal principles which apply in the present case at length because they were fully addressed in this Court’s judgment in *QT*. There was no dispute between the parties to this appeal as to those principles or that this appeal fell to be resolved by applying them to the facts of this case. In the circumstances, it is sufficient to summarise those principles briefly.

#### ***B.1 The nature of discrimination***

16. It is a cardinal principle of a system governed by the rule of law that all persons are equal before the law and that principle is enshrined in the Basic Law of the Hong Kong Special Administrative Region and the Hong Kong Bill of Rights:

(1) Art. 25 of the Basic Law provides:

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

(2) Art. 1(1) of the Hong Kong Bill of Rights provides:

“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.”

(3) Art. 22 of the Hong Kong Bill of Rights provides:

“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.”

17. As this Court made clear in its judgment in *QT*, unlawful discrimination is “fundamentally unacceptable” (*QT* at [27]-[28]). However, the law has to draw distinctions between different situations or types of conduct, to which different legal consequences may attach. Principles have therefore been established “for determining when distinctions drawn by legal or administrative measures are rational and fair and when such distinctions constitute unlawful discrimination” (*QT* at [29]).

18. It is now acknowledged that there are three forms of differential treatment, which may be described as discriminatory. In summary, these are: (i) direct discrimination where like cases are not treated alike; (ii) direct discrimination where unlike cases are treated in the same way; and (iii) indirect discrimination where an ostensibly neutral criterion is applied which operates to the significant prejudice of a particular group (*QT* at [31]-[33]).

### ***B.2 Differential treatment and the justification test***

19. 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 (*QT* at [81]-[83]).

20. The initial step of determining whether there is differential treatment on a prohibited ground essentially involves a comparison exercise. As was said in *QT* (at [38]):

“A person complaining about discrimination generally has in mind one or more comparators. The question asked is: Why is the complainant being treated less favourably than individuals in a relevant comparator group? Here, *QT* asks: ‘Why am I denied a dependant visa which would be granted to a married spouse of a sponsor?’ The Director’s answer is essentially simply to state: ‘Because she is married and you are not’. As we have seen, the Director recognises someone as married only if he or she is a party to a marriage which, if celebrated here, would be valid under Hong Kong law, in other words, a party to a monogamous and heterosexual marriage, wherever it might have been contracted.”

Accordingly, the initial step must be for 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. Only after this is demonstrated does it then become necessary to consider whether such differential treatment is lawful. If the treatment is held to be unlawful, then the complainant will be entitled to remedies.

21. In order to determine whether differential treatment is unlawful, the courts apply the same test used to determine if incursions into constitutionally protected rights are lawful (*QT* at [84]-[86]). When applied in the context of an analysis of constitutionality, that test is usually referred to as the “proportionality” test. When applied in the context of determining whether differential treatment is unlawful, that test is usually referred to as the “justification” test.

22. The justification test consists of four steps or elements: (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 (QT at [86]-[87]).

### **C. The parties' respective cases**

23. It is the appellant's case that the Benefits Decision and the Tax Decision constitute unlawful discrimination against him on the ground of his sexual orientation. That is because the marriage criterion that is applied by the 1<sup>st</sup> respondent in respect of the conferment of the spousal benefits and by the 2<sup>nd</sup> respondent in respect of the availability of joint tax assessment for a married couple is limited to heterosexual married couples and excludes same-sex married couples. As a gay man, he is never going to be able to qualify within the marriage criterion as applied by the respondents.

24. The appellant contends that he is validly married to Mr Adams under New Zealand law and, as such, should be regarded as falling within the marriage criterion by which it is determined whether civil service spousal benefits and joint tax assessment are available. He contends that the Benefits Decision constitutes unlawful discrimination and is irrational and unreasonable and that section 10 of the IRO, as construed by the Commissioner as the basis for the Tax Decision, is unconstitutional as it unlawfully discriminates against same-sex couples contrary to the right to equality protected under Art. 25 of the Basic Law and/or Arts. 1(1) or 22 of the Hong Kong Bill of Rights.

25. For their part, the respondents contend that their respective decisions do not amount to unlawful discrimination against the appellant. It is, however, accepted (and this concession, see Section D.2 below, will be examined in closer detail in Section D.3 below) that there is differential treatment on the ground of sexual orientation amounting to indirect discrimination. It is therefore also accepted that, for the respondents to succeed in this appeal, they must justify that differential treatment applying the justification test. This, they contend, they can do (and this contention will also be examined in closer detail in Section E below).

26. It was common ground between the parties that the challenges to the Benefits Decision and the Tax Decision both fall to be considered applying the same principles and that, in effect, they stand or fall together.

27. Although the appellant asserts that his claim for unlawful discrimination on the basis of his same-sex marriage places him in a relevantly comparable position to a man married to a woman, this appeal does not concern the question of whether same-sex couples have a right to marry under Hong Kong law. In *W v Registrar of Marriages*,<sup>[15]</sup> which concerned the right of a post-operative transsexual woman to marry a man in her new gender as a woman, it was "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".<sup>[16]</sup> As was the case in QT, it was not argued in this appeal that the constitutional freedom to marry and raise a family<sup>[17]</sup> makes marriage available to same-sex couples.<sup>[18]</sup>

### **D. Whether differential treatment on the basis of sexual orientation**

#### **D.1 The appellant's case**

28. In the appellant's printed case, it is contended:

"The Appellant's married relationship with his husband is in substance completely indistinguishable from that of a heterosexual married relationship. The Appellant's marriage is characterised by life-long commitment, monogamy, sexual intimacy and interdependence, exactly like a heterosexual (monogamous) marriage."[\[19\]](#)

29. By letter from the Registrar to the parties prior to the hearing of the appeal, the Court invited written submissions from the parties on the following two questions:

(1) "Whether the same sex marriage contracted by the applicant in New Zealand can, as a matter of Hong Kong law, be regarded as valid, in particular whether he had the capacity to enter into the marriage?"

(2) "If not valid, what are the consequences for the purposes of this appeal?"

30. In the appellant's answer to those questions, it is contended:

"The Applicant's case is that the fact of his relationship with Mr Adams, the nature and substance of which is evidenced *inter alia* by that marriage, puts him and Mr Adams in an analogous position to persons who are married in accordance with the marriage law of Hong Kong for the purposes of Civil Service benefits and taxation. This mirrors the position as it was in *Director of Immigration v QT* [\[2018\] HKCFA 28](#), [\[2018\] 4 HKC 403](#) for the purposes of immigration control."[\[20\]](#)

31. As already noted at [2] above, the appellant and his husband began cohabiting in 2013 and, on 18 April 2014, they were married in New Zealand where same-sex marriage is legal. Importantly, upon their marriage in New Zealand, the couple were issued with a New Zealand Marriage Certificate formally acknowledging their marriage and its registration by the Registrar of Births, Deaths and Marriages of New Zealand.

32. The appellant's case is that, by the respondents' application of an exclusively heterosexual marriage criterion in reaching the Benefits Decision and the Tax Decision, he is being discriminated against on the ground of his sexual orientation.

## ***D.2 The respondents' concession of differential treatment***

33. The respondents accept, for the purposes of this appeal, that "a same-sex married couple is in an analogous position to that of an opposite-sex married couple".[\[21\]](#) This is an important part of the respondents' concession and constitutes a crucial aspect in the circumstances of this case.

34. It was also accepted by the respondents, for the purposes of this appeal, that the denial of spousal benefits to a same-sex married couple and their inability to elect for joint tax assessment "constitutes indirect discrimination against same-sex couples on the ground of their sexual orientation *if not justified*, as they cannot get married lawfully under the prevailing marriage laws of Hong Kong".[\[22\]](#)

35. The respondents maintained this stance in their responses to the Court's questions referred to at [29] above.[\[23\]](#) They did so notwithstanding that they



contended that the appellant's same-sex marriage contracted in New Zealand could not be regarded as valid as a matter of Hong Kong law. That invalidity flowed, it was contended, from the fact that, under the conflict of laws rules in Hong Kong, capacity to enter into a marriage is a matter of essential validity and is determined by reference to the law of each party's place of ante-nuptial domicile.<sup>[24]</sup>

36. It is relevant to add, however, that the respondents did not contend, in response to the Court's questions, that the appellants' same-sex marriage was also invalid as a matter of New Zealand law. This argument had been alluded to in written submissions made on behalf of the respondents below in the Court of Appeal but the Court of Appeal noted that this point had been abandoned.<sup>[25]</sup> For that reason, and because there was no evidence of New Zealand law to suggest the contrary, the appeal before this Court proceeded on the basis that, as a matter of New Zealand law, the appellant and Mr Adams are lawfully married in that jurisdiction.

### ***D.3 The appellant is subject to differential treatment requiring justification***

37. The need to justify the differential treatment of the appellant being conceded by the respondents, it might be thought unnecessary to discuss the issue of whether there is relevantly differential treatment in this case. As the Court's questions (identified at [29] above) demonstrate, though, there might well have been some scope for debate as to the true boundaries of the analogous situations existing between same-sex couples and opposite-sex couples. Not all couples are in a truly analogous situation and the use of the status of marriage itself as a distinguishing characteristic may or may not be determinative of the question of whether there is relevant differential treatment in any given case. As the Court held in *QT*:

"This is not to suggest that a person's marital status is irrelevant as a condition for the allocation of rights and privileges. Such status may in some circumstances be highly important or even decisive. The point we make is 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, and that a person's marital condition cannot determine presumptively that discrimination does not exist."<sup>[26]</sup>

38. The question of whether treatment is relevantly different such as to require justification is always a matter that is context dependent. The Court observed in *QT*:

"44. The second major objection to the Director's first argument is that the identification of comparators does not of itself permit a proper conclusion to be reached as to whether a given difference in treatment is or is not discriminatory. As Lord Walker pointed out in *R (Carson) v Secretary of State for Work and Pensions*, the real issue in the case at hand was:

'... why the complainant had been treated as she had been treated. Until that question was answered, it was impossible to focus properly on the question of comparators.'

45. The notion of whether the comparators are analogous or relevantly similar is elastic both linguistically and conceptually. As his Lordship pointed out in the same judgment: 'Some analogies are close, others are more distant'. It is therefore generally unprofitable to debate in the

abstract whether a given comparator is or is not sufficiently analogous to require like treatment. The context of the question is crucial.”[\[27\]](#)

39. In *QT*, the relevant context was immigration control and the issue of dependency visas to persons from overseas who were dependents of those who had been admitted to live and work in Hong Kong. *QT* and *SS* had entered into a same-sex civil partnership in England under the UK’s Civil Partnership Act 2004. In the context of that case, the relevant comparison was between *QT* and her same-sex partner *SS* and a heterosexual married couple from overseas since it was the differential application of the dependency visa policy to both couples that gave rise to the differential treatment of *QT* on the basis of her sexual orientation. The Court held that, in the immigration context for the purposes of the dependency visa policy, there was no obvious difference between homosexual civil partners and heterosexual married couples: each status was recognised under UK law, and both homosexual and heterosexual couples were capable of having equivalent interdependent and interpersonal relationships.[\[28\]](#)

40. The present case is concerned with the conferment of financial benefits on spouses in the contexts of employment and taxation. Those benefits are conferred on the basis of marriage. The nature of the relationship between the appellant and Mr Adams is one of same-sex marriage valid under the law of the place where it was entered into. It is a relationship which has the same characteristics of publicity and exclusivity which distinguish a heterosexual marriage.

41. The characteristic of publicity is established by the formality of the marriage entered into by the couple under the laws of New Zealand and by the New Zealand Marriage Certificate issued to them under the Births, Deaths, Marriages, and Relationships Registration Act 1995. That certificate, which bears a formal registration number, states: the full particulars of the first and given names and surnames of the parties to the marriage; their sex, age, date and place of birth; their usual occupation, relationship status and usual residential address; and also full particulars of the first and given names and surnames of the couple’s parents. The date and place of the marriage are also recorded and the certificate states that it is a true copy of particulars recorded by a Registrar.

42. Similarly, in Hong Kong, there are detailed provisions for publicity of a marriage prescribed in the [Marriage Ordinance](#).[\[29\]](#) Notice of an intended marriage must be given to the Registrar of Marriages either directly or through a civil celebrant.[\[30\]](#) The Registrar is required to file and exhibit every notice of intended marriage in his office.[\[31\]](#) A marriage may be celebrated in a licensed place of worship or before a civil celebrant[\[32\]](#) and there are prescribed forms of marriage certificate that must be delivered to the parties in both such ceremonies.[\[33\]](#) The Registrar is required to register all certificates of marriage[\[34\]](#) and such certificates of marriage are admissible as evidence of the marriage to which they relate.[\[35\]](#) Searches of the register of marriages may be made and certified copies of marriage certificates obtained.[\[36\]](#)

43. The characteristic of exclusivity of the appellant’s and Mr Adams’ same-sex marriage is constituted by the consequence of their marriage under New Zealand law. Unless and until that marriage is legally dissolved in New Zealand, it must be taken to be valid and subsisting under that law. The appellant will not be free to marry someone else under New Zealand law whilst his marriage to Mr Adams subsists.

44. Exclusivity is also an essential characteristic of a marriage under Hong Kong law. Under the [Marriage Ordinance](#), the form of marriages under that ordinance is limited to “Christian marriage or the civil equivalent of a Christian marriage”<sup>[37]</sup> and such a 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”.<sup>[38]</sup> The fact that one or other of the parties to an intended marriage was already lawfully married at the time of the marriage renders such a marriage void and is a ground for a decree of nullity under the [Matrimonial Causes Ordinance](#).<sup>[39]</sup> Again, unless the marriage is dissolved in court proceedings, it must be taken as valid and subsisting.

45. In her submissions on behalf of the appellant, Ms Karon Monaghan QC,<sup>[40]</sup> pointed to the appellant’s New Zealand marriage certificate as evidence of his intimate relationship bearing family incidents with Mr Adams. That it may well be, as a matter of fact, but the material fact that the marriage certificate establishes is that the appellant and Mr Adams are in a valid same-sex marriage under the laws of New Zealand, where such marriages are lawfully recognised. It is not just the relationship between the appellant and Mr Adams that is important for the purposes of determining if there is differential treatment in respect of the Benefits Decision and the Tax Decision. A mere relationship (whether opposite-sex or same-sex) will not have the same readily identifiable characteristics of publicity and exclusivity described above that positively identify a same-sex married couple as being in materially the same position as an opposite-sex married couple. It is to be noted that the relationship between QT and SS in QT, having entered into a civil partnership, similarly had these characteristics of publicity and exclusivity.

46. For these reasons, the respondents’ concession of differential treatment requiring justification was properly made. In the context of the present case, concerned with financial spousal benefits, a same-sex married couple and an opposite-sex married couple are relevantly analogous and the appellant was treated differently to a heterosexual married man in respect of the two challenged decisions on the ground of his sexual orientation.

### ***E. Whether differential treatment justified***

47. There being differential treatment of the appellant on the basis of sexual orientation, it was common ground that the respondents bear the burden of justifying that treatment or else it will constitute unlawful discrimination. As noted at [22] above, the justification test is a four-step analysis and the respondents must show that the differential treatment satisfies each of the four steps in question.

#### ***E.1 The legitimate aim identified by the respondents***

48. The legitimate aim relied upon by the respondents in this case has been articulated in various, slightly different, ways.

49. First, as identified in the questions for which leave to appeal to this Court was given, the legitimate aim is said to be that “of protecting and/or not undermining the concept and/or 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”. This “not undermining the institution of marriage” aim reflects the way in which the legitimate aim was expressed in the evidence filed on behalf of the respondents in opposition to the appellant’s judicial review application.<sup>[41]</sup>

50. Secondly, the legitimate aim is said to be that “of protecting and not undermining the institution and unique status of marriage as understood and recognised in Hong Kong”.<sup>[42]</sup> This “protection of the unique status of marriage” aim is consistent with the way the legitimate aim was identified by each member of the Court of Appeal:

(1) Cheung CJHC (as Cheung PJ then was) referred to the fact that “by allowing same-sex couples to share in benefits or privileges that up till now have long been exclusively associated with or enjoyed by married couples, one is undermining the uniqueness of the status of marriage in society”;<sup>[43]</sup>

(2) Lam VP said: “The unique status of marriage, as the laws in Hong Kong presently stand, is only confined to heterosexual marriages. It is important to bear this in mind in the application of the proportionality test in the present case where protection of marriage is put forward as the justification for the differential treatments of the [appellant].”<sup>[44]</sup>

(3) Poon JA held: “Heterosexual marriage, as the only form of marriage recognized in Hong Kong and deeply imbedded in our legal system, must for obvious reason deserve full protection of the law.”<sup>[45]</sup>

51. Thirdly, Lord Pannick QC, on behalf of the respondents,<sup>[46]</sup> expressed the legitimate aim in terms of protecting the coherence of the law of Hong Kong on the subject of marriage. It was contended that there is a legitimate aim in avoiding the incoherence at the level of the laws of Hong Kong that would arise if the respondents were required to extend marital benefits to the appellant even though, as a matter of Hong Kong law, he is not married. This third variation of the legitimate aim argument may be described as the “coherence” aim.

52. Each of these ways of expressing the legitimate aim relied upon by the respondents is a variation of a similar rationale that was sought to be raised on behalf of the Director of Immigration at the hearing of the appeal in this Court in *QT* but which the Court did not permit the Director to argue as it had formed no part of the analysis of the courts below in that case and had not been addressed in evidence or submission by the parties.<sup>[47]</sup>

## ***E.2 Illegitimate or irrelevant aims***

53. Before addressing the three expressions of the legitimate aim identified at [49] to [51] above, it is convenient to identify two rationales for the differential treatment of the appellant that are either illegitimate or irrelevant. These rationales are alluded to in the main judgment in the Court of Appeal given by Poon JA (with which the other two members of the court agreed).

54. The first such argument is based on the concept of core rights and benefits unique to marriage. This was referred to by Poon JA in Section G of the CA Judgment. Although he rejected the argument that differential treatment of same-sex couples in respect of spousal benefits and the right to elect joint assessment did not require to be justified, he examined them in terms of whether they were core rights.<sup>[48]</sup> The “core rights” argument had its genesis in the Court of Appeal’s judgment in *QT*. In this Court’s judgment in *QT* (which was handed down after the judgment of the Court of Appeal in this case), the Court rejected the Court of Appeal’s approach of recognising that there were certain core rights pertaining to marriage and that differential treatment based on those core rights could not be regarded as

discriminatory.<sup>[49]</sup> It is therefore illegitimate to speak in terms of core marriage rights or to regard differences of treatment as not being discriminatory because they relate to such rights.

55. The other argument that can be shortly disposed of is the suggestion that prevailing views of the community on marriage are relevant to identifying a legitimate aim and justification of differential treatment. In the Court of Appeal, Poon JA said “protecting and not undermining the status of marriage in light of the prevailing views of the community on marriage as mentioned in Part G1 above is plainly a legitimate aim.”<sup>[50]</sup> In Part G1 of the CA Judgment, Poon JA referred to the fact that:

“As demonstrated by the results of recent surveys, public opinion on same-sex marriage remains divided with the majority firmly against it. The corollary is that the majority of the community still regards heterosexual marriage as the only acceptable form of marriage in the local social circumstances.”<sup>[51]</sup>

56. In Section F.9 of their joint judgment in *W v Registrar of Marriages*, Ma CJ and Ribeiro PJ rejected the absence of a majority consensus as a reason for rejecting a minority’s claim as being inimical in principle to fundamental rights. They quoted with approval the extra-judicial comments of the Chief Justice of Ireland, Murray CJ, in the following terms:

“... The use of consensus as an interpretive tool is inherently problematic, not only because of any perceived inconsistency in the application of the doctrine by the [ECtHR], but fundamentally because the very application of a doctrine of consensus by a court required to adjudicate on fundamental rights begs important questions of legitimacy. How can resort to the will of the majority dictate the decisions of a court whose role is to interpret universal and indivisible human rights, especially minority rights?”<sup>[52]</sup>

In his concurring judgment, Bokhary NPJ similarly rejected societal consensus as a relevant consideration.<sup>[53]</sup>

57. It follows therefore that the “prevailing views of the community on marriage” as identified by Poon JA, even if this can confidently be gauged in the first place, are simply not relevant to a consideration of the justification exercise. To the extent that Questions (1)(b) and (2)(b) (set out at [14] above) refer to the “prevailing socio-moral values of society on marriage”, they are to be answered in the negative.

### ***E.3 Is the aim identified legitimate?***

58. The appellant accepted that it has been held “that in principle the protection of the ‘*traditional family*’ as constituted by heterosexual marriage may constitute a legitimate aim”<sup>[54]</sup> and the respondents relied on the appellant’s acceptance of this legitimate aim.<sup>[55]</sup> To this extent, the question of whether the aim of the differential treatment is legitimate was common ground between the parties.

59. The respondents did not suggest that there was any difference in substance between the three ways in which the legitimate aim relied upon was articulated (see Section E.1 above) or that any of them differed in substance from what, as noted above, the appellant accepted to be a legitimate aim. They are materially the same as the argument which the Director of Immigration was not permitted to raise in *QT*



(see [52] above) and the slightly different ways the legitimate aim has been put were, as Lord Pannick QC described them in his oral submissions, complementary and “variations on a theme”.

60. The proposition that the protection of the traditional family constituted by heterosexual marriage is a legitimate aim is supported by a number of authorities, including the House of Lord’s decision in *Ghaidan v Godin-Mendoza*[56]: see also, *Mata Estevez v Spain*,[57]*Karner v Austria*,[58]*In re G (Adoption: Unmarried Couple)* [59]and *Kozak v Poland*. [60] In *Şerife Yiğit v Turkey*, the European Court of Human Rights stated:

“With regard to art.12 of the Convention, the Court has already ruled that marriage is widely accepted as conferring a particular status and particular rights on those who enter it. *The protection of marriage constitutes, in principle, an important and legitimate reason which may justify a difference in treatment between married and unmarried couples.* Marriage is characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit. Thus, states have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security.”[61]

61. 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. To this extent, in answer to Questions (1)(b) and 2(b) of the certified questions of law, the protection of the institution of marriage as defined under, and in its context within, the laws of Hong Kong is part of “the local legal landscape and societal circumstances” for the purposes of the issue of proportionality and/or justification.

62. The real contest between the parties in this appeal was the question of whether the differential treatment of the appellant was rationally connected to that legitimate aim of the protection of the traditional family in the circumstances of the present case and it is that to which we now turn.

#### ***E.4 Is the differential treatment rationally connected to the legitimate aim?***

63. In addressing this question, it is necessary to remember that one has reached it having already concluded that a same-sex married couple such as the appellant and Mr Adams are in a relevantly analogous position to an opposite-sex married couple and that there has been differential treatment that requires justification (see Section D.3 above).

64. It is also important to keep in mind the context of the differential treatment when addressing this question, just as context is relevant in determining whether one is considering an analogous situation giving rise to differential treatment (see the citation at [38] above).

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’.”[62]

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."[\[63\]](#)

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 but in particular:

(1) In the judgment of Cheung CJHC at CA Judgment [12]:

"... by allowing same-sex couples to share in benefits or privileges that up till now have long been exclusively associated with or enjoyed by married couples, one is undermining the uniqueness of the status of marriage in society; one is in fact equating relationships which society does not recognise as a marriage relationship and is not prepared to accord the status of marriage to, with what society regards as constituting a marriage relationship and is prepared to accord the status of marriage to. To do so, in the eyes of those holding the objection, is to offend, challenge, question, confuse, or subtly change society's established understanding and concept of marriage, which, as explained, is rooted in its traditional, historical, social, moral or religious background and values, as embedded in article 37 of the Basic Law. To do so, in other words, is to dilute or diminish the unique status of marriage in society. ..."

(2) And in the judgment of Poon JA at CA Judgment [90] and [126]:

"90. ... The protection must be full in the sense that the law must safeguard the special status of marriage from any impermissible inroads or encroachments lest the very institution of marriage, guaranteed by the Basic Law, would be shaken or would even collapse. ...

...

126. ... In the local context, if Spousal Benefits and joint assessment, which have been long associated closely and exclusively with marriage, were made available to homosexual couples, it would per se undermine, or be perceived by many to undermine, the status of marriage. Thus using marital status as the benchmark is plainly rationally connected to the aim of protecting marriage in the societal context of Hong Kong."

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.

73. The suggested rational connection between the differential treatment and the legitimate aim is all the more illogical in respect of the Benefits Decision when one takes into account the Government's published policy as an equal opportunities employer:

(1) The appellant's evidence was that, when he applied to join the Government as a civil servant, the advertisement of vacancies was accompanied by a note similar to that which is presently appended to Government employment advertisements. That note states:

"As an Equal Opportunities Employer, the Government is committed to eliminating discrimination in employment. The vacancy advertised is open to all applicants meeting the basic entry requirement irrespective of their disability, sex, marital status, pregnancy, age, family status, sexual orientation and race."[\[64\]](#)

(2) Furthermore, the Secretary has adopted a "Code of Practice against Discrimination in Employment on the Ground of Sexual Orientation", which includes the following statement:

"5.1 Government is committed to the principle of equal pay for equal work and encourages all employers to share that commitment. ... [This] means that – in principle – all employees are entitled to the terms and conditions of employment or access to employment or access to benefits, facilities or services commensurate with their rank, duties, seniority and experience and any other special circumstances of their employment, irrespective of their sexual orientation."[\[65\]](#)

74. It is difficult to see how the Secretary can adhere to the published employment policies dedicated to the elimination of discrimination on the ground of sexual orientation by denying to a married same-sex couple the same employment benefits that are available to a married opposite-sex couple.

75. The contention that there is a rational connection between the Tax Decision and the legitimate aim of protecting the institution of marriage as understood under Hong Kong law (i.e. heterosexual and monogamous) is, similarly, further undermined by the fact that section 2(1) of the IRO recognises a polygamous marriage in that it extends the definition of "marriage" to that between a man and his principal wife. The

IRO simply does not serve the purpose of promoting traditional heterosexual monogamous marriage.

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.

### ***E.5 The third and fourth steps of the justification test***

78. Having concluded that the two challenged decisions cannot be justified because the restriction of the spousal employment and tax benefits to opposite-sex married couples is not rationally connected to the legitimate aim of protecting the institution of marriage under Hong Kong law, it is not necessary to go on to consider the third and fourth steps of the justification test (set out at [22] above).

79. It was similarly unnecessary to go into those questions in the case of *QT* (at [100]), although the Court discussed the standard of review briefly in view of the full arguments received. Had it been necessary to go on to consider the third and fourth steps of the justification test, we would have followed the same reasoning as set out in *QT* at [103] to [109] and, albeit that the standard of review is case specific (*QT* at [110(c)]), would have applied the reasonable necessity standard in assessing the justification exercise in this case.

80. Realistically, though, both Ms Monaghan QC and Lord Pannick QC recognised in argument that their respective cases in this appeal stood or fell depending on the answer to the question of whether the differential treatment was rationally connected to the legitimate aim in question. Thus, in view of the Court’s conclusion in Section E.4 above, the answers to the third and fourth steps in the justification test would likely have been that the differential treatment was not proportionate and was not a fair balance in that it resulted in an unacceptably harsh burden on the appellant. But, as we have said, it is not necessary to express a concluded view on those issues.

### ***F. Conclusion***

81. We therefore answer the certified questions of law as follows:

(1) As to Question 1:

(a) No, see Section E.4 above.

(b) The local legal landscape and societal circumstances are relevant to the issue of proportionality and/or justification but not the prevailing socio-moral values of society on marriage, see [57] and [61] above.

(c) No.

(2) As to Question 2:

(a) No, see Section E.4 above.

(b) The local legal landscape and societal circumstances are relevant to the issue of proportionality and/or justification but not the prevailing socio-moral values of society on marriage, see [57] and [61] above.

(c) No.

82. For the reasons set out above, we would allow the appellant's appeal.

83. Both parties requested that the Court invite further written submissions on the form of relief that should follow in the event that we were to allow the appeal. It would also be appropriate for the parties to address the issue of the costs of the appeal in those written submissions. Accordingly, we direct that:-

(1) The appellant file written submissions as to the form of relief and the costs of the appeal within 14 days of the date of handing down of this judgment;

(2) The respondents file written submissions in response thereto within 14 days thereafter;

(3) The appellant file any written submissions in reply to those of the respondents within 7 days thereafter;

(4) Save with the leave of the Court, the appellant's and respondents' respective written submissions should not, in aggregate, exceed 5,000 words in length.

84. Unless otherwise directed, after receipt of the parties' written submissions pursuant to the above directions, the Court will proceed to determine the relief to be granted and the disposition of the costs of the appeal without any further oral hearing.

(Geoffrey Ma)  
Chief Justice

(R A V Ribeiro)  
Permanent Judge

(Joseph Fok)  
Permanent Judge

(Robert Tang)  
Non-Permanent Judge

(Murray Gleeson)  
Non-Permanent Judge

Ms Karon Monaghan QC, Mr Nigel Kat SC and Mr Azan Marwah, instructed by Daly & Associates, assigned by the Director of Legal Aid, for the Appellant

Lord Pannick QC, Mr Stewart Wong SC and Mr Johnny Ma, instructed by the Department of Justice, for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents

Hogan Lovells, for the Intervener (by written submissions only)

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[1] [\(2018\) 21 HKCFAR 324](#) (“QT”).

[2] [\(Cap.112\)](#) (“IRO”).

[3] The Court of Appeal gave leave to the ICJ to intervene by way of written submissions below.

[4] Specifically, CSRs 900 to 925 and 950 to 954.

[5] IRO, section 10 provides:

“(1) In the case of a husband and wife, unless an election is made under subsection (2), salaries tax shall be payable on the net chargeable income of each spouse ascertained under this Part by the spouse to whom the income has accrued.

(2) Where in any year of assessment a husband and wife, not being a wife living apart from her husband, both have assessable income and –

(a) either the husband or wife is entitled to deductions under Part 4A and allowances under Part 5 which, in aggregate, are in excess of his or her net assessable income; or

(b) both also have a net chargeable income and the aggregate of the salaries tax which would be payable by them if subsection (1) applies exceeds the salaries tax which would be payable if an election is made under this subsection,

an election may be made by them, subject to section 11, to be assessed to salaries tax in the manner specified in subsection (3).

(3) Where an election is made by a husband and wife under subsection (2) salaries tax shall be payable on their aggregated net chargeable income as ascertained under section 12B(2) and in the case of an election –

(a) under subsection (2)(a), the spouse who would have been chargeable to salaries tax in the absence of such an election;

(b) under subsection (2)(b), the spouse who is nominated by them,

shall be chargeable to salaries tax in respect of such aggregated net chargeable income.

(4) Where a husband or wife is deceased an executor shall have the same right to make an election under subsection (2) as the deceased would have had if the deceased had not died.

(5) For the purposes of subsection (3), where an election is made under subsection (2) by a husband and wife who married one another in the year of assessment to which the election relates, they shall be deemed, for the purposes of ascertaining their aggregated net chargeable income for that year, to have married at the commencement of that year.”



[6] In fact, the appellant was not adversely affected by this basis of assessment since, even if he and Mr Adams had been assessed for salaries tax by way of joint assessment as a married couple, they would not have obtained any reduction of their total tax liability.

[7] HCAL 258/2015, Judgment dated 28 April 2017 (“CFI Judgment”).

[8] CFI Judgment at [46]-[60].

[9] CFI Judgment at [64]-[66] and [76]-[78].

[10] CFI Judgment at [87]-[90].

[11] CACV 126/2107, [2018] HKCA 318 (Cheung CJHC, Lam VP and Poon JA), Judgment dated 1 June 2018 (“CA Judgment”).

[12] CA Judgment at [12]-[17] (per Cheung CJHC), [24] and [33] (per Lam VP), and [125]-[130] (per Poon JA).

[13] *Ibid.*

[14] Under s.22(1)(b) of the [Hong Kong Court of Final Appeal Ordinance \(Cap.484\)](#), in CACV 126/2017, [2018] HKCA 638, Judgment dated 24 September 2018.

[15] [\(2013\) 16 HKCFAR 112](#).

[16] *Ibid.* at [63].

[17] Under Art. 37 of the Basic Law which provides: “The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.”

[18] [\(2018\) 21 HKCFAR 324](#) at [25]-[26].

[19] Case for the Appellant at [9] (footnote omitted).

[20] Appellant’s Supplemental Case, 23 April 2019, at [4].

[21] Case for the Respondents at [38].

[22] Case for the Respondents at [26] and, similarly, [64] (*italics in original*).

[23] Supplemental Case for the Respondents at [11] and [15].

[24] *Ibid.* at [2]-[10].

[25] CA Judgment at [62(1)], footnote 16, which reads: “In her written submissions, Ms Carss-Frisk took the point that because of lack of capacity as a matter of the law of his domicile, which is Hong Kong law, the applicant could not be regarded as lawfully married to Mr Adams even under New Zealand law. But in her oral submissions, she effectively abandoned this point because, as she readily accepted, it did not help inform the proper analysis of the issues before the Court.”

[26] [\(2018\) 21 HKCFAR 324](#) at [76].

[27] *Ibid.* at [44]-[45] (italics in original; footnotes omitted).

[28] *Ibid.* at [46]-[52].

[29] (Cap.181).

[30] *Ibid.*, [section 6\(1\)](#).

[31] *Ibid.*, [section 7](#).

[32] *Ibid.*, [sections 19\(1\)](#) and [21\(1\)](#) respectively.

[33] *Ibid.*, [sections 20\(3\)](#) and [21\(6\)](#) respectively.

[34] *Ibid.*, [section 23](#).

[35] *Ibid.*, [section 24](#).

[36] *Ibid.*, [section 26](#).

[37] *Ibid.*, [section 40\(1\)](#).

[38] *Ibid.*, [section 40\(2\)](#).

[39] (Cap.179), per [section 20\(1\)\(c\)](#).

[40] Appearing with Mr Nigel Kat SC and Mr Azan Marwah.

[41] Affidavit of Tse Wing Yee Winnie on behalf of the 1<sup>st</sup> respondent dated 20 June 2016 at [65]; Affidavit of Kung Chun Fai Frederick on behalf of the 2<sup>nd</sup> respondent dated 20 June 2016 at [51].

[42] Case for the Respondents at [27] and [38].

[43] CA Judgment at [12].

[44] *Ibid.* at [23].

[45] *Ibid.* at [89].

[46] Appearing with Mr Stewart Wong SC and Mr Johnny Ma.

[47] [\(2018\) 21 HKCFAR 324](#) at [89].

[48] CA Judgment at [103]-[116].

[49] [\(2018\) 21 HKCFAR 324](#) at [62]-[66].

[50] CA Judgment at [125].

[51] *Ibid.* at [109(2)].

[52] [\(2013\) 16 HKCFAR 112](#) at [116].

[53] *Ibid.* at [219]-[220].

[54] Case for the Appellant at [59] (*italics in original*).

[55] Case for the Respondents at [19] and [27].

[56] [2004] 2 AC 557 per Lady Hale at [138].

[57] (Application No. 56501/00, 10 May 2001), [ECHR 2001-VI](#).

[58] (2004) 38 EHRR 24 at [40].

[59] [2009] 1 AC 173 at [108].

[60] (2010) 51 EHRR 16 at [98].

[61] (2011) 53 EHRR 25 at [72] (footnotes omitted, *italics added*).

[62] [2009] UKPC 52, [2010] 3 LRC 653 at [26].

[63] [2004] 2 AC 557 at [143] (*italics in original*).

[64] Affirmation of Leung Chun Kwong, 24 December 2015, at [9].

[65] *Ibid.* at [28]-[29], referring to [http://www.cmab.gov.hk/en/issues/full\\_code\\_of\\_practice.htm](http://www.cmab.gov.hk/en/issues/full_code_of_practice.htm) (21 December 2015).