CACV 558/2020, [2024] HKCA 184

On Appeal From [2023] HKCA 1224

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

# COURT OF APPEAL

CIVIL APPEAL NO 558 OF 2020

(ON APPEAL FROM HCAL NO 3525 OF 2019)

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BETWEEN

NG HON LAM EDGAR Applicant

and

SECRETARY FOR JUSTICE Respondent

(By Original Action)

AND BETWEEN

LI YIK HO Applicant

and

SECRETARY FOR JUSTICE Respondent

(By Order to carry on proceedings dated 8 April 2021

substituting Ng Hon Lam Edgar upon death)

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Before: Hon Cheung, Yuen and Au JJA in Court

Dates of Written Submissions: 5, 19 and 27 December 2023

Date of Decision: 26 February 2024

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D E C I S I O N

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Hon Au JA (giving the Decision of the Court):

On 24‍ October 2023, this court handed down its judgment (“**the CA Judgment**”) dismissing the respondent’s appeal.

By way of the Notice of Motion dated 21 ‍November 2023, the respondent seeks leave to appeal the CA Judgment to the Court of Final Appeal.

The facts and issues in the appeal, as well as this court’s reasons for dismissing it, are set out in the CA Judgment. We will not repeat them here. Unless otherwise stated, we will also adopt in this decision the abbreviations used in the CA Judgment.

After reviewing the Notice of Motion, we see no reason to deviate from the usual practice to consider this application on paper pursuant to paragraph‍ 3 of Practice Direction‍ 2.1.

Section‍ 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance, Cap‍ 484 provides that an appeal shall lie to the Court of Final Appeal at the discretion of this court or the Court of Final Appeal if the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court of Final Appeal for decision.

In the Notice of Motion, the respondent has set out the following three questions which he says are of great general or public importance:

1. Question 1: Is the status of marriage a distinguishing characteristic in the context of the Marriage Provisions, rendering same-sex married couples and opposite-sex married couples not relevantly comparable in this context, given the interrelationship between the laws of inheritance and matrimony, which also impose expectations and legal obligations that apply to married persons only, namely the Lifetime Marital Maintenance Duty.
2. Question 2: Is the legitimate aim of having consistent and coherent definitions of “valid marriage” across legislative schemes which touch on the subject of marriage rationally connected to the difference in treatment between same-sex married couples and opposite-sex married couples, taking into account the Government and the Legislature’s prerogative (and now duty following the judgment of the Court of Final Appeal in *Sham Tsz Kit* *v Secretary for Justice* [2023] HKCFA 28) to review Hong Kong’s social, policy and legislative context for the purposes of establishing an alternative framework for legal recognition of same-sex partnerships.
3. Question 3: If the answer to Question 2 above is “yes”, whether in all the circumstances the non-inclusion of same‑sex married couples in the Marriage Provisions is (a)  proportionate; and (b) implements a reasonable balance between societal benefits and individual rights, given *inter  alia* the comparatively limited interference with rights by reason of the availability of alternative means for same-sex married couples to exercise their rights outside of the intestacy scheme under the IEO and IPO.

We agree that these questions are of great general or public importance, in particular in light of the Court of Final Appeal’s recent judgment in *Sham Tsz Kit v Secretary for Justice*. These questions are also inter-dependent and directly or indirectly impact on the important issue of the constitutionality and lawfulness of the relevant intestacy scheme under the IEO and IPO.

Further, notwithstanding the applicant’s contrary submissions, we are of the view that the grounds of appeal as set out in the Notice of Motion cannot be said to be unarguable.

In the premises, and for the above reasons, we will grant leave to the respondent to appeal the CA Judgment to the Court of Final Appeal for the questions and under the grounds of appeal as set out in the Notice of Motion.

We further order on a *nisi* basis that:

1. The costs of this application be in the cause of the appeal.
2. The applicant’s own costs be taxed in accordance with legal aid regulations.

(Peter Cheung) (Maria Yuen) (Thomas Au)

Justice of Appeal Justice of Appeal Justice of Appeal

Written submissions by Mr Abraham Chan SC and Ms Denise Souza, instructed by Department of Justice, for the Respondent

Written submissions by Mr Jin Pao SC and Mr Azan Marwah, instructed by Daly & Associates, assigned by the Director of Legal Aid, for the Applicant