FACV No. 8 of 2019

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL NO. 8 OF 2019 (CIVIL)
(ON APPEAL FROM CACV NO. 34 OF 2017)

BETWEEN

LEUNG KWOK HUNG **Appellant**
also known as "LONG HAIR"

and

COMMISSIONER OF CORRECTIONAL SERVICES **Respondent**

SUPPLEMENTAL CASE FOR THE APPELLANT[1]

A. INTRODUCTION

1. The Appellant submits this Supplemental Case in response to the Case for the Respondent dated 27 December 2019 ("**the Commissioner's Case**").

2. This Supplemental Case will not address each and every point raised in the Commissioner's Case. The fact that certain points are not addressed in this Supplemental Case should not be taken as the Appellant's admission or concession of the same.

[1] All emphases are added save otherwise specified. The Appellant adopts the definitions and abbreviations used in the Case for the Appellant dated 20 November 2019.

B. PURPORTED EVIDENCE ON THE "CONVENTIONAL HAIRSTYLES"

3. In §6 of the Commissioner's Case, the Commissioner alleged, *inter alia*, that:

> "The ***evidence*** is that SO 41-05 is based on the conventional hairstyles of male and female persons in Hong Kong society, and that, objectively, there are different conventional standards of appearance for men and women. …"

4. In purported support of this assertion, the only "evidence" referred to by the Commissioner (in footnote 4 of the Commissioner's Case) is §36 of the Affirmation of Leung Kam Yan. [B/20/76]

5. In reply, it should be noted that:

(1) in §36 of the Affirmation of Leung Kam Yan, the word "conventional" (or any word to that effect) was *not* even used. In fact, §36 is the very last paragraph in that Affirmation which was clearly not addressing the purported reasons for issuing SO 41-05: *cf* §§5-26 of the same Affirmation which address the purported "Policy Reasons for the Hair-Cutting Requirement for Male Prisoners". In any event, there is no evidence as to when and how the alleged "reference to the hairstyle of male and female persons in Hong Kong society" was made or whether it has ever been reviewed; and [B/20/76] [B/20/65-72]

(2) the Commissioner has never adduced any evidence on the so-called "***conventional*** hairstyles of male and female persons in Hong Kong society", let alone evidence that the "conventional hairstyle" of male in Hong Kong was one of "sufficiently close".

6. Further, the Commissioner repeatedly alleged that the evidence on the so-called "conventional hairstyle" or "conventional standards of appearance" is "unchallenged" by the Appellant: see the Commissioner's Case at §§8(1), 28, 30(1), 46 and 74.

7. Such allegation is unfair and incorrect because:

(1) as submitted above, the Commissioner has never adduced any evidence on the so-called "conventional hairstyles" of male and female in Hong Kong. As such, there was simply no "evidence" for the Appellant to "challenge";

(2) contrary to the assertions contained in §§30(2), 77 and 78(2) of the Commissioner's Case, the burden rests squarely on the Commissioner to adduce sufficient admissible evidence to support his bare assertion that the "conventional standard of hairstyle for men in Hong Kong is a short hairstyle whereas the conventional standard for women is that they may have short or long hair": see the Commissioner's Case at §30(1); and

(3) in any event, the Appellant's case is that the alleged "conventional standards of appearance" of male and female

per se are part of the mischief at which the anti-sex discrimination legalisation aims. See David Pannick, *Sex Discrimination Law* (Clarendon Press, Oxford 1985) at 189:[2]

> 'The stereotypes of acceptable male and female behaviour which many grooming codes adopt are inconsistent with a statute which requires employment decisions to be made without reference to the sex of employees. ***Grooming codes which act on such stereotypes are part of the mischief at which the [Sex Discrimination Act 1975][3] aimed. They define the treatment of individuals according to social expectations of what is appropriate for each sex.*** They adopt and they reinforce custom and prejudice based on gender and ***not on any characteristic inherent in men or in women***.'

C. THE SO-CALLED "CONVENTIONAL HAIRSTYLE" WAS NOT RELIED UPON BY THE COMMISSIONER IN THE COURT OF FIRST INSTANCE

8. In §6 of the Commissioner's Case, the Commissioner further alleged, *inter alia*, that:

[2] See also Ivan Hare, *Gender Discrimination and Grooming Codes in the Labour (Super)Market* (1995) 1 International Journal of Discrimination and the Law 179 at 181-182.
[3] As Hartmann J observed in the **Education Case** at §7: "The [SDO] is very largely, although not entirely, based on the Sex Discrimination Act 1975 …".

"… An inmate is simply required to wear a hairstyle which conforms to the conventional hairstyle of his or her own sex. This was never challenged by the Appellant in both Courts below, even though the case based on standards of appearance was a major feature of the Respondent's case. …"

9. In purported support of the assertion that "the case based on standards of appearance was a major feature of the Respondent's case", the Commissioner referred (in footnote 7 of the Commissioner's Case) to the CFI Judgment at §58 *et seq*. [A/1/25]

10. In reply, it is significant to note that:

(1) the so-called "conventional hairstyle" was not even relied upon by the Commissioner in the Court of First Instance ("**CFI**");

(2) despite the fact that **Smith v Safeway plc** [1996] ICR 868 was relied upon by the Commissioner in the CFI,[4] the Commissioner's case was that "SO 41-05 also applies a common principle of achieving ***custodial discipline*** (including health and cleanliness) and ***prison security*** for both male and female prisoners by reducing the risks that disproportionately affect male inmates population more": see §63 of the CFI Judgment; [A/1/27-28]

[4] See §§59-62 of the CFI Judgment [A/1/26-27].

(3) as recognised in §58 of the CA Judgment, the Commissioner's "submission was initially advanced with its focus upon the concern for security as the objective for the hair length policy"; and [A/7/95]

(4) it is therefore not correct to suggest that "the case based on standards of appearance was a major feature of the Respondent's case" in the CFI. It is also unfair to suggest that this was "never challenged by the Appellant in both Courts below" given that the Commissioner drastically changed his case only in the CA.

D. SECTION 10 OF THE SDO

11. In §§16 and 50 of the Commissioner's Case, the Commissioner relied on section 10 of the SDO, which provides that the comparison under section 5(1) of the SDO "shall be such that the relevant circumstances in the one case are the same, or not materially different, in the other".

12. As Hartmann J observed in the **Education Case** at §97, the purpose of section 10 of the SDO "is to differentiate between ***purely personal qualities*** which separate persons of whatever sex and to find the common ground which will determine whether there has been discrimination".

13. In this regard, it should be noted that the so-called "conventional hairstyles of male and female persons in Hong Kong society" are ***not*** "***purely personal qualities*** which separate persons of whatever

sex", but are merely "social expectations of what is appropriate for each sex"[5]. It is therefore not open to the Commissioner to attribute to each sex a "conventional hairstyle" as part of the "relevant circumstances" under section 10 of the SDO.

E. STEREOTYPING

14. In relation to stereotyping, the Commissioner argued that:

(1) "The question of stereotyping or generalisation is relevant only to the Causation Question, and not the Comparator Question": see the Commissioner's Case at §§35(1) and 36-43;

(2) "This is simply not a stereotyping case at all": see the Commissioner's Case at §§35(2) and 44-52; and

(3) alternative to (1) and (2) above, "the treatment of the Appellant is nonetheless still not objectively less favourable": see the Commissioner's Case at §§35(3) and 53-59.

15. First, it is wrong in law for the Commissioner to suggest that the question of stereotyping or generalisation is "relevant only to the Causation Question".

[5] See David Pannick, *Sex Discrimination Law* (Clarendon Press, Oxford 1985) at 189.

16. As Lord Nicholls observed in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 at §8:

> "No doubt there are cases where it is convenient and helpful to adopt this two step approach to what is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others? But, especially where the identity of the relevant comparator is a matter of dispute, this sequential analysis may give rise to needless problems. Sometimes ***the less favourable treatment issue*** cannot be resolved without, at the same time, deciding ***the reason why issue***. ***The two issues are intertwined***."

17. There is no reason *in principle* why the policy that "individuals should be treated as individuals, and not assumed to be like other members of a group"[6] should not be applied to both the "less favourable treatment issue" and the "the reason why issue".

18. Take the **Education Case** for example:

    (1) as can be seen from §77, the Director of Education contended that the relevant gender-based mechanisms did not "treat one sex less favourably than the other";

    (2) Hartmann J rejected such contention by giving two reasons at §78, and then went on to elaborate the two reasons at §§79-95 and 96-102 respectively; and

[6] See **R (E) v Governing Body of JFS** [2010] 2 AC 728 at §90.

(3) it is clear that the principle stated in §91 of the **Education Case** (ie "the force of s.5(1)(a) of the [SDO] is not to be deflected by broad assumptions, even if statistically well-founded, that categorise women according to stereotypes") is relevant to the two intertwined issues.

19. See also **R (Interim Executive Board of Al-Hijrah School) v HM Chief Inspector of Education, Children's Services and Skills** [2018] 1 WLR 1471 at §§49-53, where Sir Terence Etherton MR and Beatson LJ (with whom Gloster LJ agreed on this point) held that the judge below was wrong to approach the question of "less favourable treatment" on the footing that "each sex must be viewed as a group".

20. Secondly, it is factually incorrect for the Commissioner to suggest that this is "simply not a stereotyping case at all".

21. As Baroness Hale explained in the **Roma Case** at §74:

> "… The whole point of the law is to require suppliers to treat each person as an individual, not as a member of a group. The individual should not be ***assumed to hold the characteristics which the supplier associates with the group***, whether or not most members of the group do indeed have such characteristics, ***a process sometimes referred to as stereotyping***. …"

22. The assumption that "the conventional standard of hairstyle is short hair for men"[7] is plainly a form of stereotype whereby the Commissioner assumes an individual man to hold a characteristic (ie short hair) which he associates with the group.

23. Thirdly, the treatment of the Appellant is clearly objectively less favourable. This is so because the Appellant was deprived of "a choice which is … valued by [him] … and which (even though others may take a different view) is a choice obviously valued, on reasonable grounds, by many others": see **R v Birmingham City Council** at 1193H.

24. Further, as Sir Roger Ormrod remarked in **Gill v El Vino Co** [1983] QB 425 at 432D-E (cited in **R (Interim Executive Board of Al-Hijrah School)** at §59):

> "… I find it impossible to say, where one sex has an option and the other has not, that there is not a differentiation between them and, prima facie, a differentiation which results in less favourable treatment."

25. In requiring all male prisoners to have their hair "kept cut sufficiently close" while giving all female prisoners choices as to whether to have a hair-cut and their hair length, SO 41-05 clearly treats male prisoners less favourably.

Dated the 7th day of February 2020.

[7] See the Commissioner's Case at §48.

Hectar Pun, SC

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