FACV 8 & 9 of 2022

IN THE COURT OF FINAL APPEAL
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL No. 8 OF 2022 (CIVIL)
(ON APPEAL FROM CACV NO. 183 OF 2019)

BETWEEN:

Q

Appellant

and

COMMISSIONER OF REGISTRATION

Respondent

AND

IN THE COURT OF FINAL APPEAL
HONG KONG SPECIAL ADMINISTRATIVE REGION
FINAL APPEAL No. 9 OF 2022 (CIVIL)
(ON APPEAL FROM CACV NO. 184 OF 2019)

BETWEEN

TSE HENRY EDWARD

Appellant

and

COMMISSIONER OF REGISTRATION

Respondent

SUPPLEMENTAL CASE FOR THE APPELLANTS

Introduction

1 This Supplemental Case addresses the submissions made in paragraphs 8-9 (pp.17-27) of the Commissioner's Written Case. Those paragraphs challenge the approach taken by the Court of Appeal to the standard of scrutiny applicable to the proportionality test in the present case.

2 The approach taken by the Court of Appeal is set out at paragraph 50 of its Judgment[1] which was reproduced in paragraph 54 of the Appellant's Printed Case.

3 The Commissioner says at paragraph 9 of his submissions that he will

> "proceed on the basis that the standard of scrutiny is at the more stringent end of the spectrum",

but "for future guidance", he invites the Court to "clarify what is the correct approach".

4 The Commissioner did not seek leave to argue that the Court of Appeal erred in law in this respect.

5 Just as it is the submission for the Commissioner (paragraph 9 of his Written Case) that

> "his primary case is that whatever standard of scrutiny is adopted",

the Policy satisfies the proportionality test, so the Appellants submit that whatever standard of scrutiny is applicable, the Policy fails the

[1] [A/6/97]

proportionality test.

6 Nevertheless, the Court may find it helpful to have the Appellants' response to the Commissioner's criticisms of the approach adopted by the Court of Appeal.

The Standard of Scrutiny

7 The Appellants accept that the standard of scrutiny to be applied depends on the context and on the circumstances of the particular case, as stated by Ma CJ for the Court in Kwok Cheuk Kin v Secretary for Constitutional and Mainland Affairs (2017) 20 HKCFAR 353 at paragraphs 36-40.

8 However, it has long been recognised that where the decision affects "core values" or "fundamental concepts", a "much less leeway or margin of appreciation will be accorded to the authority concerned": Fok Chun Wa v Hospital Authority (2012) 15 HKCFAR 409, paragraphs 77-79 (Ma CJ for the Court). That is even where the case concerns social or economic policies where the Court would otherwise recognise a broad measure of discretion. This does not mean that there is a universal rule, rather that there is a strong presumption that strict scrutiny will be applied in such cases.

9 That was the approach taken by the ECtHR in Lustig-Prean and Beckett v United Kingdom (2000) 29 EHRR 548. The Court stated at p.580, paragraph 82 that where the interference with rights protected by Article 8 of the ECHR concerns "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such an interference could be justified. The ECtHR applied that principle, in that case, in relation to the organisation of the armed forces of the United Kingdom and where the Government sought to justify its policy to dismiss all homosexuals on

the basis of *inter alia* operational effectiveness, morale and discipline - a context in which the State would normally enjoy a broad margin of discretion.

10 The ECtHR applied that same approach in AP, Garcon and Nicot v France (Application Nos. 79885/12, 52471/13 and 52596/13, Judgment dated 6 April 2017) at paragraphs 122 & 123 (which are reproduced at paragraphs 58 – 59 of the Appellants' Printed Case).

12 The Appellants submit that both the CFI (at paragraphs 44–51[2]) and Court of Appeal were correct to conclude that a strict standard of scrutiny is appropriate in the circumstances of the present case:

(1) The Policy interferes with a "most intimate part of an individual's private life": their sexual identity and the disclosure of it to others. Because of the Policy, the Appellants must disclose their transgender status to strangers whenever (and it is frequent) they use their HKID. They suffer repeated and severe humiliation, loss of dignity and embarrassment as a consequence.

(2) Furthermore, the Policy interferes with the physical integrity of the Appellants, because the only means by which the Appellants can avoid the harm done to their private life when they use their HKID is by submitting to sterilization and major surgery which is not only invasive but for the Appellants', medically unnecessary.

13 None of the arguments advanced by the Commissioner justify the adoption by the Court of a broad margin of discretion in the circumstances of this

[2] [A/3/36-39].

case:

(1) The Commissioner's reliance on the judgment of Lord Reed for the Supreme Court in R (SC) v Secretary of State for Work and Pensions [2022] AC 223 is misplaced. Lord Reed emphasised at paragraph 151 that although a wide margin of discretion would normally apply in relation to social and economic policy, where allocation of state benefits resulted in discrimination on "suspect grounds",

> "a number of other factors may also be relevant in the circumstances of particular cases, some of which may call for a stricter standard of review. One might then ask, for example in a case concerned with 'suspect' grounds, whether 'very weighty reasons' have been shown ...".

Lord Reed repeated at paragraph 158:

> "In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a 'suspect' ground is to be justified. ... Equally , even where there is no 'suspect' ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children".

Those considerations do not arise in the present case as the core aspect of Article 14 namely gender identity and physical integrity are clearly engaged

(2) The Commissioner suggests at paragraph 9.4 of his Written Case that, disagreeing with the CFI judgment at paragraph 46[3] and the

[3] [A/3/38]

Court of Appeal judgment at paragraph 50)[4], the interference with the core right to private life is limited because the Appellants are able to live their lives in Hong Kong. This demonstrates a lack of understanding of the degree of detriment imposed by the Policy. The Court of Appeal said at paragraph 85 of its Judgment[5] that it was:

> "profoundly conscious of the hardship that the [Appellants] have to endure in this regard".

See paragraphs 50, 51, 85(3), 90, and 92(2) of the Appellants' Printed Case for the Appellants' submissions on the degree of detriment and the dilemma to elect between two facets of their Article 14 rights. That all of this does not mean that the Appellants "cannot live at all as transgender persons in Hong Kong" (paragraph 9.4 of the Commissioner's Written Case) is no answer to the complaint that the Policy has a severe impact on intimate aspects of the Appellants' private life and on their bodily integrity such that a strict scrutiny of the justification for the Policy is required.

(3) The Commissioner also relies on the judgment of Lord Reed for the Supreme Court in R (Elan-Cane) v Secretary of State for the Home Department [2022] 2 WLR 133 a case concerning the refusal to issue passports with "X" as a sex indicator to identify non-gendered individuals. Lord Reed did not accept (see paragraphs 36 and 57 of the Judgment) that "a particularly important facet of the applicant's existence or identity is at stake in the present proceedings" because there was no requirement in the UK to use the passport as a routine identification document, and the adverse consequences were no

[4] [A/6/97]
[5] [A/6/114]

more than minimal, see paragraphs 37-42 per Lord Reed. This contrasts sharply with the situation in Hong Kong and causes to the Appellants detriments stated in (2) above, unless they agree to invasive and unnecessary medical treatment.

(4) The Commissioner also relies on what he says at paragraph 9.6 are the considerations concerning "the impact on the public of a change of the sex entry". But the Appellants are not disputing that those interests need to be weighed in the balance under the proportionality test. The question in issue is what degree of scrutiny the Court should apply to the public interests on which the Commissioner relies.

(5) At paragraph 9.7, the Commissioner contends that because the Appellants have not presented arguments under Article 3 of the Hong Kong Bill of Rights,

> "the fact that SRS affects the physical integrity of an individual is not a factor which supports a narrow margin".

However, the Appellants stated at paragraphs 5 and 51 of their Printed Case that notwithstanding the position on Article 3, Article 3 considerations inform the breach of Article 14 which protects the right to physical and bodily integrity. Therefore whether or not there is a breach of Article 3, the Policy requiring the Appellants to elect invasive and medically unnecessary medical treatment in order to avoid the detriments identified in (2) above requires strict scrutiny. The ECtHR so recognised in AP (see paragraph 10 above)

(6) At paragraph 9.8, the Commissioner says that the challenge to the legality of the Policy concerns "sensitive moral and ethical issues". But the justifications advanced by the Commissioner are practical, not moral or ethical, i.e.

(a) "…to enable a registration officer to determine the application".

(b) "[T]he practical difficulties which would be caused if the external physical appearance of the holder is incongruent with the sex entry" on the HKID.

(c) "[H]ormonal and psychiatric treatments that precede full SRS are not absolutely irreversible".

In any event, strict scrutiny is not excluded whenever a sensitive moral or ethical issue arise. See, for example, Lustig-Prean and Beckett v United Kingdom.

(7) At paragraph 9.9, the Commissioner suggests that the Court is "ill-equipped to deal with" the issues. The Basic Law requires the Court to assess proportionality in the present context which it regularly does and the Court of Appeal did not suggest it was incapable of assessing the arguments.

(8) As such the reliance in paragraphs 9.10-9.11 on the judgment of the Court of Appeal in R (McConnell) v Registrar General for England and Wales [2021] Fam 77 is misplaced. That case did not turn on any severe intrusion on the private life of the Applicant and on their

bodily integrity as in the present case (see (2) above). Instead, the applicant argued in R (McConnell) that he was entitled to register as a "parent" of his child instead of "mother" and the legislative scheme under the Gender Recognition Act 2004 which said otherwise was in breach of Article 8 ECHR and his right to be identified as a male. The English Court of Appeal held at paragraph 35 that the applicant's argument to replace "mother" with "parent" "would not be an exercise in interpretation at all but would amount to judicial legislation". It was therefore in that context that it held at paragraph 81,

> "… If there is to be reform of the complicated, inter-linked legislation in this context, it must be for Parliament and not for this Court."

(9) Finally, the Commissioner relies at paragraph 9.12 on the fact that the Government has set up a Working Group to consider the question of gender recognition generally. As the Court of Appeal noted at paragraph 36 of its Judgment, the Inter-Departmental Working Group ("IWG") issued a consultation paper and obtained public views by 31 October 2017 and more than five years later, "has yet to finalize their recommendations". The possibility that IWG would provide recommendations at some unspecified time which has no binding force cannot possibly provide a basis for the Court not to apply strict scrutiny to the justifications advanced by the Commissioner in the present case if strict scrutiny is otherwise required by law.

Conclusion

14 For all the reasons set out above, the Appellants invite the Court to conclude that there is no basis for it to give "guidance" disagreeing with the conclusions reached by the Court of Appeal as to the appropriate standard of scrutiny in the present case.

LORD PANNICK KC

HECTAR PUN SC

EARL DENG

25 November 2022