Press Summary (English)

Press Summary (Chinese)

FACV No. 1 of 2018

[2018] HKCFA 28

**IN THE COURT OF FINAL APPEAL OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

FINAL APPEAL NO. 1 OF 2018 (CIVIL)

(ON APPEAL FROM CACV NO. 117 OF 2016)

---

BETWEEN

| | |
|---|---|
| QT | Applicant (Respondent) |
| and | |
| DIRECTOR OF IMMIGRATION | Respondent (Appellant) |

---

Before: Chief Justice Ma, Mr Justice Ribeiro PJ, Mr Justice Tang PJ, Mr Justice Fok PJ and Lord Walker of Gestingthorpe NPJ

Date of Hearing: 4 June 2018

Date of Judgment: 4 July 2018

---

J U D G M E N T

---

**THE COURT:**

*A. Introduction*

1. This appeal raises important issues concerning equality under the law and, specifically, whether there has been unlawful discrimination on the part of the Director of Immigration ("the Director") in the administration of his policy regarding the issue of dependant visas.

### *A.1 The parties*

2. The respondent QT[1] is a British national. She is homosexual and met her partner, SS, who has dual South African and British nationality, in 2004. In May 2011, QT and SS entered into a same-sex civil partnership in England under the UK's Civil Partnership Act 2004.

3. SS was offered employment in Hong Kong and granted an employment visa to come and work here. On 23 September 2011, the couple entered Hong Kong, SS on the strength of her employment visa and QT as a visitor. Since their arrival in Hong Kong, SS's employment visa has been extended from time to time as has QT's visitor status. As a visitor, QT is not permitted to work or study in Hong Kong and, unlike those who enter under a dependant visa, her period of stay may not qualify her for eventual permanent resident status. The couple live in Hong Kong together and SS supports QT. There is no dispute that their civil partnership is a genuine relationship and that they live together as a family.

4. Under the Immigration Ordinance,[2] the Director is responsible for immigration controls on entry into, stay in and departure from Hong Kong. The policy presently in question is that under which a person may apply to take up residence or remain in Hong Kong as a dependant of another person who has been admitted into Hong Kong to take up employment ("the Policy").

### *A.2 The Policy*

5. Under the Policy, certain persons are eligible to apply as dependants of sponsors who are not Hong Kong permanent residents. They are (i) the sponsor's spouse; and (ii) his or her unmarried dependant children under the age of 18.[3] The Immigration Department states that an application for admission of a dependant may be favourably considered if:

> "a. there is reasonable proof of a genuine relationship between the applicant and the sponsor;
>
> b. there is no known record to the detriment of the applicant; and
>
> c. the sponsor is able to support the dependant's living at a standard well above the subsistence level and provide him/her with suitable accommodation in the HKSAR."[4]

It is not disputed that QT and SS meet these three requirements.

6. In his affirmation, Mr Wong Mo Cheong Wilson ("Mr Wong"), a Principal Immigration Officer in charge of the Visa Control (Policies) Division of the Immigration Department, states that the rationale of the Policy is "to ensure that Hong Kong will continue to attract people with the right talent and skills to come to Hong Kong by giving them the choice of bringing in their dependants to live with them in Hong Kong".[5] However, because of Hong Kong's small size and high population density, Mr Wong asserts that the Director has to maintain a strict policy of immigration control and that the eligibility criteria under the Policy are necessarily stringent.[6] As will be seen, the issues in the present case arise from the Director's definition under the Policy of "the sponsor's spouse" as someone of the opposite sex in a monogamous marriage, adopting marital status as defined under Hong Kong's matrimonial law, thus excluding same-sex parties such as QT and SS.

### *A.3 QT's application for a dependant visa and its refusal*

7. After making unsuccessful applications for a dependant visa and also for an employment visa in her own right, on 29 January 2014 QT submitted the application for a dependant visa which has led to these proceedings.

8. On 18 June 2014, the Director refused her application on the ground that it was "outside the existing policy", providing the following explanation:

> "Under existing immigration policy, application for entry as a dependant for a sponsor who has been admitted into the HKSAR to take up employment will normally be considered for:
>
> (a) husband/wife to join resident spouse; or
>
> (b) unmarried children under the age of 18 to join resident parents[.]

> The existing immigration policy on admission of spouse as a dependant is based on monogamy and the concept of a married couple consisting of one male and one female. In other words, when applying for a dependant visa, the applicant and his/her sponsor should, among other things, show that their marriage was celebrated or contracted in accordance with the law in force at the time and in the place where the marriage was performed and recognized by such law as involving the voluntary union for life of one man and one woman to the exclusion of all others."

### *A.4 The application for judicial review*

9. In October 2014, QT commenced the present judicial review proceedings seeking to quash the Director's decision refusing her dependant visa application. She advanced three grounds of challenge:

> (a) First, that the decision was unreasonable in the public law sense[7] as it was discriminatory against her on sexual orientation grounds that were not justified;
>
> (b) Secondly, that the Director erred in law in construing "spouse" in the Policy to mean husband or wife but not including a party to a same-sex marriage-like relationship; and
>
> (c) Thirdly, that, if the Director was correct in his construction of "spouse", then this infringed QT's constitutional rights under Articles 1, 14 and 22 of the Hong Kong Bill of Rights[8] and Articles 25, 39 and 41 of the Basic Law of the Hong Kong Special Administrative Region.[9]

10. In the Court of First Instance, Au J concluded in favour of the Director on grounds 1 and 2 and dismissed QT's application for judicial review. He held it unnecessary to deal with the constitutional challenge under ground 3. [10]

### *A.5 The Court of Appeal's decision*

11. QT appealed, relying on grounds of appeal that corresponded to her three grounds of challenge at first instance. The Court of Appeal unanimously allowed QT's appeal and quashed the Director's decision refusing her a dependant visa.[11]

12. It was recognised that the first ground of appeal was determinative of the outcome of the appeal.[12] Giving the main judgment, Poon JA[13] found that the Director's policy of accepting only opposite-sex spouses as eligible for a dependant visa under the Policy constituted indirect discrimination unless justified by the Director.[14]

13. Although arguing that excluding same-sex married partners or civil partners as spouses under the Policy did not constitute discrimination on any prohibited or suspect ground, the Director contended in the alternative that such differential treatment could be justified. His case in this respect was set out in counsel's written summary given to the Court of First Instance, relied upon also in the Court of Appeal, in the following terms:

> "The difference in treatment pursues the legitimate aim of striking a balance between (1) maintaining Hong Kong's continued ability to attract people with the right talent and skills to come to Hong Kong to work (by giving them the choice of bringing in their closest dependants to live with them in Hong Kong and to care for and support them in Hong Kong); and (2) the need for a system of effective, strict and stringent immigration control in the light of Hong Kong's small geographical size, huge population, substantial intake of immigrants, relatively high per capita income and living standard, and local living and job market conditions, which bring constant and high pressure on Hong Kong's society as a whole in particular the labour market, social benefits system, housing, education and infrastructure.
>
> To achieve the said legitimate aim, the Director adopts a bright-line rule, based on marital status as defined by Hong Kong's matrimonial law and which the Director is obliged to follow and give effect to, and which provides for legal certainty and administrative workability and convenience, which is rationally connected with the said aim and is no more than necessary to accomplish the said aim."[15]

14. Whilst it was common ground that the aim of striking the balance described was legitimate,[16] Poon JA held that the Director's eligibility requirement, restricted to heterosexual married persons and excluding same-sex married partners or civil partners, was not rationally connected to that aim.[17] Accordingly, he concluded that the Director failed to justify the discriminatory treatment[18] and that it was unnecessary to consider the remaining steps of the justification analysis (referred to below[19]). He noted, however, that the Director had not sought to explain why the discriminatory aspect of the eligibility requirement was no more than necessary to achieve the asserted aim of striking the balance described. [20] QT's application for judicial review accordingly succeeded.

### *A.6 Leave to appeal to this Court*

15. On the Director's application, the Court of Appeal granted leave to appeal on the ground that the appeal involved questions of great general or public importance which ought to be submitted to this Court for decision. [21] Those questions are as follows:

> "(1) Given that same-sex marriage or civil partnership is not legally recognised in Hong Kong on all levels (constitutional, statutory and common law), and accordingly the denial of the right to marry to same-sex couples does not constitute discrimination on account of sexual orientation, whether this is an absolute bar to a claim of discrimination on account of sexual orientation when the differential treatment is based on marital status (as recognised under Hong Kong law) in all contexts.
>
> (2) Given that the status of marriage (as recognised under Hong Kong law) carries with it certain special and privileged rights and obligations unique to and inherent in marriage ('core rights and obligations'), which are not open to all other persons including unmarried same-sex couples who cannot get married under Hong Kong law, and any differential treatment based on marital status in the context of such core rights and obligations requires no justification, whether immigration (in particular, the eligibility of a person in a same-sex marriage or civil partnership recognised under a system of foreign law for a dependant visa based necessarily on a spousal relationship with the sponsor) falls within these core rights and obligations.
>
> (3) If justification for a differential treatment in the context of immigration (in particular, the eligibility of a person in a same-sex marriage or civil partnership recognised under a system of foreign law for a dependant visa based necessarily on a spousal relationship with the sponsor) based on marital status is required: (a) what is the appropriate standard of scrutiny to be applied in the present context given that under the Basic Law and the Hong Kong Bill of Rights, and as recognised by the Courts, the Director of Immigration is entitled to exercise stringent control over immigration matters and enjoys a wide margin of appreciation or discretion as to how to formulate and administer his immigration policies; and (b) whether the Director of Immigration has justified the difference in treatment for eligibility for dependant visa based on marital status."

### *A.7 Application to intervene*

16. In March 2018, shortly before the hearing of this appeal, a group of 15 financial institutions ("the Banks"), a group of 16 law firms ("the Law Firms") and Amnesty International Limited applied for leave to intervene in the appeal in order to file written submissions in support of the Court of Appeal's judgment. In the case of the Banks and the Law Firms, the application was made on the basis that their perspective would provide the Court with a more rounded picture of the practical effects of the Policy. In particular, they wished to draw to the Court's attention the fact that the Policy had the effect of limiting the pool of foreign employees from which employers might wish to select and that this would adversely affect their interests as well as the wider interests of Hong Kong.

17. The Appeal Committee[22] was prepared to accept that the Policy had a practical limiting effect which was not purely speculative or theoretical. It considered that the perspective of the Banks and Law Firms was evident without requiring their intervention. The effect of the Policy on the Director's aim of encouraging talented people to live and work in Hong Kong is addressed by QT so that the Appeal Committee was not satisfied that the proposed intervention by the Banks and Law Firms, or that of Amnesty International, materially added to the arguments contained in QT's written case. Accordingly, the applications to intervene were refused.

## *B. The applicable principles*

### *B.1 The nature of QT's Claim*

18. Article 154 of the Basic Law vests the HKSAR Government with the power of immigration control over the Region.[23] This is given statutory effect by the Immigration Ordinance under which a person who does not enjoy the right of abode or have the right to land may not enter without the Director's permission.[24] Where permission to land or remain is granted, sections 11(2)[25] and 11(5A)[26] furnish the Director with powers to impose time limits and other conditions on a person's stay in Hong Kong. It is pursuant to those powers that the Director operates the Policy.

19. Although his powers are expressed in very wide terms, the Director accepts that in implementing the Policy, he is constrained to exercise them in accordance with what has been referred to as "the principle of equality". He is right to do so.

20. It is a cardinal principle of administrative law that broad statutory powers are to be construed with the implied limitation that they are to be exercised only for the purposes for which they are given.[27] And as Sir Anthony Mason NPJ observed:

> "A statutory discretionary power, no matter how widely expressed, is necessarily subject to some limits. It must, for example, be exercised by the repository of the power. Other limits may arise from context of the power and from the purpose or purposes which it is designed to serve. Or the limits may arise from extraneous considerations giving rise to an abuse of power, such as bias and bad faith, which are naturally presumed to lie outside the scope of the statutory grant of power. Judicial review is available to correct an exercise of power that exceeds the limits set by the statutory grant of power or otherwise constitutes an abuse of power."[28]

21. In order to be within the scope of the statutory grant, it is presumed that such powers must be exercised fairly and rationally, reflecting the rule of law.[29] As Lord Hoffmann pointed out in *R (Alconbury Developments Ltd) v Environment Secretary*:

> "The principles of judicial review give effect to the rule of law. They ensure that administrative decisions will be taken rationally, in accordance with a fair procedure and within the powers conferred by Parliament."[30]

And as Lord Steyn put it in *R v Secretary of State for the Home Department, ex parte Pierson*:[31]

> "Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."

22. The principle of equality is an important aspect of such rationality. Writing for the Privy Council in *Matadeen v Pointu*,[32] Lord Hoffmann stated:

> "... treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational."

23. Thus, as Baroness Hale of Richmond noted, discrimination is the antithesis of rational equal treatment: "Treating some as automatically having less value than others" is "the reverse of the rational behaviour we now expect of government and the state".[33] Violation of the principle of equality may therefore sustain an application for judicial review on the ground of *Wednesbury* unreasonableness.[34]

24. While QT also alleges infringement of her constitutional equality rights (which remain indirectly relevant, as explained below[35]), her claim is primarily and sufficiently framed as one for judicial review on the basis that refusing her a dependant visa by application of the Policy amounts to unlawful discrimination which is irrational and unreasonable in a *Wednesbury* sense. As the challenge is made to an administrative policy and not to primary legislation, there is no need to rely on the Court's powers of constitutional review.

25. We also note what this appeal is *not* about. It does not involve any claim that same-sex couples have a right to marry under Hong Kong law. As this Court recognised in *W v Registrar of Marriages*,[36] by virtue of section 40 of the Marriage Ordinance,[37] a valid marriage is a "voluntary union for life of one man and one woman to the exclusion of all others". Marriage in this jurisdiction is therefore heterosexual and monogamous. By definition, it is not a status open to couples of the same sex.[38]

26. Article 37 of the Basic Law provides that the freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law. However, it has not been argued that this makes marriage available to same-sex couples. As the Director points out, the European Court of Human Rights ("ECtHR") has held in relation to the comparable right to marry under Article 12 of the European Convention on Human Rights[39] ("ECHR"), that that provision "does not impose an obligation on contracting states to grant same-sex couples access to marriage".[40] As the point has not been argued, it is unnecessary to say anything more.

### *B.2 The nature of discrimination*

27. It hardly needs to be pointed out that unlawful discrimination is fundamentally unacceptable. In *R (Carson) v Secretary of State for Work and Pensions*,[41] Lord Walker of Gestingthorpe put it thus:

> "In the field of human rights, discrimination is regarded as particularly objectionable because it disregards fundamental notions of human dignity and equality before the law. Discrimination on the ground of sex or race demeans the victim by using a sexual or racial stereotype as a sufficient ground for unfavourable treatment, rather than treating her as an individual to be judged on her own merits."

28. Similarly, in *Ghaidan v Godin-Mendoza*,[42] Lord Nicholls of Birkenhead stated:

> "Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced."

29. However, as Lord Nicholls pointed out,[43] the law has of course to draw distinctions: "One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence." The task of the courts has been to establish principles for determining when distinctions drawn by legal or administrative measures are rational and fair and when such distinctions constitute unlawful discrimination.

30. There has been a notable convergence in the approaches of various courts, including our own, to what constitutes discrimination, influenced by international human rights instruments. The jurisprudence of the ECtHR and its interaction with the jurisprudence of the House of Lords, the Privy Council and the United Kingdom Supreme Court relating to the Human Rights Act 1998 and domestic anti-discrimination legislation are of particular relevance in the present case.

31. An inquiry into whether an individual or group has suffered unlawful discrimination generally begins with a claim that the complainant has been subjected to some unfairly adverse treatment. It is usually recognised that such treatment may broadly occur in three forms. The first two are succinctly conveyed by the statement: "Like cases should be treated alike, unlike cases should not be treated alike."[44] The third involves indirect discrimination where the measure complained of appears neutral on its face but is significantly prejudicial to the complainant in its effect.

32. The ECtHR's case-law recognising these three forms of discrimination was summarised by the Grand Chamber in *DH v Czech Republic*:[45]

> "The Court has established in its case law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations. However, Art 14[46] does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group, and that discrimination potentially contrary to the Convention may result from a de facto situation."

This approach was also adopted by the Privy Council in *Rodriguez v Minister of Housing of the Government*.[47]

33. The three categories of discrimination may be illustrated as follows.

> (a) The first category involves the complaint that like is not being treated as like in that the complainant is receiving treatment which is unfavourable when compared with treatment given to persons in "relevantly similar situations". For example, in *James v Eastleigh Borough Council*,[48] a man and his wife were both aged 61 and wished to use a public swimming pool. He complained that he was charged admission while his wife got in for free. The Council's policy was to allow free admission to women aged 60 and to men aged 65, in line with their pensionable ages. That policy was held to constitute direct discrimination on the grounds of sex.

(b) The second category involves the complainant disadvantageously receiving the same treatment as persons in significantly different situations. This is sometimes called "*Thlimmenos* discrimination", referring to *Thlimmenos v Greece*, [49] where an individual who had been convicted of insubordination for refusing, because of his pacifist religious beliefs, to wear military uniform when mobilised, complained that he was wrongly equated with convicted felons in subsequently being refused appointment as a chartered accountant. He successfully argued that the felons were in a materially different situation and that he should not be equated with them to his disadvantage.

(c) The third, indirect, form of discrimination involves application of an ostensibly neutral criterion which operates to the significant prejudice of a particular group. Thus, in the *Rodriguez* case,[50] the Gibraltarian government's policy was to confine the right to succeed to a government tenancy to couples who were married or had children together. It was not direct discrimination since the policy applied also to unmarried opposite-sex couples. But it was held to be indirect discrimination against a same-sex couple based on sexual orientation since the policy laid down criteria which, unlike unmarried opposite-sex couples, same-sex couples would never be able to meet. The same conclusion was reached in *Preddy v Bull*,[51] where the indirectly discriminatory policy involved the letting of double-bedded rooms only to married couples, putting a gay couple who had entered into a civil partnership and could not acquire married status at an insurmountable disadvantage.[52]

(d) Although the objections are sometimes about wrongly receiving different treatment and sometimes about wrongly being treated the same, we will for convenience refer to the complained of disadvantage as the relevant "difference in treatment" or "differential treatment".

*B.3 The issues*

34. Two main contested issues arise in the present case. The first is whether there has been discriminatory treatment at all, that, is whether the Policy falls within one or more of the aforesaid categories. If it does, the second issue is whether such discriminatory treatment can be justified.[53]

35. The Director's primary stance is that the Policy needs no justification. He contends that the status of marriage is plainly special and different from the status conferred by a civil partnership so that the respective dependants obviously occupy unlike positions which he is entitled to treat differently without having to go through any justification exercise.

36. Alternatively, the Director submits that if, contrary to his primary submission, the difference in treatment requires to be justified, he is able to satisfy the tests for such justification. He submits that since the challenge raises an issue concerning the Government's social or economic policy, the courts should not interfere unless satisfied that the Policy is manifestly without reasonable foundation.

37. QT, on the other hand, contends that the Director's denial of the need for justification is untenable and that this is a case where the difference in treatment falls within at least one, and possibly all three, of the abovementioned categories of discrimination. She also contends that his policy cannot be justified as rational and fair since the Director is unable to show that the incursions made by the Policy into the principle of equality are rationally connected to achievement of a legitimate aim and are no more than reasonably necessary to accomplish that aim.

*C. Director's first argument: Whether justification is required*

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.

39. The Director exercises immigration control over persons seeking to enter Hong Kong from all over the world. Many may have contracted valid marriages under the laws of their countries of origin which differ from Hong Kong law as to the capacity to marry, whether in terms of age, consent, consanguinity, polygamy or otherwise. Of course, it may in some cases be contrary to public policy in Hong Kong to recognise certain marriages, such as those involving very young children. However, the Policy does not draw the line at unions which are objectionable on grounds of public policy. Instead – one might think somewhat oddly – it purports to exclude spousal relationships simply because they do not correspond with the definition of marriage under Hong Kong law (although, as we shall see, it does not do so consistently[54]). One might also note, applying the *Padfield* principle discussed in Section B.1 of this judgment, that enforcement of Hong Kong's matrimonial laws is not a purpose within the statutory grant of powers to the Director.

40. Lord Pannick QC[55] contends nevertheless that the Director is entitled to draw such a line. He submits that the Director may rationally adopt a policy conferring the benefit of a dependant visa (which is a benefit under Hong Kong law) only on spouses in a union which, if celebrated here, would have been recognised as a valid marriage under Hong Kong law. He is entitled, Counsel submits, to treat same-sex couples who cannot attain marital status under Hong Kong law as being obviously not in a relevantly similar situation with married couples and thus properly subjected to differential treatment without the Director having to embark upon any justification exercise. The difference in status between QT and a married spouse is, in short, itself a justification. In support, Lord Pannick QC relies on a series of ECtHR decisions[56] which, he argues, demonstrate how marriage is treated as a special status providing a proper basis for treating married couples differently. He also points out that unmarried same-sex couples are given the same dependant visa treatment as unmarried opposite-sex couples, so that the Policy, he submits, is not discriminatory.

41. We are unable to accept that submission both as a matter of principle and on the existing authorities.

### *C.1 Circularity*

42. The first unsatisfactory aspect of the Director's first argument is its circularity. It puts forward the challenged differentiating criterion as its own justification. It is hardly satisfactory to answer the question: "Why am I treated less favourably than a married person?" by saying: "Because that person is married and you are not".

43. In *Rodriguez*,[57] Baroness Hale pointed this out in connection with the majority decision of the Grand Chamber in *Burden v United Kingdom*,[58] as follows:

> "... in the recent case of *Burden v United Kingdom* (2008) 24 BHRC 709, the majority of the Grand Chamber held that two sisters living together were not in an analogous situation to civil partners because marriage and civil partnership were different forms of relationship from siblingship. The problem with that analysis is that the *ground* for the difference in treatment, the lack of marital or civil partnership status, is also the reason why the person treated differently is said not to be in an analogous situation. This can be dangerous. If the ground for the difference in treatment were a difference in sex, it would not be permissible to say that a man and a woman are not in an analogous situation because men and women are different."[59]

### *C.2 Considering similarity or difference in vacuo*

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 the *Carson* case,[60] 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".[61] 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.[62]

46. Indeed, when one considers in general terms the inter-personal relationships between two civil partners on the one hand and between a married couple on the other, each being a status recognised under UK law, it is hard to see any basis for the Director concluding that they are obviously different comparators. In *Ghaidan v Godin-Mendoza*,[63]a case concerning discrimination in rules which excluded the survivor of a long-term cohabiting homosexual couple from succession to a statutory tenancy, Lord Nicholls stated:

> "A homosexual couple, as much as a heterosexual couple, share each other's life and make their home together. They have an equivalent relationship. There is no rational or fair ground for distinguishing the one couple from the other in this context..."

47. In the same case,[64] Baroness Hale pointed out that "[homosexual couples] can have exactly the same sort of inter-dependent couple relationship as heterosexuals can" – an observation of obvious relevance in a discussion about dependency.

48. At the hearing, Lord Pannick QC fairly accepted that same-sex couples in an enduring relationship are well capable of having a relationship that is as loving as, or more loving than, that of many heterosexual couples.

49. The Civil Partnership Act 2004 which governs the relationship between QT and SS under English law, creates a structure for the establishment and formal recognition of civil partnerships which is defined by section 1(1) as "a relationship between two people of the same sex ... which is formed when they register as civil partners of each other ..." Sir Mark Potter, sitting in the English High Court, described its provisions as follows:

> "The subsequent sections, over two hundred in number, provide the bureaucratic mechanisms necessary for the purposes of the civil registration process and remedy, and remove the financial and other legal and economic disadvantages caused by the prohibition on same sex partners marrying, by conferring on those who have entered a civil partnership similar rights, benefits and material advantages to those enjoyed by married couples. They also provide for the breakdown of the civil partnership in much the same way as marriage."[65]

50. In *Preddy v Bull*,[66] a case of discrimination against a same-sex couple in a civil partnership regarding the provision of double-bedded lodging at a hotel, Baroness Hale of Richmond DPSC explained:

> "Civil partnership is not called marriage but in almost every other respect it is indistinguishable from the status of marriage in United Kingdom law. It was introduced so that same sex couples could voluntarily assume towards one another the same legal responsibilities, and enjoy the same legal rights, as married couples assume and enjoy. It is more than a contract. Like marriage, it is a status, in which some of the terms are prescribed by law, and which has consequences for people other than the couple themselves and for the state. Its equivalence to marriage is emphasised by the provision in regulation 3(4) that being married and being a civil partner is not to be treated as a material difference for the purpose of a finding of either direct or indirect discrimination."

51. The close equivalence between civil partnerships and traditional marriages was relied on by the Grand Chamber of the ECtHR as a reason for not requiring the right to marry under ECHR Art 12 to be interpreted as obliging Member States to grant same-sex couples access to marriage:

> "The court found in 2006 in the case of *Parry v UK* (App no 42971/05) (admissibility decision, 28 November 2006) that even if same-sex marriage was not allowed at the time in English law, the applicants could continue their relationship in all its essentials and could also give it a legal status akin, if not identical, to marriage, through a civil partnership which carried with it almost all the same legal rights and obligations. The court thus regarded civil partnership as an adequate option."[67]

52. It follows that the Director's assertion that an obvious difference exists between marriage and a civil partnership rests on shaky foundations. It is untenable as a basis for precluding scrutiny of the Policy's justification.

### *C.3 The authorities relied on by the Director*

53. The Director cites a number of cases for the proposition that marriage creates a special status which fittingly provides an exclusive criterion for bestowing on the married couple particular benefits denied to others.

54. It is no doubt true that in some cases, it may be appropriate to confine certain benefits to married persons but this would generally be on the basis that the difference in treatment can be justified on fact-specific grounds, such as in connection with parental rights where the best interests of a child are involved or where certain biological issues arise.[68] But the authorities cited do not support an approach which eschews the need for justification simply on the basis of an asserted difference in status.

55. *Gas v France*,[69] relied on by the Director, was a second-parent adoption case. A woman cohabiting with her lesbian partner (the applicant), gave birth to a daughter conceived via anonymous donor insemination. They subsequently entered into a civil partnership under French law, the couple and the daughter living together in a shared home. The applicant's claim to adopt the child was refused by the *tribunal de grande instance* because, by virtue of Art 365 of the French Civil Code, such an adoption would transfer parental responsibility to the adoptive parent, thus depriving the birth mother of her own rights in relation to the child, "unless the adoptive parent is married to the adoptee's mother or father". The claimant obviously could not bring herself within that exception and complained of discrimination on the basis of sexual orientation. Her challenge failed, the Court holding that such a transfer of parental responsibility would not be in the child's best interests, since the birth mother intended to continue raising the child.[70] As Ms Dinah Rose QC[71] pointed out, the claimant did not challenge Art 365 itself but took the legal framework as given. The ECtHR therefore held that the legal consequences of that provision meant that the claimant was not in a relevantly similar position to married persons, justifying the court's denial of her claim.

56. *X v Austria*,[72]was another second-parent adoption case relied on. A woman in a stable same-sex relationship sought an order for her to adopt the son conceived by her partner with a man outside of marriage, with a view to the child's relationship with the father ceasing while leaving his relationship with his birth mother intact. She was unsuccessful in the domestic courts. Austrian law laid down differing requirements for adoption by married couples, individuals and unmarried couples, both heterosexual and homosexual. The applicants' focus in the ECtHR was on a second-parent adoption. They "stressed that they did not wish to assert a right that was reserved to married couples",[73] emphasising "that the key issue in the present case was the unequal treatment between unmarried different-sex couples and unmarried same-sex couples" in relation to second-parent adoption which was "possible for unmarried heterosexual couples, but not for unmarried same-sex couples".[74] The Grand Chamber concluded that (given the unchallenged legal framework) unmarried same-sex couples were not in a relevantly similar situation to married heterosexual couples regarding second-parent adoption.[75] However, it found that "there was a difference of treatment between the applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner's child" which "was inseparably linked to the fact that the first and third applicants formed a same-sex couple, and was thus based on their sexual orientation". [76] It applied the justification test established in ECtHR jurisprudence and held that the differential treatment was unjustified.[77]

57. In *Shackell v United Kingdom*,[78] a woman who had cohabited with a man with whom she had had three children complained to the ECtHR that after his death in a work accident, she was discriminated against by being denied widow's benefit which she would have received if they had been married. The Chamber held that there was no discrimination as she was not in a relevantly similar situation as a widow. As Ms Rose QC submitted, the applicant would have qualified for widow's benefit if she and the deceased had chosen to get married. Since, for whatever reason, they had chosen not to do so, it was difficult to see the basis for finding that she had been the victim of discrimination.

58. Finally in this context, the Director relied on *Burden v United Kingdom,* [79] which involved a challenge regarding potential liability for inheritance tax brought by two unmarried sisters who had lived together all their lives. Each had made a will leaving all their property to the other and under UK law, when one of the sisters died, the survivor would be liable to pay inheritance tax on any assets received under the will. However, property passing between spouses or from one civil partner to another was exempt from inheritance tax, a difference in treatment they alleged to be discriminatory. This case has been mentioned above[80] in connection with the dangers of circularity in the Director's first argument. Leaving that aside, the Grand Chamber's rejection of the sisters' challenge was based on two main justifications. First, the Court sought to distinguish their situation from that of both married couples and same-sex civil partners as follows:

> "Rather than the length or the supportive nature of the relationship, what is determinative is the existence of a public undertaking, carrying with it a body of rights and obligations of a contractual nature. Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand, the absence of such a legally binding agreement between the applicants renders their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple."[81]

59. That may, with respect, be thought to be less than convincing since, as pointed out by judge David Thór Björgvinsson:[82]

> "... consanguinity between the applicants prevents them from entering into a legally binding agreement similar to marriage or civil partnership, which would make the legal framework applicable to them, including the relevant provisions of the law on inheritance tax."[83]

60. The second basis for the Court's decision was that the United Kingdom should be given leeway within the margin of appreciation afforded to Member States in relation to tax legislation. The Grand Chamber held:

> "Member States have adopted a variety of different rules of succession as between survivors of a marriage, civil partnership and those in a close family relationship and have similarly adopted different policies as regards the grant of inheritance tax exemptions to the various categories of survivor; states, in principle, remaining free to devise different rules in the field of taxation policy."[84]

61. In any event, it is significant for present purposes that the Grand Chamber treated married couples and same-sex civil partners as having equivalent status, placing them in the same category to be compared against unmarried cohabiting couples. It provides no support for the Director's submission that married couples merit different treatment simply by virtue of their marital condition, viewed as special.

### *C.4 The Court of Appeal and the need for justification*

62. We note that in the Court of Appeal, citing "nature... tradition or long usage", Mr Justice Cheung CJHC favoured the view that certain "core rights and obligations unique to a relationship of marriage" exist "so much so that the entailing privileged treatments to married couples as compared with unmarried couples (including same-sex couples) should simply be considered as treatments that require no justification because the difference in position between the married and the unmarried is self-obvious".[85]

63. This was also Mr Justice Lam VP's view:

> "As explained by the Chief Judge, it is important that the law should recognize that there are core characteristics (be it called rights, privileges or even obligations) pertaining to a marriage. For matters related to such core features, difference in treatment for unmarried persons (including those who could not marry under the laws in Hong Kong due to one's sexual orientation) cannot be regarded as discriminatory. It is simply the application of the tenet that different cases should be treated differently."[86]

64. Similarly, Mr Justice Poon JA referred to "recognition that there are certain core rights pertaining to marriage and that differential treatment based on those core rights cannot be regarded as discriminatory."[87]

65. While Cheung CJHC acknowledged the existence of certain problems inherent in this line of argument[88] and their Lordships held that the immigration treatment in the present case does not fall within such "core rights" and therefore does require justification,[89] Cheung CJHC adhered to the aforesaid approach stating:

> "Divorce, adoption and inheritance are obvious examples of these areas of life regarding which the status of marriage carries rights and obligations unique to married couples. Without these core rights and obligations, the legal status of marriage simply has little if any substance in law. And the court must be most slow, if ever, to empty marriage of its legal content and meaning. When the context involved is one of those areas of life, the status of marriage provides the obvious, relevant difference between a married couple and one that is not (heterosexual or same-sex)."[90]

66. With respect, that approach should not be followed. It proposes that the question: "Why am I being treated differently from a married person to my disadvantage?" may be answered: "Because you are not married and the benefit you are claiming is a 'core right' reserved uniquely for those who are married", without need for justification. It mirrors the Director's first argument and gives rise to similar difficulties regarding circularity and subjective, fruitless debate as to what does or does not fall within the "core". The real question is: *Why* should that benefit be reserved uniquely for married couples? Is there a fair and rational reason for drawing that distinction? Differences in treatment to the prejudice of a particular group require justification and cannot rest on a categorical assertion.

67. What may seem obvious to some may be not at all clear to others. One can readily see that divorce, being one of the prescribed legal means of dissolving a marriage, may be said to be a remedy appropriately limited to persons who are parties to a marriage. Why, after all, should anyone who is not married wish to petition for divorce? But it is by no means clear that persons other than married couples may fairly or rationally be excluded from other benefits, such as the rights of adoption or succession mentioned by Cheung CJHC.

68. Indeed, the suggestion that adoption is a "core right" which is properly restricted to married couples, far from being obvious, runs counter to numerous authorities, the following being a few illustrations.

69. Thus, in *The National Coalition for Gay and Lesbian Equality v* The *Minister of Home Affairs*,[91] writing for the South African Constitutional Court, Ackermann J noted:

> "Gays and lesbians are certainly individually permitted to adopt children under the provisions of section 17(b) of the Child Care Act 74 of 1983 and nothing prevents a gay couple or a lesbian couple, one of whom has so adopted a child, from treating such child in all ways, other than strictly legally, as their child. They can certainly love, care and provide for the child as though it was their joint child."

70. *EB v France*,[92] concerned an application for authorisation to adopt by a homosexual single person (who was in a stable and permanent relationship with her partner). The Grand Chamber of the ECtHR pointed out "that French law allows single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual..."[93] and held that since her avowed homosexuality "was a decisive factor leading to the decision to refuse her authorisation to adopt",[94] that decision was "based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention".[95]

71. In *Re G (Adoption: Unmarried Couple)*,[96] a man and a woman who had been living together since before the birth of the woman's ten-year-old child but were not married, wished to apply jointly to adopt the child in order for the man, who was not the child's biological father, to be formally recognised as the father while maintaining the woman's status as the legal mother. However, Article 14 of the Adoption (Northern Ireland) Order 1987 provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple. The House of Lords held that this blanket ban effectively created an irrebuttable presumption that no unmarried couple could make suitable adoptive parents and could not be justified. As Lord Hoffmann put it:

> "It is one thing to say that, in general terms, married couples are more likely to be suitable adoptive parents than unmarried ones. It is altogether another to say that one may rationally assume that no unmarried couple can be suitable adoptive parents. Such an irrebuttable presumption defies everyday experience. The Crown suggested that, as they could easily marry if they chose, the very fact that they declined to do so showed that they could not be suitable adoptive parents. I would agree that the fact that a couple do not wish to undertake the obligations of marriage is a factor to be considered by the court in assessing the likely stability of their relationship and its impact upon the long term welfare of the child. Once again, however, I do not see how this can be rationally elevated to an irrebuttable presumption of unsuitability."[97]

72. The interests of the child had to be paramount and therefore, as Lord Hope of Craighead held:

> "The aim sought to be realised in regulating eligibility for adoption is how best to safeguard the interests of the child. Eligibility simply opens the door to the careful and exacting process that must follow before a recommendation is made. The interests of the child require that this door be opened as widely as reasonably possible. Otherwise there will be a risk of excluding from assessment couples whose personal qualities and aptitude for child rearing are beyond question. To exclude couples who are in an enduring family relationship from this process at the outset simply on the ground that they are not married to each other would be to allow considerations favouring marriage to prevail over the best interests of the child. I do not think that this can be said to be either objectively justified or proportionate. From this it must follow that the applicants' exclusion from eligibility would be incompatible with their Convention rights as it would be discriminatory."[98]

73. As we have already seen, in *X v Austria*,[99] the ECtHR held that the difference of treatment between a lesbian couple and an unmarried straight couple in relation to second-parent adoption was unjustified discrimination based on the applicants' sexual orientation.

74. Finally in *Boeckel v Germany*,[100] the applicants were two women in a civil partnership, one of whom had given birth to a son. The other had been granted an adoption order by the Hamburg-Altona District Court so that the son obtained the legal position of a child of both applicants. This was, in other words, a case where a second-parent adoption by a person in a same-sex civil partnership was approved. The issue before the ECtHR concerned rectification of the child's identity card.

75. A similar survey of the authorities could be conducted for examples of cases where unmarried or same-sex couples have been held entitled to equal treatment in respect of certain succession rights enjoyed by married couples, for instance in relation to protected statutory tenancies,[101] calling into question Cheung CJHC's suggestion that this constitutes an area obviously involving rights properly regarded as unique to married couples.

76. 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.

### *C.5 The discrimination alleged by QT*

77. Lord Pannick QC accepts that if the Director's first argument fails, the Policy may be said to involve the third, indirect, category of discrimination on the basis of QT's sexual orientation. This is because the criterion of a dependant having to be a party to a marriage which satisfies the requirements of a valid marriage under Hong Kong law, cannot be met by homosexual persons and therefore makes them ineligible for dependant visas by reason of their sexual orientation.

78. That concession suffices for QT's purposes. However, it is also submitted on her behalf that she faces both direct and *Thlimmenos* discrimination.

79. She argues that she suffers direct discrimination as a result of the Director not treating like cases alike when polygamous marriages are taken as the comparator. Thus, Mr Wong's evidence is that under the Policy, "where a Hong Kong resident has more than one spouse residing outside Hong Kong, only one of them should be allowed to take up residence in Hong Kong as the sponsor's dependant".[102] The Policy therefore treats a party to a polygamous union which would plainly be invalid as a marriage under Hong Kong law as eligible for a dependant visa, but excludes QT on the ground of such invalidity. Like cases are therefore wrongly being treated unlike to QT's disadvantage.[103]

80. QT's case on *Thlimmenos* discrimination is a reaction to the Director's argument that there is no discrimination since the Policy treats unmarried opposite-sex couples in the same way. Her submission is that such equal treatment is discriminatory since such opposite-sex couples are in a materially different situation. Whereas civil partners have made a public commitment to be life partners, unmarried straight couples have not and may be in a transient relationship. More importantly, unmarried opposite-sex couples can get married and bring themselves within the Policy, while homosexual civil partners cannot. Unlike cases are wrongly being treated alike to QT's prejudice.

### *D. The Director's second argument: Justification*

*D.1 The need for scrutiny*

81. Where an issue of equality before the law arises, the question of whether a measure is discriminatory is necessarily bound up with whether the differential treatment which the measure entails can be justified. Thus, in *Secretary for Justice v Yau Yuk Lung*,[104] Li CJ pointed out that a difference in treatment does not constitute discrimination where it satisfies the justification test. One does not decide independently whether there has been discrimination and then seek to determine whether it can be justified. His Lordship stated:

> "Where the difference in treatment satisfies the justification test, the correct approach is to regard the difference in treatment as not constituting discrimination and not infringing the constitutional right to equality. Unlike some other constitutional rights, such as the right of peaceful assembly, it is not a question of infringement of the right which may be constitutionally justified."

82. And in *Fok Chun Wa v Hospital Authority*,[105]Ma CJ stated:

> "In the majority of cases where equality issues are involved, it will be necessary for the Court to look at the materials which go to the three facets of the justification test before this crucial question is answered. It will be a rare case, I daresay, where the court will comfortably be able to answer this question without any recourse to the issue of justification at all..."

83. Indeed, in our view, the correct approach is to examine every alleged case of discrimination to see if the difference in treatment can be justified. As Lord Nicholls observed, "the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny".[106] In particular, as Lord Bingham of Cornhill noted: "What has to be justified is not the measure in issue but the difference in treatment between one person or group and another."[107] And as Lord Nicholls also pointed out, sometimes the answer may appear obvious: "There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous."[108] Those are cases where the justification is readily apparent, but nonetheless required.

*D.2 Justification and proportionality principles*

84. The proportionality concepts developed for scrutinising incursions made into constitutionally protected rights constitute the justification test. As Li CJ explained:

> "In order for differential treatment to be justified, it must be shown that:
>
> (1) The difference in treatment must pursue a legitimate aim. For any aim to be legitimate, a genuine need for such difference must be established.
>
> (2) The difference in treatment must be rationally connected to the legitimate aim.
>
> (3) The difference in treatment must be no more than is necessary to accomplish the legitimate aim."[109]

85. That approach was endorsed in *Fok Chun Wah**[110]*** and is the approach generally adopted by the ECtHR:

> "The court has established in its case law that in order for an issue to arise under art 14[111] there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised."[112]

It has also been applied by the English courts both for the purposes of the Human Rights Act 1998 and of domestic anti-discrimination legislation. [113]

86. In the light of this Court's decision in *Hysan Development Co Ltd v Town Planning Board*,[114] added to the three elements of the proportionality test mentioned above is the fourth step involving consideration of whether a reasonable balance had been struck between the societal benefits of the encroachment on the one hand, and the inroads made into the constitutionally protected rights of the individual on the other, asking in particular whether pursuit of the societal interest results in an unacceptably harsh burden on the individual.

87. Although, as we have noted, this case has proceeded as a claim for judicial review, Lord Pannick QC (in our view rightly) accepted that the proportionality concepts developed in constitutional law, including the *Hysan* fourth step, are equally applicable to deciding whether the differential treatment entailed by the Policy is justified or whether it may be impugned as *Wednesbury* unreasonable. Thus the provisions of Art 25 of the Basic Law[115] and Art 22 of the Bill of Rights[116] are indirectly relevant here.

### *D.3 The aims espoused by the Director*

88. As we have seen,[117] the twin aims of the Policy have been stated by the Director as (i) the encouragement of persons with needed skills and talent to join our workforce, accompanied by their dependants; while at the same time (ii) maintaining strict immigration control. A subsidiary aim is stated to be that of being able to draw a "bright line" between those who do and those who do not qualify for dependant visas thereby promoting legal certainty and administrative workability and convenience. QT accepts that these are legitimate aims.

89. At the hearing, Lord Pannick QC sought to introduce a newly minted rationale as a further legitimate aim, namely, that the Policy promotes the special status of marriage which would be undermined if spousal benefits were conferred on same-sex relationships. He acknowledged that this had not been argued below[118] and that the submission was stimulated by the judgment of the Court of Appeal (consisting of the same panel of judges) in *Leung Chun Kwong v Secretary for the Civil Service*,[119] handed down three days before the start of this appeal. Ms Rose QC objected on the ground that QT had not had any opportunity to consider or respond to the new argument either evidentially or in written submissions. She pointed out that Cheung CJHC was careful to explain[120] that the Court of Appeal was taking an entirely different tack in *Leung Chun Kwong* and that their Lordships had deliberately refrained in the present case from dealing with the rationale now sought to be advanced by Lord Pannick QC.[121] It is therefore a rationale that forms no part of the Court of Appeal's reasoning in the present case. We agree with the objection taken by Ms Rose QC and will confine the Director to his case based on the "talent", immigration control and "bright line" aims referred to above.

### *D.4 Is the Policy rationally connected to the legitimate aims?*

90. It is at this point that the Director encounters major difficulties justifying the Policy. In cases like the present, the sponsor has been granted an employment visa presumably because he or she has the talent or skills deemed needed or desirable. Such a person could be straight or gay. The Policy is, as the Director has stated, aimed at encouraging such persons to join our workforce "by giving them the choice of bringing in their dependants to live with them in Hong Kong". As is evident from the attempted intervention of the Banks and Law Firms, the ability to bring in dependants is an important issue for persons deciding whether to move to Hong Kong. But, as Ms Rose QC submitted, it runs wholly counter to the Director's stated aim to say: "You can bring in your partner provided that he or she is straight and would be viewed as married validly under Hong Kong law". Such a policy is counter-productive and plainly not rationally connected to advancing the "talent" aim.

91. It is similarly hard to see how the Policy's exclusion of persons who are bona fide same-sex dependants of sponsors granted employment visas promotes the legitimate aim of strict immigration control. As Cheung CJHC put it in the Court of Appeal:

> "Maintaining a strict, stringent immigration policy means, in the present context, controlling both the quantity and quality of the entrants to Hong Kong. In terms of quantity, under the policy, each foreign worker is only entitled to apply to bring one spouse to join him or her in Hong Kong. Whether that spouse is of the same sex or different sex is neither here nor there. In terms of quality, whether the spouse is heterosexual or gay cannot possibly be relevant. Thus analysed, the restriction to heterosexual spouses does not advance the aim of maintaining a strict or stringent immigration policy ..."[122]

92. Similarly, as Poon JA pointed out:

> "... the Director's avowed aim of balancing (a) the encouragement of talented people to live and work in Hong Kong with (b) the maintenance of stringent immigration control applies just as much to talented homosexual people as it does to talented heterosexual people. Simply put, the Director's avowed aim of striking the balance is applicable to all potential talented people that Hong Kong wishes to attract irrespective of their sexual orientation. Yet the Eligibility Requirement only permits heterosexual married people to bring their spouses with them. Thus analyzed, the Eligibility Requirement is inconsistent with the Director's avowed aim."[123]

93. Clearly, the Policy is not rationally connected with the legitimate objective of strict immigration control.

94. We turn next to the Director's aim of facilitating the administration of immigration controls by laying down clear or bright lines to determine "which categories of person can be allowed into Hong Kong and on what conditions or restrictions".[124]

95. That it is helpful to have bright demarcating lines is acceptable as a general proposition but with the qualification that certain areas of administrative discretion do not lend themselves to being governed by hard-edged rules. Thus, for instance, as Lord Hoffmann held in *Re G (Adoption: Unmarried Couple)*,[125] the paramountcy of the interests of the child in an adoption case made it irrational to adopt any bright line test:

> "A bright line rule cannot be justified on the basis of the needs of administrative convenience or legal certainty, because the law requires the interests of each child to be examined on a case-by-case basis."

96. That applies to some extent to the Policy. In putting forward the "bright line" aim, the Director has in mind the convenience of drawing a demarcating line based on production of a marriage certificate. But the line is not quite so bright or simple since the conditions of eligibility include "reasonable proof of a genuine relationship between the applicant and the sponsor", bogus marriages being a practical concern,[126] and require evidence that "the sponsor is able to support the dependant's living at a standard well above the subsistence level and provide him/her with suitable accommodation in the HKSAR."[127]

97. But even purely at the level of convenience, QT and SS are just as conveniently able to produce their civil partnership certificate. Excluding them on the basis of administrative convenience is irrational.

98. More substantively, the rationality in question is not about the convenience of drawing of bright lines but about the rationality of the demarcation. We are back to the question of *why* the line is drawn, not how clearly it can be drawn. Thus, in *James v Eastleigh Borough Council*,[128] the Council sought to justify its policy of free admission to a public swimming pool for women aged 60 and over while levying admission charges on men until they reached the age of 65, on the basis that it had acted with the best intentions and that it was administratively convenient to use pensionable ages as the criterion. That did not convince Lord Bridge of Harwich who stated:

> "The criterion of pensionable age was a convenient one to apply because it was readily verified by possession of a pension book or a bus pass. But the purity of the discriminator's subjective motive, intention or reason for discriminating cannot save the criterion applied from the objective taint of discrimination on the ground of sex."[129]

99. Given that the Policy cannot be justified as a measure rationally connected to the avowed "talent" and "immigration control" objectives, it is not saved by the "bright line" aim.

### *D.5 The standard of review*

100. As we have concluded, in agreement with the Court of Appeal,[130] that the Policy is not rationally connected with the Director's declared legitimate aims, it is unnecessary to go on to consider the applicable standard of review. However, as the issue has been fully argued some discussion may be helpful.

101. The usual standard of review in proportionality analyses (applicable to the justification exercise in equality cases) is that of reasonable necessity: the challenged policy or measure (assuming it to be rationally linked to the promotion of a legitimate aim) may be permitted to encroach upon the protected right only to an extent that is no more than reasonably necessary. It is the usual standard since, as pointed out in *Hysan*:[131]

> "... it reflects the essential purpose of the exercise: the Court's endeavour to accommodate acceptable limitations of constitutional rights in the pursuit of a legitimate societal interest while preserving to the maximum extent the guarantees laid down in the constitution."

102. Applying that standard, if a less intrusive measure could have been employed without unacceptably compromising the legitimate objective, the measure is held to be disproportionate.

103. In the present case, the issue is whether the reasonable necessity standard remains applicable (as QT submits) or whether (as the Director contends) the appropriate standard is the higher-threshold "manifest standard" whereby the Court will only intervene if satisfied that the Policy is "manifestly without reasonable foundation". The difference in the intensity of review applicable under each of these standards and the factors influencing the court's choice between them are discussed in *Hysan*.[132]

104. The Director submits that the "manifest standard" applies in the present case because determining who should be admitted into Hong Kong as a dependant involves the formulation of social or economic policy, in respect of which the executive branch of government is undoubtedly acknowledged to have a wide margin of discretion.[133]

105. However, as Ma CJ noted in *Fok Chun Wa*:[134]

> "The proposition that the courts will allow more leeway when socio-economic policies are involved, does not lead to the consequence that they will not be vigilant when it is appropriate to do so or that the authorities have some sort of carte blanche . After all, the courts have the ultimate responsibility of determining whether acts are constitutional or lawful. It would be appropriate for the courts to intervene (indeed they would be duty-bound to do so) where, *even in the area of socio-economic or other government policies*, there has been any disregard for core-values." (Italics supplied)

106. The "core values" mentioned by Ma CJ are often referred to as the "suspect or prohibited grounds" identified in Art 22 of the Bill of Rights as including "any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". [135] It is clear that discrimination on the ground of sexual orientation is included within this assemblage of suspect grounds, sexual orientation falling within the words "other status".[136]

107. Discrimination on any of those grounds is regarded as especially pernicious because, as Lord Walker pointed out in *Carson*:[137]

> "They are personal characteristics (including sex, race and sexual orientation) which an individual cannot change (apart from the wholly exceptional case of transsexual gender reassignment) and which, if used as a ground for discrimination, are recognised as particularly demeaning for the victim."

108. Accordingly, where a person is subjected to differential treatment on any of the suspect grounds, including sexual orientation, the government's margin of discretion is much narrowed and the court will subject the impugned measure to "particularly severe scrutiny".[138] That does not mean that the measure can never pass muster, but it will require the government to provide "very weighty reasons" or "particularly convincing and weighty reasons"[139] to justify the challenged difference in treatment, applying the standard of reasonable necessity.

109. Since the Director has conceded that if held to be discriminatory, the Policy subjects QT to indirect discrimination on the suspect ground of her sexual orientation, the Court would have applied that the reasonable necessity standard applies as part of the justification exercise. However, since we have held that a rational connection does not exist, it would make little sense to seek to examine in any detail whether the Policy goes beyond what is reasonably necessary to attain the avowed legitimate aims. The absence of a rational connection also makes it unnecessary to consider the fourth step in the proportionality analysis.

*E. Conclusion*

110. Our answers to the Questions set out above,[140] are as follows:

(a) Question 1: No, this is not an absolute bar.

(b) Question 2: We do not accept that differential treatment requires no justification if based on marital status and if said to involve core rights and obligations unique to marriage.

(c) Question 3: The appropriate standard of review is case-specific and in the present case would be the standard of reasonable necessity. The Director has not justified the differential treatment in the present case.

111. For the foregoing reasons we dismiss the appeal. We make an *order nisi* that the costs of the appeal be borne by the Director and that the respondent's own costs be taxed in accordance with the Legal Aid Regulations. We direct that if a different order for costs is sought, either party be at liberty to lodge written submissions on the question of costs within 14 days of the date of this judgment and that the other party be at liberty to lodge written submissions in reply within 14 days thereafter. In default of such submissions, the *order nisi* is to stand as an order absolute without further direction. It remains for us to thank Counsel for their most helpful submissions.

| (Geoffrey Ma) | (R A V Ribeiro) | (Robert Tang) |
|---|---|---|
| Chief Justice | Permanent Judge | Permanent Judge |

| (Joseph Fok) | (Lord Walker of Gestingthorpe) |
|---|---|
| Permanent Judge | Non-Permanent Judge |

Lord Pannick QC, Mr Stewart Wong SC and Ms Grace Chow, instructed by the Department of Justice, for the Respondent (Appellant)

Ms Dinah Rose QC and Mr Timothy Parker, instructed by Vidler & Co., assigned by the Director of Legal Aid, for the Applicant (Respondent)

---

[1] Originally the applicant for judicial review.

[2] Cap 115.

[3] Guidebook for Entry for Residence as Dependants in Hong Kong, Form ID(E) 998 (4/2015) published by the Immigration Department, at §4.

[4] *Ibid* at §5.

[5] Affirmation of Wong Mo Cheong Wilson, dated 5 February 2015, at §16.

[6] *Ibid* at §17.

[7] As explained in the decision in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223.

[8] Contained in the Hong Kong Bill of Rights Ordinance (Cap 383).

[9] Art 25 of the Basic Law and Art 22 of the Bill of Rights are set out in Section D.2 of this judgment.

[10] HCAL 124/2014, (11 March 2016) at §§18-97 (ground 1); §§98-99 (ground 2) and §§100-102 (ground 3).

[11] Cheung CJHC, Lam VP and Poon JA, CACV 117/2016 (25 September 2017).

[12] Court of Appeal §60.

[13] With whom Cheung CJHC and Lam VP, delivering concurring judgments, agreed.

[14] Court of Appeal §§126 and 132.

[15] CFI §34; Court of Appeal §§45 and 134.

[16] Court of Appeal §136. However, the suggestion that the Director is obliged to give effect to marital status as defined by Hong Kong law (adopted by Au J at §39 of his judgment) is wrong in law, as everyone now accepts.

[17] Court of Appeal §§139-148; and at §§30-32 in the concurring judgment of Cheung CJHC.

[18] Court of Appeal §148.

[19] Section D.2 of this judgment.

[20] Court of Appeal §149.

[21] CACV 117/2016 (4 December 2017).

[22] Ma CJ, Ribeiro and Fok PJJ, *QT v Director of Immigration, ABN Amro Bank NV & Ors (Intended Interveners)* FACV 1 of 2018 [2018] HKCFA 17 (30 April 2018).

[23] Article 154 materially provides: "The Government of the Hong Kong Special Administrative Region may apply immigration controls on entry into, stay in and departure from the Region by persons from foreign states and regions."

[24] Immigration Ordinance, section 7.

[25] Section 11(2): "Where permission is given to a person to land or remain in Hong Kong, an immigration officer or immigration assistant may impose (a) a limit of stay; and (b) such other conditions of stay as an immigration officer or immigration assistant thinks fit, being conditions of stay authorized by the Director, either generally or in a particular case."

[26] Section 11(5A): "An immigration officer or a chief immigration assistant may at any time by notice in writing to any person other than a person who enjoys the right of abode in Hong Kong, or has the right to land in Hong Kong by virtue of section 2AAA (a) cancel any condition of stay in force in respect of such person; (b) vary any condition of stay (other than a limit of stay) in force in respect of such person if the condition as varied could properly be imposed by an immigration officer or a chief immigration assistant (other than the Director) under subsection (2)(b); (c) vary any limit of stay in force in respect of such person by enlarging the period during which such person may remain in Hong Kong."

[27] *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030.

[28] *C v Director of Immigration (UNHCR Intervening)*(2013) 16 HKCFAR 280 at §72.

[29] *Ibid* at §§18-21.

[30] [2003] 2 AC 295 at §73.

[31] [1998] AC 539 at 591. As Lord Mustill explained in *R v Secretary of State for the Home Department, Ex parte Doody* [1994] 1 AC 531 at 560D-F, the standards of fairness depend on the circumstances and context of the decisions sought to be impugned.

[32] [1999] 1 AC 98 at 109.

[33] *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at §132.

[34] Referring to the line of authority stemming from *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223.

[35] Section D.2 of this judgment.

[36] (2013) 16 HKCFAR 112 at §§48-49, 80 and 117.

[37] Cap 181. Section 40: "(1) Every marriage under this Ordinance shall be a Christian marriage or the civil equivalent of a Christian marriage. (2) The expression 'Christian marriage or the civil equivalent of a Christian 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."

[38] Thus section 20(1)(d) of the Matrimonial Causes Ordinance (Cap 179) provides that one of the grounds for a decree of nullity is "that the parties are not respectively male and female".

[39] ECHR Art 12: "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

[40] *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at §101; *Hamalainen v Finland* (2014) 37 BHRC 55 at §71; *Chapin and Charpentier v France* (Application no 40183/07, 9 June 2016) at §36.

[41] [2006] 1 AC 173 at §49.

[42] [2004] 2 AC 557 at §9.

[43] *Ibid*.

[44] Per Lord Nicholls in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at §9. This was referred to by Li CJ in *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335 at §19.

[45] (2008) 47 EHRR 3 at §175. The mention of "correcting inequalities" may be thought also to be a reference to positive discrimination, which does not come within the present discussion.

[46] ECHR Art 14: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[47] [2009] UKPC 52 at §§13-15.

[48] [1990] 2 AC 751, a case brought under the UK's Sex Discrimination Act 1975.

[49] (2001) 31 EHRR 15.

[50] *Rodriguez v Minister of Housing of the Government* [2009] UKPC 52 at §§13-15.

[51] [2013] 1 WLR 3741 at §33, a case under the Equality Act (Sexual Orientation) Regulations 2007.

[52] For a Hong Kong example, see *Leung William T C Roy v Secretary for Justice* [2006] 4 HKLRD 211 at §48.

[53] See *Rodriguez v Minister of Housing of the Government* [2009] UKPC 52 at §16.

[54] As noted in Section C.5 below, the Director also issues dependant visas to spouses of polygamous marriages, invalid under Hong Kong law.

[55] Appearing for the Director with Mr Stewart Wong SC and Ms Grace Chow.

[56] *Shackell v United Kingdom* (Application no 45851/99, 27 April 2000); *Burden v United Kingdom* (2008) 47 EHRR 38; *X v Austria* (2013) 57 EHRR 14; *Gas v France* (2014) 59 EHRR 22.

[57] *Rodriguez v Minister of Housing of the Government* [2009] UKPC 52.

[58] (2008) 47 EHRR 38.

[59] [2009] UKPC 52 at §17.

[60] *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at §63, citing Lord Nicholls of Birkenhead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at §11.

[61] *Ibid*, at §68.

[62] *Ibid,* at §§15 and 16.

[63] [2004] 2 AC 557 at §17.

[64] At §142.

[65] *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam) at §20.

[66] [2013] 1 WLR 3741 at §26.

[67] *Hamalainen v Finland* (2014) 37 BHRC 55 at §71.

[68] For example, in *Nylund v Finland* (Application no 27110/95, 29 June 1999), 1999-VI ECHR, under Finnish law there is a presumption of paternity in favour of the husband of the mother of a child born to her during wedlock. A man who claimed to be the biological father was held not to have a right of action to demand a DNA test to disprove such paternity. His claim that his right of access to a court was infringed was rejected by the ECtHR on the ground that maintaining the presumption based on the couple's marital status was in the best interests of the child.

[69] (2014) 59 EHRR 22.

[70] *Ibid* at §62.

[71] Appearing for QT with Mr Timothy Parker.

[72] (2013) 57 EHRR 14.

[73] *Ibid* at §108.

[74] *Ibid* §§63-64.

[75] *Ibid* §§108-109.

[76] *Ibid* §130.

[77] *Ibid* §151.

[78] Application no 45851/99, 27 April 2000.

[79] (2008) 47 EHRR 38.

[80] Section C.1.

[81] (2008) 47 EHRR 38 at §65.

[82] The Judge appointed by Iceland in his concurring judgment which differed on this point.

[83] (2008) 47 EHRR 38 at §O-II4.

[84] *Ibid* §65.

[85] Court of Appeal §14.

[86] Court of Appeal §36.

[87] Court of Appeal §131.

[88] Court of Appeal §16.

[89] Court of Appeal §§15-28.

[90] Court of Appeal §14.

[91] [1999] ZACC 17 at §50.

[92] (2008) 47 EHRR 21.

[93] *Ibid* at §94.

[94] *Ibid* at §89.

[95] *Ibid* at §96.

[96] [2009] 1 AC 173.

[97] *Ibid* at §18.

[98] *Ibid* at §54.

[99] (2013) 57 EHRR 14.

[100] (2013) 57 EHRR SE3 51.

[101] See, for example, *Karner v Austria* (2004) 38 EHRR 24; *Ghaidan v Godin-Mendoza* [2004] 2 AC 557; and *Rodriguez v Minister of Housing of the Government* [2009] UKPC 52.

[102] Affirmation of Wong Mo Cheong Wilson, dated 5 February 2015, at §19.

[103] The same may be said of the Director's policy of granting visas to "same-sex spouses or civil partners of accredited members of the consular posts" in the HKSAR, as disclosed in a letter dated 13 February 2017 from the Department of Justice to Messrs Vidler & Co.

[104] (2007) 10 HKCFAR 335 at §22.

[105] (2012) 15 HKCFAR 409 at §58(2).

[106] *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at §3.

[107] *A v Secretary of State for the Home Department* [2005] 2 AC 68 at §68.

[108] *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at §3.

[109] (2007) 10 HKCFAR 335 at §20.

[110] (2012) 15 HKCFAR 409 at §56.

[111] Set out in Section B.2 above.

[112] *Hamalainen v Finland* (2014) 37 BHRC 55 at §108. See also *X v Austria* (2013) 57 EHRR 14 at §98; *DH v Czech Republic* (2008) 47 EHRR 3 at §196.

[113] Eg, *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at §18; *Rodriguez v Minister of Housing of the Government* [2009] UKPC 52 at §§13 and 25; *R (E) v Governing Body of JFS and another (United Synagogue and others intervening)* [2010] 2 AC 728 at §57.

[114] (2016) 19 HKCFAR 372.

[115] BL25: "All Hong Kong residents shall be equal before the law."

[116] BOR22: "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."

[117] Section A.2 of this judgment. Affirmation of Wong Mo Cheong Wilson, dated 5 February 2015, at §16.

[118] The Director's case was as set out in counsel's summary referred to in Section A.5 above. Au J had also noted that the new rationale had not been advanced at first instance: Judgment at §55(4).

[119] Cheung CJHC, Lam VP and Poon JA, CACV 126/2017 [2018] HKCA 318 (1 June 2018).

[120] *Ibid* at §4.

[121] This was made clear by Cheung CJHC in the Court of Appeal below (at §34): "... I say nothing about a policy with a legitimate aim to, for instance, uphold and maintain the traditional concept of (heterosexual) marriage, or the traditional family constituted by traditional (heterosexual) marriage, and the associated values. No such justification or legitimate aim was relied on. None was asserted in the evidence. Learned counsel did not put forward any such justification whether at the hearing below or on appeal before us."

[122] Court of Appeal §31.

[123] Court of Appeal §139.

[124] Director's written case at §50.

[125] [2009] 1 AC 173 at §16.

[126] One such case being *Durga Maya Gurung v Director of Immigration*, CACV 1077/2001 (19 April 2002).

[127] Guidebook for Entry for Residence as Dependants in Hong Kong, Form ID(E) 998 (4/2015), at §5.

[128] [1990] 2 AC 751.

[129] *Ibid* at 765-766.

[130] Court of Appeal §§30-32 (Cheung CJHC) and §148 (Poon JA).

[131] *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §83.

[132] *Ibid*, at §§81-123.

[133] *Ibid,* at §§101-104 and §139, citing *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 and *Kong Yunming v Director of Social Welfare* (2013) 16 HKCFAR 950. This reflects the wide margin of appreciation afforded States in matters of socio-economic strategy in the jurisprudence of the ECtHR. See eg, *Carson v United Kingdom* (2010) 51 EHRR 13 at §61; *Stec v United Kingdom* (2006) 43 EHRR 47 at §52.

[134] *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at §77.

[135] *Ibid*.

[136] *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at §77; *EB v France* (2008) 47 EHRR 21 at §91; *Karner v Austria* (2003) 38 EHRR 24 at §37.

[137] *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at §55. As Iacobucci J put it in the Canadian Supreme Court in *Law v Canada (Minister of Employment and Immigration)* (1999) 170 DLR (4th) 1 at §53: "Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits."

[138] *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409 at §78.

[139] *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372 at §111; *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173 at §58; *Stec v United Kingdom* (2006) 43 EHRR 47 at §52; *EB v France* (2008) 47 EHRR 21 at §91; *AL (Serbia) v Secretary of State for the Home Department* [2008] 1WLR 1434 at §29; *Humphreys v Revenue and Customs Commissioners* [2012] 1 WLR 1545 at §16; and *Taddeucci and McCall v Italy* (Application no 51362/09, 30 June 2016) at §89.

[140] In Section A.6 of this judgment.