

# BACK TO BACK VICTORIES FOR THE LGBT+ COMMUNITY

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**Workplace Matters - Asia Pacific**

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On 28 April 2017, in *Leung Chun Kwong v Secretary for the Civil Service and Another* (HCAL 258/2015), the Hong Kong Court of First Instance (HKCFI) decided that the same-sex spouse of a civil servant working at the Civil Service Bureau (CSB) was entitled to spousal benefits. Shortly after, on 25 September 2017, in *QT v Director of Immigration* (CACV 117/2016), the Hong Kong Court of Appeal (HKCA) held that dependant visas could be granted to the same-sex spouse of an employment visa holder.

## THE LEUNG CASE

On 18 April 2014, the applicant, Mr. Leung Chun (Mr. Leung) and his spouse were legally married in New Zealand. Being a full-time employee of the government, under the Civil Service Regulations (CSR), Mr. Leung was entitled to certain medical and dental benefits. These benefits also covered an employee's spouse. Under CSR 513, every officer is required to inform his department immediately of any change in their marital status.

On 27 March 2014, prior to entering into the marriage, Mr. Leung wrote to the CSB asking whether he was required to update his marital status pursuant to CSR 513. The CSB responded that the same-sex marriage in New Zealand would fall outside the definition of marriage under the CSR and, accordingly, there was no change in marital status for the purposes of the reporting requirement. This meant that Mr. Leung's spouse was not entitled to the relevant benefits.

Mr. Leung argued that the CSB's decision to deprive his spouse of the benefits was discriminatory and contravened Article 25 of the Basic Law as well as Article 1(1) and Article 22 of the Hong Kong Bill of Rights Ordinance (Bill of Rights). Article 25 of the Basic Law states that all Hong Kong residents shall be equal before the law; Article 1(1) of the Bill of Rights states that the rights recognized in the Bill of Rights shall be enjoyed with distinction of any kind, such as race, colour, sex, language, religion, political or other opinion; and Article 22 states that all persons are equal before the law and are entitled to the equal protection of the law.

The CSB argued that its decision did not amount to discrimination and, even if it did, it was justifiable as the decision was no more than reasonably necessary to prevent the institution of marriage from being undermined and to protect the public interest of ensuring that matrimonial laws were consistent.

The HKCFI rejected the CSB's position and found that the CSB's decision unlawfully discriminated against Mr. Leung on the basis of his sexual orientation.

The HKCFI's decision is currently under appeal by the CSB to the HKCA.

## THE QT CASE

QT is a British national whose same-sex partner SS is a dual national of South Africa and Great Britain. In May 2011, the couple entered into a civil partnership in England. The same year, SS was offered employment by a company in Hong Kong. SS applied for an employment visa with the Immigration Department and included QT as her accompanying dependant. Later, QT's application for a dependant visa was withdrawn and SS was issued with an employment visa on 26 August 2011. QT entered Hong Kong under a visitor status.

On 25 April 2013, QT applied for an employment visa but was refused. On 29 January 2014, QT made a fresh application for a dependant visa with SS as her sponsor. This too was denied on 18 June 2014, when the Director of Immigration rejected QT's application on the grounds that she was not a "spouse" within the meaning of the Immigration Department's immigration policy.

QT complained that the grounds, as applied by the Director of Immigration, constituted discrimination against her on account of her sexual orientation and commenced legal proceedings for judicial review of the decision.

The Department of Immigration's policy states that the spouses of sponsors who have been admitted in Hong Kong to take up employment may apply to join him/her for residence.

QT challenged the decision on the following grounds:

1. The decision was discriminatory and unjustified and, accordingly, was 'Wednesbury' unreasonable
2. The Director of Immigration misapplied the policy and the definition of spouse
3. The decision was unconstitutional because it was inconsistent with Articles 25, 39 and 41 of the Basic Law and Articles 1, 14 and 22 of the Hong Kong Bill of Rights.

On 11 March 2016, the HKCFI rejected all three grounds of review and dismissed QT's application for judicial review. The judge held that marriage confers a special legal status with new legal rights and obligations which could be different from civil partnership and that under the common law a "spouse" means husband and wife of a heterosexual marriage and excludes same-sex couples. The judge also said that in the immigration context the Director of Immigration was entitled to draw a line for immigration control.

QT filed an appeal against the HKCFI's decision. While QT conceded that Hong Kong does not recognize same-sex marriage or civil partnership, she contended that differential treatment based on marital status may still constitute discrimination on account of sexual orientation.

The HKCA held that the policy, as applied by the Director of Immigration, amounted to indirect discrimination on the ground of sexual orientation and failed to demonstrate that the eligibility requirement was rationally connected to the avowed aim of striking the balance between administrative workability and convenience. In particular, given that the dependant visa merely allows an applicant to stay in Hong Kong, it does not have the legal effect of the Director of Immigration recognizing the validity of the union or relationship under Hong Kong law. The HKCFI's decision was set aside.

## CONCLUSION

Against the backdrop of growing globalization, the continued success of Hong Kong depends very much on its ability to retain and attract skilled workers. As more and more jurisdictions are becoming LGBT+ friendly and

recognizing or legalizing same-sex marriage, it is vital for Hong Kong to develop consistent immigration policies that enable Hong Kong to attract the most talented staff, irrespective of sexual orientation.

While the decision in the Leung case concerns the rights of civil servants, the same legal principles may be applicable to the private sector. Companies in the private sphere may wish to take the opportunity to re-evaluate their policies and guidelines and bring them in line with the court's decision. Employers are encouraged to take note of these developing trends and carefully consider whether their benefits framework should extend to the spouses of same-sex couples.

## KEY CONTACTS



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