FACV No. 14 of 2022
[2023] HKCFA 28

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NO. 14 OF 2022 (CIVIL)
(ON APPEAL FROM CACV NO. 557 OF 2020)

BETWEEN

SHAM TSZ KIT (岑子杰)	**Applicant (Appellant)**
and	
SECRETARY FOR JUSTICE	**Respondent**

Before: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Mr Justice Keane NPJ

Dates of Hearing: 28-29 June 2023

Date of Judgment: 5 September 2023

JUDGMENT

Chief Justice Cheung:

1. I have had the advantage of reading in draft the joint judgment of Mr Justice Ribeiro PJ and Mr Justice Fok PJ. I would gratefully adopt the facts as set out in that judgment and its description of the legal proceedings below.

2. In short, the appellant, a Hong Kong permanent resident, is a homosexual. In 2011, he entered into a stable same-sex relationship in Hong Kong. Not being able to get married locally, he and his partner entered into a same-sex marriage in New York in November 2013. That marriage is not legally recognised in Hong Kong.

3. The appellant argues before us, as he unsuccessfully did in the courts below,[1] that :

(1) he has a constitutional right to same-sex marriage under Article 25 of the Basic Law and Article 22 of Hong Kong Bill of Rights;[2]

(2) alternatively, the absence of any alternative means of legal recognition of same-sex partnership constitutes a violation of Article 14 of the Hong Kong Bill of Rights (on privacy) and/or Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights (on equality); and

(3) the non-recognition of foreign same-sex marriage constitutes a violation of Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights.

These three propositions, which are denied by the respondent, have throughout this litigation been referred to as Questions 1, 2 and 3.

Question 1

4. On Question 1, I agree with Mr Justice Ribeiro PJ and Mr Justice Fok PJ that the appellant's contention must fail. Article 37 of the Basic Law specifically provides that the freedom of marriage of Hong Kong residents shall

---

[1] [2020] 4 HKLRD 930 (Chow J); [2022] 4 HKLRD 368 (Poon CJHC, Kwan VP and Chu JA).

[2] Hong Kong Bill of Rights Ordinance (Cap 383), s 8.

be protected by law. This has been consistently understood and construed to mean a constitutional guarantee on the right to heterosexual marriage.[3] It does not follow that same-sex marriage is constitutionally prohibited. But it does mean that there is no constitutional right to same-sex marriage under Article 37. The net result is that it is up to the government and the legislature to decide whether to allow or recognise same-sex marriage under Hong Kong's marriage and matrimonial legislation – thus far they have not chosen to do so. Unless and until the court gives Article 37 a wider, more liberal interpretation to cover same-sex marriage[4], this is the position in Hong Kong on the constitutional level. In this appeal, no attempt is made by the appellant to persuade the court to give Article 37 such an expansive interpretation.[5]

5. The same can be said in relation to Article 19(2) of the Hong Kong Bill of Rights, which has constitutional status in Hong Kong because of Article 39(1) of the Basic Law.[6] Article 19(2) of the Hong Kong Bill of Rights, which is based on Article 23(2) of the International Covenant on Civil and Political Rights (ICCPR), guarantees the right of men and women of marriageable age to marry. This right has always been understood and interpreted to mean the right to heterosexual marriage only.[7]

---

[3] *W v Registrar of Marriages* (2013) 16 HKCFAR 112, [63], [65] and [165]; *QT v Director of Immigration* (2018) 21 HKCFAR 324, [26]; *Leung Chun Kwong v Secretary for Civil Service* [2018] 3 HKLRD 84, [2], [7], [23] and [89].

[4] On the basis that the Basic Law is a living instrument and its interpretation should move with the times.

[5] Unlike the (unsuccessful) applicant in *MK v Government of HKSAR* [2019] 5 HKLRD 259.

[6] *HKSAR v Ng Kung Siu & Another* (1999) 2 HKCFAR 442, 455B-E; *Gurung Kesh Bahadur v Director of Immigration* (2002) 5 HKCFAR 480, [21]; *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743, [19] *Kwok Wing Hang v Chief Executive in Council and Another* (2020) 23 HKCFAR 518, [68].

[7] *Joslin v New Zealand* (2003) 10 IHRR 40.

6. Likewise, there is no attempt to persuade us that Article 19(2) of the Hong Kong Bill of Rights, or Article 23(2) of the ICCPR, should (or has been) given a wider meaning to encompass same-sex marriage.

7. This makes the appellant's sole argument under Question 1 based on equality untenable.

8. The appellant's argument under Question 1 is based entirely on Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights, both of which protect equality before the law. The argument essentially boils down to this : a stable and committed same-sex relationship is no different from or analogous to a stable and committed different sex relationship. As access to marriage is open to the latter as is constitutionally guaranteed under Article 37 of the Basic Law (and Article 19(2) of the Hong Kong Bill of Rights), the same should be made available to the former as a matter of equality.

9. This argument is unsustainable in light of the *lex specialis* doctrine, or more generally, the constitutional interpretation principle that a constitutional instrument should be construed as a coherent whole.[8] In short, Article 37 is the specific provision in the Basic Law dealing with the constitutional right to marry and it only guarantees the right to different sex marriage, but not same-sex marriage. As a matter of construction, a general provision on equality contained in the same constitutional instrument (and indeed in the same chapter – Chapter III – on fundamental rights) cannot be understood as going beyond what is specifically provided for in the bespoke provision on the constitutional right to marry. Just as the equality protection in Article 25 of the Basic Law must be read subject to the special provision favouring indigenous inhabitants of the New Territories under Article 40 of the Basic Law in respect of their

[8] *Kwok Cheuk Kin v Director of Lands (No 2)* (2021) 24 HKCFAR 349, [44(2)]; *Day and another v Governor of the Cayman Islands and another* (2022) 52 BHRC 598, [38].

"lawful traditional rights and interests" (including their entitlements under the "small house policy"),[9] it must also be read subject to the special constitutional guarantee to different sex marriage under Article 37.

10. Similar conclusions have been reached by the European Court of Human Rights in relation to Article 12 of the European Convention on Human Rights on the right to marry,[10] as well as by the Privy Council in relation to the constitutional right to marry under the Constitution of Cayman Islands.[11]

11. The same can be said in relation to Article 19(2) of the Hong Kong Bill of Rights on the right to marry and its relationship to the equality provisions under that instrument.[12]

12. In short, Question 1 must be answered against the appellant. That is, there is no constitutional right to same-sex marriage in Hong Kong.

13. As I said, it does not follow that there cannot be same-sex marriage in Hong Kong. It is a matter for the government and the legislature. But my conclusion does mean there is no constitutional requirement that there must be laws providing for same-sex marriage.

Question 2

14. Turning to Question 2, the appellant complains that the lack of legal recognition of same-sex relationship by way of any civil partnership or same sex union regime constitutes a violation of his constitutional right to equality as well as his right to privacy.

---

[9] *Kwok Cheuk Kin*, [43].

[10] *Schalk and Kopf v Austria* (2011) 53 EHRR 20, [101]; *Hämäläinen v Finland* (2014) 37 BHRC 55, [96]; *Oliari v Italy* (2017) 65 EHRR 26, [191] – [194]; *Orlandi v Italy* [2017] ECHR 1153 (Applications nos 26431/12, 26742/12, 44057/12 and 60088/12), [192].

[11] *Day*, [40].

[12] *Joslin*, [8.2] – [8.3].

Argument based on equality

15. The appellant's case on equality can be disposed of quickly. Essentially, the appellant argues that the same-sex relationship between him and his partner is, in substance, no different from or analogues to that between a different sex couple. Yet the latter has access to marriage under Article 37 of the Basic Law (and Article 19(2) of the Hong Kong Bill of Rights), whereas he and his partner have access to neither marriage nor an alternative institution providing a substantially equivalent legal status, carrying with it substantially the same rights, benefits and obligations.

16. This argument based on equality cannot be accepted for the same reason why the appellant's earlier argument for the right to same-sex marriage must be rejected. In substance, the appellant, under this argument, is simply asking for access to marriage in another name. The law looks at substance, rather than form. This back-door argument for access to same-sex marriage in the different name of civil partnership must likewise fail.

Argument based on privacy

17. The appellant's case for legal recognition of his same-sex relationship with his partner based on the right to privacy invokes different considerations. Unlike his case based on the equality provisions, the case on privacy does not depend on any comparison (at least direct comparison) between his and his partner's case and that of a different sex couple. Under the privacy argument, the focus is on the non-interference of and respect for the applicant's privacy or private life as an individual.

18. A second major difference from his argument based on equality is that under this argument based on privacy, the appellant does not contend before us that the legal recognition of his same-sex relationship should carry with it the *same* rights, benefits and obligations as that enjoyed (or entailed)

under a marriage relationship between different sex people. Rather, only "core rights", that is, rights inherently essential to a meaningful legal recognition of same-sex relationship must be provided for under the recognition regime. The appellant says a civil partnership regime should at least provide for material support, maintenance obligations and inheritance rights.

19. Because of these differences, the appellant's contention under this privacy route is not blocked by the *lex specialis* doctrine, which simply has no application to the appellant's privacy argument.

BL29 and 30

20. So far as the Basic Law is concerned, there is no specific provision guaranteeing a general right to privacy as such. Article 29 of the Basic Law concerns the protection of the home and other premises of Hong Kong residents. Article 30 deals with their freedom and privacy of communication. For a general right to privacy, one must turn to the Hong Kong Bill of Rights, which is based on the ICCPR, which, as mentioned, is given constitutional status under Article 39(1) of the Basic Law.

BOR14 and ICCPR17

21. Article 14 of the Hong Kong Bill of Rights, based on Article 17 of the ICCPR, provides :

> "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

22. Basing his argument essentially on European jurisprudence under the European Convention on Human Rights, the appellant argues that his protected right to privacy entitles him to legal recognition of his same-sex relationship with his partner, and the absence of any civil partnership regime in

Hong Kong to recognise that relationship constitutes a violation of his right to privacy protected under Article 14 of the Hong Kong Bill of Rights.

ECHR8 and "the right to respect"

23. Before I turn to the European cases, it has to be pointed out at the outset that Article 8 of the European Convention on Human Rights, which protects the right to private life, is worded differently from Article 14 of the Hong Kong Bill of Rights. Article 8 of the European Convention reads :

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

24. Under Article 8 of the European Convention, the emphasis is on the right to respect for private life, and "the right to respect" has been made the basis on which to found not only a negative obligation not to interfere with private life (and the consequential obligation to take positive actions to prevent and protect against any such interference), but also a positive obligation, *even in the absence of any interference*, to facilitate and ensure the full enjoyment of one's private life. In particular, the European case law has evolved since the past decade or so to the stage where there is now a positive obligation on the part of the Contracting States to legally recognise and protect same-sex relationship by means of a civil partnership regime (or some other similar regime).[13]

---

[13] See [41]-[52] below.

BOR14 and non-interference

25. In Article 14 of the Hong Kong Bill of Rights, by way of contrast, the emphasis is on non-interference[14]. The constitutional right under Article 14 is the right to "the protection of the law *against such interference* or attacks"[15]. Protection of the law, by definition, requires the existence of the relevant law. Where the relevant law of protection does not exist, there is plainly a positive duty on the part of the government and the legislature to enact it. However, such law as is required to be enacted is to protect "against such interference or attacks", that is, interference with a person's "privacy, family, home or correspondence, … [or] unlawful attacks on his honour and reputation".

26. In other words, at least on its face, the scope of protection and emphasis of Article 14 of the Hong Kong Bill of Rights are not entirely the same as that of Article 8 of the European Convention on Human Rights. In this regard, it has to be firmly borne in mind that Article 14 is based not on Article 8 of the European Convention, but Article 17 of the ICCPR. Therefore, before one turns to the European jurisprudence on the European Convention on Human Rights, one should start with any relevant international materials on the ICCPR. In this regard, there are two notable matters to bear in mind.

HRC's GC16

27. First, the United Nations Human Rights Committee's General Comment No 16[16] on Article 17 of the ICCPR states :

> "1. Article 17 provides for the **right of every person to be protected against** arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the

---

[14] Article 14(1) : "No one shall be subjected to arbitrary and unlawful interference with his privacy …".

[15] Article 14(2), emphasis added.

[16] Adopted by the Committee at its 32th session (1988).

> Committee this right is required to be guaranteed **against all such interferences** and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition **against such interferences** and attacks as well as to the **protection of this right**.
>
> …
>
> 9. States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework **prohibiting** such acts by natural or legal persons."
>
> (emphasis added)

28. The last sentence in paragraph 1 has to be carefully read. It says that there is an obligation on the part of a Contracting State under Article 17 of the ICCPR to adopt legislative and other measures to give effect to the prohibition against "such interferences and attacks as well as to the protection of this right". "Such interferences and attacks" obviously refer to interferences with one's privacy etc and attacks on one's honour and reputation referred to in Article 17(1) of the ICCPR. The obligation to legislate is directed against such interferences and attacks. As for "the protection of this right" at the end of paragraph 1, again "*this* right" must be a reference back to the first sentence of paragraph 1 of the General Comment where it states that Article 17 provides for "the right" of every person to be protected "against arbitrary or unlawful interference with his privacy [etc]". So, again, it is concerned with a duty to legislate in order to protect against interferences and attacks. It is quite different from an obligation on the part of the State to legislate on the right of privacy, independent of any interferences or attacks.

29. This reading of paragraph 1 is reinforced by paragraph 9 which only refers to States Parties being under a duty themselves not to engage in interferences and to provide the legislative framework "prohibiting" such acts of interference by others.

HRC's lack of comments and its Concluding Observations

30. Secondly, we have not been referred to any comments by the Human Rights Committee in relation to the relevant practices of any States Parties at any time, criticising or otherwise commenting on any States Parties' failure to enact any regime to legally recognise same-sex relationship in violation of Article 17 of the ICCPR. This is so despite the substantial change in position in Europe in this aspect during the last decade or so, which the Human Rights Committee must be fully aware of.

31. In this regard, it has to be remembered that Article 14 of the Hong Kong Bill of Rights is based on an international treaty which has been acceded to by over 170 countries. The proper interpretation of Article 14 of the Hong Kong Bill of Rights, and Article 17 of the ICCPR, cannot be looked at without regard to the international understanding of the ICCPR, and in particular, to the understanding of the Human Rights Committee, which is the treaty body established by the ICCPR[17] to consider the periodic reports submitted by the States Parties on their compliance with the ICCPR[18], and any individual petitions concerning the States Parties to the ICCPR's First Optional Protocol[19]. Moreover, the Human Rights Committee has issued 37 "General Comments", each of which provides detailed guidance on particular parts of the ICCPR. As mentioned, General Comment No 16 is the only relevant comment on Article 17.

32. It should be noted that in the Concluding Observations dated 29 April 2013 by the Human Rights Committee on the Third Periodic Report of Hong Kong[20], the Committee observed :

---

17 Article 28 of the ICCPR.

18 Article 40(1) and (4) of the ICCPR.

19 Article 1 of the First Optional Protocol.

20 CCPR/C/CHN-HKG/CO/3.

> "23. The Committee is concerned about the absence of legislation explicitly prohibiting discrimination on the basis of sexual orientation and reported discrimination against lesbian, gay, bisexual and transgender persons in the private sector (arts. 2 and 26).
>
> **Hong Kong, China, should consider enacting legislation that specifically prohibits discrimination on ground of sexual orientation and gender identity, take the necessary steps to put an end to prejudice and social stigmatization of homosexuality and send a clear message that it does not tolerate any form of harassment, discrimination or violence against persons based on their sexual orientation or gender identity. Furthermore, Hong Kong, China, should ensure that benefits granted to unmarried cohabiting opposite-sex couples are equally granted to unmarried cohabiting same-sex couples, in line with article 26 of the Covenant.**"
>
> (original emphasis)

33. There, the reference to unmarried cohabiting same-sex couples was made under Articles 2 and 26 of the ICCPR (Articles 1 and 22 of the Hong Kong Bill of Rights) on equality/non-discrimination. There was, at that time, no mention of recognition of same-sex couples whatsoever.

34. In its List of Issues dated 26th August 2020[21] in relation to the Fourth Periodic Report of Hong Kong to be submitted, the Human Rights Committee raised for the first time the question of recognition of same-sex partnership under the caption "Non-discrimination and equality between men and women (arts 2, 3, 25 and 26)". Paragraph 8 of the List said :

> "With reference to the Committee's previous concluding observations (CCPR/C/CHN-HKG/CO/3, para. 23)[22], **please indicate any steps taken to recognize same-sex partnerships and to address discrimination faced by same-sex couples**. Please provide an update on any legislative developments for the recognition of transgender persons and clarify the compatibility with the Covenant of certain requirements for the legal recognition of gender reassignment, such as deprivation of reproductive ability and gender confirmation surgery. Please indicate the measures taken to protect lesbian, gay, bisexual, transgender and intersex persons, particularly from hate speech and hate crimes; to facilitate their right to hold events such as gay pride parades; and to respond to reports of inhumane and degrading treatment experienced by transgender persons in custody, including intrusive and humiliating full-body searches, solitary confinement and lack of access to hormone treatment." (emphasis added)

---

[21] CCPR/C/CHN-HKG/Q/4.

[22] Extracted above.

35. It is noteworthy that this reference to recognition of same-sex partnership was made not under Article 17 of the ICCPR on privacy, but under the equality provisions in the ICCPR. Moreover, it was prefaced by a reference back to paragraph 23 of the Committee's Concluding Observations on the Third Periodic Report seven years before, extracted above, which said nothing about recognition of same-sex couples.

36. In any event, after receiving Hong Kong's Reply to the List of Issues[23] as well as the Fourth Periodic Report[24], the Concluding Observations dated 11th November 2022 of the Human Rights Committee on the Fourth Periodic Report of Hong Kong[25] made no further mention of recognition of same-sex partnership anymore, whether under the equality provisions of the ICCPR or Article 17 on privacy. All it said about lesbian, gay, bisexual, transgender and intersex persons was this :

> **"Discrimination against lesbian, gay, bisexual, transgender and intersex persons**
>
> 10. The Committee is concerned about the lack of effort made by Hong Kong, China, to raise awareness among its population of the effects of discrimination based on sexual orientation and gender identity on victims. It is also concerned about the absence of a legal framework to address the discrimination, harassment, hate speech and hate crimes that lesbian, gay, bisexual, transgender and intersex persons continuously face. It is further concerned that, despite an interdepartmental working group on gender recognition having been established in 2014, no progress has been made towards drafting a law on gender recognition, and transgender persons continue to be required to undergo surgery in order to have their gender marker changed in their identity documents (arts. 2, 25 and 26)."

37. In relation to Article 17 of the ICCPR on privacy, all that the Committee was critically concerned about was covert surveillance, curbing of

---

[23] CCPR/C/CHN-HKG/RQ/4.

[24] CCPR/C/CHN-HKG/4.

[25] CCPR/C/CHN-HKG/CO/4.

freedom of speech and expression, and extensive access to the data stored on mobile devices[26].

38. The point here is that under Article 17 of the ICCPR (Article 14 of the Hong Kong Bill of Rights), no comment whatsoever was made by the Committee by as late as 2022, on any duty on the part of Hong Kong to enact laws to recognise same-sex partnership.

39. It is thus a fair observation to make that at least in the eyes of the Human Rights Committee, Article 17 carries no such duty. Given the unique responsibility of the Human Rights Committee under the ICCPR and its general role on the promotion of human rights protection[27], its understanding on Article 17's scope of application is nothing short of highly significant. This is doubly so when the Human Rights Committee cannot have been ignorant of the sea change witnessed in the Strasbourg jurisprudence relating to the recognition of same-sex partnership in Europe since the 2010s.

European jurisprudence

40. With all this in mind, one turns to the European jurisprudence based on Article 8 of the European Convention on Human Rights, which as I have stressed, is differently worded.

41. In a series of cases mirroring the drastic changes in attitude in Europe towards same-sex marriage and civil partnership, the European court in Strasbourg came to the conclusion in the 2010s that under Article 8 of the European Convention on Human Rights, the failure of a Contracting State to

---

[26] [39] – [40].

[27] and regardless of the exact nature or status of its Concluding Observations – a matter which it is unnecessary to dwell on here.

enact laws to recognise and protect same-sex couples constituted a violation of the couples' rights to respect for private life under Article 8.[28]

42. As mentioned, the essence of the protection under Article 8 is on the right to respect for private life. According to the European court, whilst the essential object of Article 8 is to protect individuals against arbitrary interferences by public authorities, it may also impose on a State certain positive obligations to ensure effective "respect" for the rights protected by Article 8.[29] Pausing here, it should be immediately observed that this, by itself, draws a distinction between the mere prevention of interferences with privacy or the right to private life and a positive duty to enact laws to "ensure effective respect for" the same. Even though the dividing line between the two may not be clear-cut in all cases, nonetheless, the distinction is a real one, and cannot be brushed aside as a mere matter of semantics. After all, it is a distinction drawn by the European court itself right from the beginning.

43. In my view, it therefore provides a crucial distinction with Article 14 of the Hong Kong Bill of Rights (Article 17 of the ICCPR), which is focused on non-interference and protection by law against interference. As explained, under Article 14 (Article 17 of the ICCPR), there is also a positive duty to enact laws. However, that is limited to the making of laws to prevent and prohibit interference. Article 8 of the European Convention, as interpreted by the European court, goes much further in this regard. Based on the concept of the right to respect for private life, there are "positive obligations *to ensure effective respect* for the rights protected by Article 8".[30] In the present context, this has

---

[28] *Schalk*; *Oliari*; *Orlandi*; *Fedotova v Russia* (Application nos 40792/10, 30538/14 and 43439/14).

[29] *X and Y v The Netherlands* (1986) 8 EHRR 235, [23]; *Maumousseau v France* (2010) 51 EHRR 35, [83]; *S v Sweden* (2014) 58 EHRR 36, [78]; *Hämäläinen v Finland* (2014) 37 BHRC 55, [62]; *Oliari*, [159]; *Orlandi*, [197]; *Fedotova*, [152].

[30] *Fedotova*, [152], emphasis added.

been held to include an obligation on the part of a Contracting State to enact legislation to legally recognise and protect same-sex partnership. This obligation is not dependent on any interference as such. Rather, it is based on the idea that the State has to do things "to ensure effective respect" for the right to private life protected under Article 8.

44. Moreover, it can be seen from a careful reading of the relevant European cases that the conclusions that the absence of legal recognition and protection of same-sex partnership in the Contracting States concerned amounted to violations of their obligations under Article 8 were heavily influenced by the relevant developments in Europe in recent years. Thus, in the leading case of *Oliari*, a case on the non-recognition of same-sex couples in Italy, the European court stressed :

> "166 That same need, as well as the will to provide for it, has been expressed by **the Parliamentary Assembly of the Council of Europe**, which recommended that the Committee of Ministers call upon Member States, among other things, 'to adopt legislation making provision for registered partnerships' as long as 15 years ago, and more recently by the Committee of Ministers (in its Recommendation CM/Rec(2010)5) which invited Member States, where national legislation did not recognise nor confer rights or obligations on registered same-sex partnerships, to consider the possibility of providing same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.
>
> …
>
> 173 … In the Court's view an obligation to provide for the recognition and protection of same-sex unions, and thus to allow for the law to reflect the realities of the applicants' situations, would not amount to any particular burden on the Italian state be it legislative, administrative or other. Moreover, such legislation would serve an important social need—as observed by the ARCD, official national statistics show that **there are around one million homosexuals (or bisexuals), in central Italy alone**.
>
> …
>
> 178 In addition to the above, of relevance to the Court's consideration is also **the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe** since the Court's judgment in *Schalk*. To date **a thin majority of CoE states (24 out of 47)** have already legislated in favour of such recognition and the relevant protection. The same rapid development can be identified globally, with particular reference to **countries in the Americas and**

Australasia. The information available thus goes to show the continuing international movement towards legal recognition, to which the Court cannot but attach some importance.

…

180 The Court notes that in Italy the need to recognise and protect such relationships has been given a high profile by the highest judicial authorities, including **the Constitutional Court and the Court of Cassation**. Reference is made particularly to the judgment of the Constitutional Court No.138/10 in the first two applicants' case, the findings of which were reiterated in a series of subsequent judgments in the following years. In such cases, the Constitutional Court, notably and repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions, a measure which could only be put in place by Parliament.

181 The Court observes that such an expression reflects the **sentiments of a majority of the Italian population**, as shown through official surveys. The statistics submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection.

…

184 … While the Court is aware of the important legal and factual differences between *Broniowski* and the present case, it nevertheless considers that in the instant case, **the legislature, be it willingly or for failure to have the necessary determination, left unheeded the repetitive calls by the highest courts in Italy**. Indeed the President of the Constitutional Court himself in the annual report of the court regretted the lack of reaction on behalf of the legislator to the Constitutional Court's pronouncement in the case of the first two applicants. The Court considers that this repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account."

(emphasis added)

45. All this led the European court to conclude in paragraph 186 that :

"To find otherwise today, the Court would have to be unwilling to take note of the **changing conditions in Italy** and be reluctant to apply the Convention in a way which is practical and effective."

(emphasis added)

46. These rather lengthy extracts are necessary to give the reader a true flavor of how much the Strasbourg jurisprudence was influenced by the developments on the European continent. From these extracts, it is plain that

the European court took into account and attached importance to the recommendations made by the Parliamentary Assembly of the Council of Europe, the huge number of homosexuals (or bisexuals) in Italy (around one million in central Italy alone), the fact that a majority of the States of the Council of Europe (24 out of 47 as at 2015) already had legislation to recognise and protect same-sex couples, the global trend particularly in countries in Americas and Australasia towards legal recognition, the judgments and repeated calls by the Constitutional Court and the Court of Cessation in Italy in favour of legal recognition, as well as the popular sentiments of the Italian population, in arriving at its conclusion. It is plainly obvious that in Hong Kong, as well as in many of States Parties to ICCPR, many if not all of these have no real parallel.

47. The same point can be made in relation to the recent case[31] of *Fedotova*, concerning a similar lack of legal recognition in Russia. In that case, the European court again emphasised that the scope and content of protection under Article 8 was a continually evolving matter, depending on the relevant developments in Europe and the Contracting States to the European Convention. The court reiterated in paragraph 167 that :

> "The Convention is a living instrument which must be interpreted in the light of **present-day conditions** and of **the ideas prevailing in democratic States today**." (emphasis added)

48. It went on to describe the developments in Europe and how the court had to respond to the changing conditions in the Contracting States :

> "167 … Since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the **changing conditions in Contracting states** and respond, for example, to any **evolving convergence** as to the standards to be achieved (see *Stafford v. the United Kingdom* [GC], no. 46295/99, §68, ECHR 2002-IV; *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, §104, 17 September 2009; and

[31] 17 January 2023. See also *Buhuceanu v Romania*, Application nos 20081/19, 20108/19, 20115/19 *et al*, 23 May 2023; *Maymulakhin and Markiv v Ukraine*, Application no 75135/14, 1 June 2023.

> *Bayatyan v. Armenia* [GC], no. 23459/03, §102, ECHR 2011). As is apparent from the case-law cited above, a failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see, to that effect, *Christine Goodwin*, cited above, §74, where the Court held that in accordance with their positive obligations under Article 8, the States Parties were henceforth required to recognise the new gender identity of post-operative transgender persons, in particular by allowing them to amend their civil status; see also *Scoppola*, cited above, §104, concerning the interpretation of Article 7 of the Convention, and *Bayatyan*, cited above, §98, concerning Article 9 of the Convention).
>
> 168. A large number of judgments delivered by the Court illustrate this interpretative approach, which **draws on developments in the laws of the member States of the Council of Europe** in order to interpret the scope of the rights guaranteed by the Convention (see, for example, *Mazurek v. France*, no. 34406/97, §52, ECHR 2000-II, where, after noting 'a distinct tendency in favour of eradicating discrimination against adulterine children' within the Council of Europe member States, the Court held that 'it [could] not ignore such a tendency in its – necessarily dynamic – interpretation of the relevant provisions of the Convention')."
>
> (emphasis added)

49. In paragraph 170, the court admitted with disarming frankness that:

> "… what may have been regarded as 'permissible and normal' at the time when the Convention was drafted may subsequently prove to be incompatible with it (see *Marckx*, cited above, §41)."

50. Focusing on "a clear ongoing trend within the States Parties towards legal recognition of same-sex couples (through the institution of marriage or other forms of partnership)"[32], the court continued :

> "175. The **trend** already observed by the Court in the above-mentioned cases is clearly confirmed today. According to the data available to the Court, **thirty States Parties** currently provide for the possibility of legal recognition of same-sex couples. **Eighteen States** have made marriage available to persons of the same sex. **Twelve other States** have introduced alternative forms of recognition to marriage. Among the eighteen States which allow marriage for same-sex couples, **eight** also offer such couples the option of entering into other forms of union (see paragraphs 66 and 67 above). In those circumstances, it is permissible to speak at present of **a clear ongoing trend within the States Parties** towards legal recognition of same-sex couples (through the institution of marriage or other forms of partnership), since **a majority of thirty States Parties** have legislated to that effect.
>
> 176. This **clear ongoing trend within the States Parties** is consolidated by the converging positions of a number of international bodies. The Court reiterates in this

[32] [175].

connection that the Convention cannot be interpreted in a vacuum (see *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, §123, 8 November 2016). The Court takes into account elements of international law other than the Convention and the interpretation of such elements by competent bodies (see *Demir and Baykara v. Turkey* [GC], no. 34503/97, §85, ECHR 2008; *Bayatyan*, cited above, §102; and *National Federation of Sportspersons' Associations and Unions (FNASS) and Others v. France*, nos. 48151/11 and 77769/13, §181, 18 January 2018). It has regard to relevant international instruments and reports, in particular those of **other Council of Europe bodies**, in order to interpret the guarantees of the Convention and to establish whether there is **a common European standard** in the field concerned (see *Tănase v. Moldova* [GC], no. 7/08, §176, ECHR 2010).

177. As far as the issue raised by the present case is concerned, **several Council of Europe bodies** have stressed the need to ensure legal recognition and protection for same-sex couples within the member States (see paragraphs 48-56 above). The Court also takes note of developments at international level (see, in particular, paragraphs 46 and 61 above). Lastly, it observes that the **Inter-American Court of Human Rights**, in its advisory opinion no. OC-24/17, expressed the view that the States Parties to the American Convention on Human Rights were required to ensure access to all the legal institutions existing in their domestic laws in order to guarantee the protection of the rights of families composed of same-sex couples, without discrimination in relation to families constituted by different-sex couples (see paragraph 64 above)."

(emphasis added)

51. In conclusion, the court said :

"178. Having regard to its case-law (see paragraphs 156-164 above) as consolidated by **a clear ongoing trend within the member States** of the Council of Europe (see paragraph 175 above), the Court confirms that in accordance with their positive obligations under Article 8 of the Convention, the member States are required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship." (emphasis added)

52. Thus again, the European court placed heavy reliance on the "clear ongoing trend" within the Contracting States to the European Convention towards same-sex marriage and civil partnership, the relevant instruments and reports of other Council of Europe bodies, the emergence of "a common European standard" and the advisory opinion of the Inter-American Court of Human Rights, in reaching its conclusion that Russia was in breach of its positive obligation to respect for the private life of the applicants under Article 8 of the European Convention by failing to have any recognition regime for same-sex couples.

53. It is of course up to the governments and legislatures in the Contracting States to the European Convention to decide whether in their countries, same-sex marriage or same-sex civil partnership should be accepted and recognised. It is equally understandable and indeed right that in construing Article 8 of the European Convention, the European court should give full consideration to these developments in individual Contracting States as well as the general trend that they represented in order to arrive at an updated interpretation of Article 8 of the European Convention as a living instrument.

54. However, that is not the issue we are faced with here. The issue here is the extent to which in interpreting our own Article 14 of the Hong Kong Bill of Rights which is based on Article 17 of a different international treaty acceded to by countries not only in Europe but also in many other parts of the world, the latest jurisprudence emanating from the European court based on their Convention and the developments in Europe should be followed or regarded as a leading guide.

Caution on the use of European jurisprudence

55. In this regard, what was said by Lord Hughes in *Lendore v Attorney General of Trinidad and Tobago*[33] about the use of Strasbourg jurisprudence to interpret the rights and freedoms protected by Trinidad and Tobago's Constitution is equally apposite :

> "59. Constitutional provisions, especially those protecting fundamental rights, generally fall to be interpreted in the light of the developing values of the societies for which they were made. Such instruments were described by the Privy Council as long ago as 1930 as 'a living tree capable of growth and expansion within its natural limits': *Edwards v Attorney General for Canada* [1930] AC 124, 136. The Court of Human Rights has always applied a corresponding principle. In *Tyrer v United Kingdom* (1978) 2 EHRR 1, 31, where it was first articulated, the court described the Human Rights Convention as
>
> > 'a living instrument which ... must be interpreted in the light of present day conditions ... the court cannot but be influenced by the developments and

---

[33] [2017] 1 WLR 3369.

commonly accepted standards in the penal policy of the member states of the Council of Europe.'

60. It is inherent in this concept of fundamental rights that different jurisdictions may develop the law in ways that reflect their own constitutional traditions, legal procedures and collective values. The Court of Human Rights has been the most prolific single international source of judicial decisions on human rights which in one form or another are protected under many instruments in many countries. But in considering the persuasiveness of its decisions in Trinidad and Tobago, some significant features of its jurisprudence must be born in mind. First, the Convention is a regional human rights instrument and, as the Strasbourg court's observations in *Tyrer* show, the values which it seeks to apply are those of the member states of the Council of Europe so far as it is possible to generalise about them. Criminal law and procedure, and penal policy in general, are areas in which accepted practices are particularly liable to diverge as between different jurisdictions and different parts of the world, where patterns of criminality, social attitudes to crime and the practical implications of penal policy may not be the same. Secondly, the Strasbourg court has not been content to lay down general principles to be applied by national courts in accordance with divergent national practice. Its practice has been to define the incidents of human rights prescriptively and in considerable detail. This means that the scope for inconsistency between the decisions of the court as an international court and the values and practices of individual jurisdictions is necessarily increased. Thirdly, perhaps because of the enormous volume of its decisions and the differing composition of its chambers, as well as because it is evolutionary, the jurisprudence of the Strasbourg court may sometimes not be entirely consistent internally, which can require analysis by states which are parties to the Human Rights Convention. It is not the duty of the courts of independent non-party states to follow every turn in its case law as it occurs.

61. Compliance with the decisions of the Court of Human Rights is not an international obligation of Trinidad and Tobago as it is of the United Kingdom. Instead, the international obligations of Trinidad and Tobago in relation to human rights arise under the instruments to which it is party, some of which have their own decision-making bodies and their own corpus of decisions. The decisions of the Court of Human Rights are not a source of law which the courts of Trinidad and Tobago are bound to take into account, as the domestic courts of the United Kingdom are by virtue of section 2(1) of the Human Rights Act 1998, let alone are they a source of binding authority. They may bear valuable persuasive authority on the general principles underlying the protection of particular rights. But they are likely to be less valuable when prescribing the detailed content of those rights or the mode of giving effect to them procedurally. As far as the Board is concerned, particular importance will generally be attached to the views of the courts below before recognising any development of the law which is not warranted by the express terms of the Constitution or necessarily implicit in them."

56. From this, it is important to bear in mind that :

(1) It is inherent in the concept of an international instrument on human rights as a living instrument that its interpretation is

necessarily influenced by the developments and commonly accepted standards on a particular subject matter of the Contracting States to the instrument.

(2) Different jurisdictions may develop the law in ways that reflect their own constitutional traditions, legal procedures and collective values.

(3) The European Convention is a regional human rights instrument and the values which it seeks to apply are those of the member states of the Council of Europe.

(4) It is not the duty of the courts of independent non-party states to follow every turn in the ever-evolving case law of the European court as it occurs.

(5) Decisions of the European court are not binding. They may bear valuable persuasive authority on "the *general* principles underlying the protection of particular rights".[34]

(6) However, importantly, "they are likely to be less valuable when prescribing the *detailed content* of those rights".[35]

57. More recently, Lord Reed likewise pointed out in *R(AB) v Secretary of State for Justice*[36] that the European court's interpretation of a right guaranteed under the European Convention on a particular subject matter and

---

[34] *Lendore*, [61], emphasis added. See also *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381, [59]; *ZN v Secretary for Justice* (2020) 23 HKCFAR 15, [60].

[35] *Lendore*, [61], emphasis added.

[36] [2022] AC 487.

the interpretation given to a corresponding provision in an United Nations treaty instrument might not always correspond :[37]

> "I would only wish to add some comments on certain assumptions inherent in counsel's argument. First, it is well understood that the European court takes account of other international treaties and other materials in its interpretation and application of the Convention. However, it also needs to be borne in mind that 'It is for the [European] court to decide which international instruments and reports it considers relevant and how much weight to attribute to them': *A-MV v Finland* (2017) 66 EHRR 22, para 74. Accordingly, although the European court frequently refers to international treaties, it does not necessarily follow the views adopted by the bodies established to interpret them. That was made clear by the Grand Chamber in *Correia de Matos v Portugal* (2018) 44 BHRC 319, para 135 ('even where the provisions of the Convention and those of the ICCPR are almost identical, the interpretation of the same fundamental right by the [UN Human Rights Committee] and by this court may not always correspond'). The judgment in *A-MV v Finland* is another example: the European court's approach to the application of article 8 and article 2 of Protocol No 4 to the Convention, in relation to a decision made on behalf of a person lacking the mental capacity to understand its significance, differed from the interpretation given to the corresponding provision of the UN Convention on the Rights of Persons with Disabilities by the relevant committee; and see also *Popović v Serbia* (2020) 71 EHRR 29, para 79."

58. As I said, very few of the developments described by the European court in the leading cases in Europe apply to Hong Kong. No such "clear general trend" can be seen in this part of the world. Nor do we have any guidance or lead from the Human Rights Committee to the same or similar effect; not that what the Human Rights Committee says is necessarily definitive or binding on our own understanding of the Hong Kong Bill of Rights.[38] If the Human Rights Committee were of the view that the present-day interpretation of Article 17 of the ICCPR should follow the latest understanding of the scope of protection under Article 8 of the European Convention, one would expect it to lose no time in urging the States Parties to the ICCPR to enact laws to recognise same-sex partnership, whether by way of its General Comments or Concluding Observations. However, this is not what we see.

---

[37] [61].

[38] *ZN*, [70].

59. In Hong Kong, protection of privacy at the constitutional level is based on the ICCPR, not the European Convention on Human Rights. Nor is the European court within the court hierarchy in Hong Kong. No doubt its judgments are entitled to the respect that they deserve, yet one must be careful in following its decisions or the reasons for its decisions when the factors influencing them are absent or do not apply in Hong Kong, and when the relevant provisions are differently worded.

Is non-recognition by itself an interference?

60. Is non-recognition of same-sex partnership by itself an interference with privacy? First, it is clear that the Human Rights Committee has not so regarded. As mentioned, in its General Comments and in its Concluding Observations also, the Human Rights Committee has not suggested that the lack of legal recognition and protection of same-sex partnership is in itself an interference with the rights protected under Article 17 of the ICCPR, or that the need of same-sex couples resorting to repeated litigation to claim individual rights or benefits enjoyed by comparable different sex couples under the equality provisions in the ICCPR by itself amounts to interference with their privacy rights.

61. Secondly, it is equally plain that even the European court, by developing and relying on the distinction between protection of individuals against interferences and imposing positive obligations on Contracting States to ensure effective respect for Article 8 rights in order to found a positive obligation to legally recognise same-sex partnership, has implicitly acknowledged that non-recognition by itself does not constitute an interference. Otherwise, there was simply no need to resort to the idea of Contracting States having a positive obligation to ensure effective respect for the right to private life, over and above their obligations to protect against interferences, to base the

conclusion that the States have a positive obligation to legally recognise and protect same-sex relationship.

62. In the final analysis, whether the lack of recognition *per se* amounts to an interference with privacy begs the basic question that one has to answer here, that is, what is the scope of protection under Article 14. As mentioned, there is a real distinction – a distinction first drawn by the European Court itself – between non-interference and a positive duty, absent interference, to take steps to facilitate and ensure the full enjoyment of privacy, despite the fact that the dividing line between the two may sometimes be fuzzy. Prohibiting the State or others to interfere with the enjoyment by a same-sex couple of their stable and committed relationship is one thing, but imposing a constitutional requirement on the State and society as a whole to legally recognise that relationship and deal with it accordingly, irrespective of their possible reservation, hesitation or even disagreement, is quite another. The former is a case of non-interference. The latter is a case of positive duty *simpliciter* [39]. One cannot be confused for another. The scope of protection under Article 14 is answered by the clear language it uses. Whilst it is no doubt true that fundamental rights should be generously interpreted, and a literal, technical, narrow or rigid construction of the language of the relevant provision avoided, the language actually used must be respected and cannot be given a construction that it cannot bear.[40]

63. Non-recognition no doubt brings about social inconvenience, legal discrepancies and indeed hardship in some circumstances to same-sex couples in a stable and committed relationship. There is no attempt whatsoever to downplay the difficulties that they may face. But in the absence of any interference (other than the non-recognition itself), all this goes only to

---

[39] That is, a positive duty to act in the absence of interference.

[40] *ZN*, [81] – [82].

highlight the prohibitory nature of the protection under Article 14 of the Hong Kong Bill of Rights. That is, under Article 14, the focus of protection is on non-interference with privacy, rather than a duty on the part of the State to facilitate and ensure the full enjoyment of privacy, absent any interference, by the enactment of bespoke legislation on recognition and provision of "core rights".

64. Moreover, it has to be remembered that under the equality provisions in the Basic Law and the Hong Kong Bill of Rights, individual rights and benefits cannot be withheld from same-sex couples in comparable situations with different sex couples without satisfying the justification test.[41]

65. In *Oliari*, the European court observed :[42]

> "… the necessity to refer repeatedly to the domestic courts to call for equal treatment in respect of each one of the plurality of aspects which concern the rights and duties between a couple, especially in an overburdened justice system such as the one in Italy, already amounts to a not-insignificant hindrance to the applicants' efforts to obtain respect for their private and family life …"

What was said there was "a not-insignificant hindrance to a same-sex couple's efforts to obtain respect for their private and family life". It referred to the court/litigation process in Italy not being an efficient means by which a same-sex couple could make use of to fully obtain and enjoy respect for their private life. The lack of such efficiency was what the European court termed as a "hindrance". In the context, "hindrance" was just another way of saying non-facilitation. It was very different from an interference of the same-sex couple's privacy, and the European court was careful not to call it an interference. Indeed, as mentioned, if such "hindrance" should by itself constitute an interference, it would not have been necessary for the European court to develop and rely on the concept of a Contracting State being under a positive duty to

---

[41] Eg, *QT*; *Leung Chun Kwong*; *Infinger v Hong Kong Housing Authority* [2020] 1 HKLRD 1188; *Ng Hon Lam Edgar v Secretary for Justice* [2020] 4 HKLRD 908; *Ng Hon Lam Edgar v Hong Kong Housing Authority* [2021] 3 HKLRD 427.

[42] [171].

ensure effective respect for the right to private life in order to base its conclusion of a violation of Article 8.

66. Moreover, the appellant's argument based on privacy, if accepted, would mean that unmarried heterosexual couples in a committed and stable relationship should also be entitled to legal recognition under a regime of civil partnership, in protection of their privacy rights under Article 14 of the Hong Kong Bill of Rights.[43] The fact that there is available to them the option of marriage does not fully answer their claim to legal recognition under a civil partnership regime based on their privacy rights, because they may not necessarily find marriage with its extensive attending rights and obligations suitable to their relationship. The non-recognition of an (unmarried) heterosexual couple's stable and committed relationship may, using the same logic as the appellant's argument for a same-sex couple, similarly be humiliating, and lead to difficulties and hardship in real life. The example about the visiting right and other rights of a partner when his or her same-sex partner is hospitalised applies equally to a different sex couple, and the difficulties in separating the mixed assets of a same-sex couple upon the termination of their relationship after a long period of cohabitation are equally faced by a different sex couple when their relationship comes to an end.

67. When the right to recognition is put on the basis of privacy, particularly when it is suggested that non-recognition of a particular relationship is by itself tantamount to interference with privacy, one must carefully bear in mind that in society, there are relationships other than same-sex relationship that may need to be taken into account. For my part, I am not sure if the imposition of a rigid, constitutional duty on the government and the legislature, regardless of their views, to positively enact laws to recognise same-sex relationship (and

---

[43] *Cf R (Steinfeld and Keidan) v Secretary of State for International Development* [2020] AC 1, where the argument was based on equality, rather than privacy.

indeed any other relationships) – albeit leaving the precise content of the laws to be decided by them – is the right direction to take for the development of the law on protection of privacy under Article 14 of the Hong Kong Bill of Rights in Hong Kong. Nor am I sure that the considerations involved are not matters that should be left to the government and the legislature, which are more suitably positioned under the Basic Law and better equipped institutionally to deal with these complicated and sensitive social issues on relationships.

68. For my part, I am not prepared to hold that the non-recognition of same-sex partnership in Hong Kong amounts by itself to interference of privacy under Article 14 of the Hong Kong Bill of Rights.

Local case law

69. As for the local authorities, *Q and Tse Henry Edward v Commissioner of Registration*[44] is a case on interference. At issue in that case was the identity card regime imposed by law on everyone in Hong Kong, including transgender persons. As a requirement under the identification card regime, a gender marker is given on the identity card.[45] An individual has no choice but to comply with this law, and has his or her gender revealed by their identity card for all kinds of identification purposes in their daily life. This being the law imposed on everyone, a wrong gender marker, or one that is no longer correct, on one's identity card is clearly an interference with one's right to privacy, leading to practical difficulties and embarrassment in real life.[46]

70. *Q* therefore provides a good example where Article 14 of the Hong Kong Bill of Rights operates to protect a transsexual person from arbitrary and unlawful interference with their privacy. It is not an example of a positive duty

---

44 (2023) 26 HKCFAR 25.

45 [3].

46 [46].

to enact laws to recognise one's gender identity in the absence of interference. Nor is it a case on gender recognition or the lack of a legal regime on gender recognition as such. What this court said in paragraph 44 of its judgment about the concept of privacy under Article 14 being materially equivalent to the concept of respect for private life in Article 8 of the European Convention must be understood in the context of that case.

71. Likewise, *HKSAR v Au Kwok Kuen*[47] provides no example of a positive duty on the part of the State to protect the right to privacy *absent an interference*. There, what was said by the court[48] was that the government has a duty under Articles 6, 29 and 105 of the Basic Law as well as Article 14 of the Hong Kong Bill of Rights to take reasonable and appropriate measures "to protect Hong Kong residents' homes and other premises *against intrusion* and their privacy at home *against interference*"[49]. Again, the context was about interference with privacy by unlawful intrusion into private property and the police's duty to take actions against such intrusion. It was not about a positive duty to protect the right to privacy, or more correctly, to facilitate and ensure the full enjoyment of privacy, absent an intrusion or interference.

72. The freedom of peaceful assembly, at issue in *Leung Kwok Hung v HKSAR*[50], carries with it a positive duty on the part of the government to take reasonable and appropriate measures to enable lawful demonstration to take place peacefully. There is no doubt about that. However, it does not assist in the proper interpretation of Article 14 of the Hong Kong Bill of Rights concerning privacy. Freedom of peaceful assembly protected under Article 17 of the Hong Kong Bill of Rights is protected as a right to such freedom. In

---

[47] [2010] 3 HKLRD 371.

[48] [74].

[49] Emphasis added.

[50] (2005) 8 HKCFAR 229.

contrast, the right to privacy protected under Article 14 is protected in terms of a prohibition against interference with privacy. The protection of law required under Article 14 is directed at interference of privacy. One cannot ignore the language difference between Articles 14 and 17, contained in the same instrument, and transpose the positive duty under Article 17 to enable the full enjoyment of the right to freedom of peaceful assembly, into Article 14 to impose a positive duty to enact laws absent interference with privacy. In paragraph 23 of this court's judgment in *Leung Kwok Hung*, the court specifically pointed out that in Hong Kong's Second Periodic Report to the Human Rights Committee, the government stated that the Hong Kong Special Administrative Region has an obligation to assist and provide for the right of peaceful public assembly and demonstration under Article 17. In contrast, there is never any acceptance of a positive obligation (absent interference) for the protection of privacy under Article 14, and certainly the Human Rights Committee has not made any comments about any such positive duty on the part of Hong Kong in any of its Concluding Observations over the years, including the latest one in 2022 (despite the drastic change in law in Europe since the 2010s).

73. Finally, *ZN* was a case concerning the prohibition of slavery, servitude and forced labour under Article 4 of the Hong Kong Bill of Rights. The government was under a positive obligation to make those prohibitions practical and effective. That does not assist in the proper construction of Article 14. I have no difficulty with any suggestion that prohibitions by law against interference with privacy must likewise be practical and effective. But that is not the issue in the present case.

Conclusion on Question 2

74. It is not for the court to express any opinion on the pros and cons of enacting laws in Hong Kong to legally recognise and protect same-sex

partnership. It is a matter for the government and the legislature. The fact that to many, it is both necessary and desirable, not only in the interest of same-sex couples, but also for the sake of Hong Kong as an inclusive, international city, to have laws to formally recognise same-sex partnership, cannot by itself be transformed into a constitutional right to have such recognition. As tempting as this may be to some, it simply does not follow.

75. In conclusion, on the second question, I would respectfully differ from Mr Justice Ribeiro PJ and Mr Justice Fok PJ and conclude that there is no constitutional right to legal recognition of same-sex partnership not only under the equality provisions in the Basic Law and the Hong Kong Bill of Rights, but also under Article 14 of the Hong Kong Bill of Rights on privacy.

Question 3

76. I can be quick with Question 3. I agree with Mr Justice Ribeiro PJ and Mr Justice Fok PJ that, on analysis, Question 3 collapses into Question 1. Question 3 must stand or fall together with Question 1. With the rejection of Question 1, Question 3 must fail. At the constitutional level, Article 37 of the Basic Law only guarantees the right to heterosexual marriage in Hong Kong. No right to same-sex marriage is constitutionally guaranteed. By definition, at the constitutional level, this automatically means that there is no constitutional right to the recognition of foreign same-sex marriage either. Any contrary conclusion would result in an incongruent situation with the lack of a constitutional right to same-sex marriage locally.

77. In other words, non-recognition of foreign same-sex marriage does not violate Article 25 of the Basic Law and Article 22 of the Hong Kong Bill of Rights on equality. In fact, to do otherwise would violate the equality provisions by unjustifiably "discriminating" against same-sex couples in Hong

Kong who cannot get married here in favour of those who are willing and able to enter into a same-sex marriage overseas.

78. For these reasons, I would dismiss this appeal.

Mr Justice Ribeiro PJ and Mr Justice Fok PJ:

A. The scope of this appeal

79. The appellant is a Hong Kong permanent resident who is gay and who has been cohabiting with a man, also a Hong Kong permanent resident, in a stable same-sex relationship since 2011. In 2013, they entered into a same-sex marriage in New York. Under Hong Kong law, there is no provision for such marriages to be entered into, nor are such marriages contracted abroad recognised. The appellant contends that this state of affairs constitutes discrimination and a violation of his constitutional rights to equality and to protection against interference with his right to privacy and family.

80. The appellant brought proceedings seeking Declarations on three matters, namely: (i) that couples have a constitutional right to enter into a same-sex marriage in Hong Kong; or alternatively (ii) if they are not able to marry, that the authorities are constitutionally obliged to provide a legal framework to enable their relationship to be officially recognised as a registered civil partnership or same-sex union in an appropriate form; and (iii) that where a same-sex marriage has been contracted abroad and is valid under the law of that place, there is a constitutional right for that marriage to be recognised as valid under Hong Kong law.

81. In the Court of First Instance, Mr Justice Anderson Chow dismissed the appellant's application.[51] In earlier proceedings brought by an

[51] [2020] 4 HKLRD 930.

applicant referred to as MK,[52] the learned Judge had given judgment on issues overlapping with issues (i) and (ii) above. His Lordship had held that denial of a right of marriage did not violate the constitutional rights of same-sex couples and that the Government was under no positive obligation to provide an alternative framework such as for a same-sex union or civil partnership. To avoid duplication, Chow J confined argument in the present case to issue (iii) concerning recognition of foreign same-sex marriages. After dismissing the application, his Lordship directed that the present case could be taken forward on appeal to the Court of Appeal on all three issues, adopting the reasoning in *MK* in respect of (i) and (ii).

82. The Court of Appeal, dealing with all three issues, dismissed the appeal.[53] It then granted leave to appeal to this Court on the following questions,[54] as being of the requisite great general or public importance, namely:-

> "Whether the exclusion of same-sex couples from the institution of marriage constitutes a violation of the right to equality enshrined in Article 22 of the Hong Kong Bill of Rights (BOR22) and Article 25 of the Basic Law of the HKSAR (BL25)? (*Question 1*)
>
> Whether the laws of Hong Kong (including the Marriage Ordinance, Cap 181), in so far as they do not allow same-sex couples to marry and fail to provide any alternative means of legal recognition of same-sex partnerships (such as civil unions or registered partnerships), constitute a violation of the right to privacy enshrined in BOR14 and/or the right to equality enshrined in BOR22 and BL25? (*Question 2*)
>
> Whether the laws of Hong Kong, in so far as they do not recognise foreign same-sex marriage, constitute a violation of the right to equality enshrined in BOR22 and BL25? (*Question 3*)"

The abovementioned provisions of the Basic Law and the Hong Kong Bill of Rights are included in the Appendix to this judgment.

---

[52] *MK v Government of HKSAR* [2019] 5 HKLRD 259.

[53] [2022] 4 HKLRD 368 ("CA Judgment").

[54] [2022] HKCA 1690.

83. Shortly prior to the hearing of the appeal, the appellant issued a summons to admit new evidence[55] said to show the growing support in Hong Kong for same-sex couples' rights and same-sex marriage. It was directed that the evidence be received *de bene esse*, leaving it to the appellant to seek leave to rely on it at the hearing. In the event, neither party referred to the summons or mentioned the proposed evidence in question in the course of the appeal and so it has not been relied on by the Court and it is unnecessary to address this material in this judgment.

B. Questions 1 and 3

84. Questions 1 and 3 in this appeal (see [82] above) correspond with Grounds 1 and 3 argued in the Court of Appeal below. Question 1 encapsulates the appellant's primary case in this appeal which is that the exclusion of same-sex couples from the institution of marriage violates the right to equality enshrined in BL25 and BOR22.[56] Question 3 advances as a further or alternative case that the laws of Hong Kong, insofar as they do not recognise foreign same-sex marriages, constitute a violation of the right to equality enshrined in BL25 and BOR22.

85. The Court of Appeal rejected those grounds on the basis that BL37 is to be construed as creating a constitutional right to, and protection of, opposite sex marriage only and that, construing the Basic Law coherently and applying the doctrine of *lex specialis* (discussed further below): (1) the rights in BL25 and BOR22 could not be relied upon by the appellant to establish indirectly a right to marry for same-sex couples (Ground 1);[57] and (2) nor could

[55] In the form of a joint report issued on 17 May 2023 by the Centre for Comparative and Public Law at the Faculty of Law of the University of Hong Kong, the Sexualities Research Programme at the Chinese University of Hong Kong and the Human Rights Law Program at the University of North Carolina School of Law.

[56] Case for the Appellant at [33].

[57] CA Judgment at [38]-[39].

the appellant establish discrimination based on the absence of recognition under Hong Kong law of his same-sex marriage in New York (Ground 3).[58]

86. It is appropriate to address both questions of law together since the appellant's case in respect of each stands or falls together. Essentially the same basis of argument is advanced on both questions. The appellant says it constitutes less favourable treatment that same-sex couples are unable to enter into a same-sex marriage or to have their foreign same-sex marriage recognised under the laws of Hong Kong because the reason why they are excluded from marriage is because of their sexual orientation as homosexuals and hence, it is argued, the difference requires justification.[59]

87. For the reasons that follow, we would answer these two questions of law in the negative.

B.1 The proper interpretation of BL37

88. The first issue to be addressed is the proper interpretation of BL37. In this regard it is now well-established[60] that the correct approach is to give a purposive and contextual interpretation to provisions of the Basic Law. This entails a consideration of the other terms of the Basic Law itself, including the provisions of the International Covenant on Civil and Political Rights ("ICCPR") as applied to Hong Kong by the Hong Kong Bill of Rights Ordinance ("HKBORO") as well as the state of Hong Kong statute and common law, and the historical context, at the time of the promulgation of the Basic Law in April 1990. It is to be noted, in particular, that the provisions of the ICCPR are not

---

[58] *Ibid* at [71]-[72].

[59] Case for the Appellant at [36] and [82].

[60] In cases including *Ng Ka Ling v Director of Immigration* (1999) 2 HKCFAR 4 at 28-29, *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at 224C-D, *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59 at [60] and *Kwok Cheuk Kin v Director of Lands (No 2)* (2021) 24 HKCFAR 349 at [35].

only incorporated domestically into the laws of Hong Kong but are given constitutional effect by virtue of BL39.[61]

89. In guaranteeing the protection of law to "[t]he freedom of marriage of Hong Kong residents and their right to raise a family freely" the article does not expressly distinguish men and women for the purposes of marriage. However, when BL37 is read, together with BOR19(2),[62] in its legal and historical context in April 1990, it is clear that the constitutional freedom of marriage referred to is opposite-sex marriage only and not same-sex marriage.

90. Thus, ICCPR23(2) expressly refers to "[t]he right of men and women of marriageable age to marry and to found a family". The article refers in terms to men and women marrying and this is undoubtedly a reference to men and women marrying each other. When the ICCPR was adopted, in 1966, there would have been no question of same-sex marriage, since that would not have been a concept within the contemplation of its drafters. As the Human Rights Committee observed, in *Joslin v New Zealand*:

> "Use of the term 'men and women', rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other."[63]

91. The clear wording of BOR19(2), by which ICCPR23(2) is applied to Hong Kong, is significant. By virtue of BL39, BOR19(2) is given

---

[61] *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59 at [24]-[25], citing *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 455, *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381 at [58], *Swire Properties Ltd v Secretary for Justice* (2003) 6 HKCFAR 236 at [53], and *Ubamaka v Secretary for Security* (2012) 15 HKCFAR 743 at [113].

[62] The terms of which are identical to ICCPR23(2).

[63] Communication No 902/1999 (17 July 2002) at [8.2].

constitutional effect and operates at the constitutional level.[64] The Basic Law must be construed together with the BOR as a coherent whole and BL37 must be construed consistently with BOR19(2).[65] Given the clear and express reference to opposite-sex marriage in BOR19(2), it must follow that BL37, to be construed consistently with BOR19(2), is also to be interpreted as guaranteeing a right to a man and a woman to marry each other.

92. The domestic legal and historical context points to the same conclusion.

93. As a matter of domestic statute law, Hong Kong law has always defined marriage in terms of the voluntary union for life of one man and one woman,[66] requiring the parties to a valid marriage to be respectively male and female.[67] Similarly, under the common law of Hong Kong, marriage is the voluntary union for life of one man and one woman to the exclusion of all others.[68]

94. As a matter of historical context, whether at the time of the promulgation of the Basic Law in April 1990 or of its coming into effect in July 1997, same-sex marriage was not provided for or recognised under the law of any country. The first country to do so was the Netherlands in 2001, so there is no realistic basis for concluding that the drafters of the Basic Law intended, through BL37, to guarantee same-sex marriage in Hong Kong.

---

[64] *Ghulam Rbani v Secretary for Justice* (2014) 17 HKCFAR 138 at [94], *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59 at [24]-[25].

[65] *Comilang Milagros Tecson v Director of Immigration* (2019) 22 HKCFAR 59 at [30]-[35].

[66] Marriage Reform Ordinance (Cap. 178) s.4, Marriage Ordinance (Cap. 181) s.40.

[67] Matrimonial Causes Ordinance (Cap. 179) s.20(1).

[68] *Hyde v Hyde* (1866) LR 1 P&D 130, *W v Registrar of Marriages* (2013) 16 HKCFAR 112 at [63].

95. It is clear, for these reasons, that the constitutional freedom of marriage guaranteed and protected by BL37 is confined to opposite-sex marriage and does not extend to same-sex marriage. An argument that BL37 should be construed to include the protection of the right of same-sex couples to marry was advanced in *MK*,[69] but the appellant has not sought to advance that contention in this appeal.[70] Instead, as is apparent from the terms of Question 1, the appellant seeks to rely on the equality and non-discrimination rights in BL25 and BOR22 to found a constitutional right to same-sex marriage and not BL37.

B.2 Do BL25/BOR22 afford a constitutional right to same-sex marriage?

(i) The lex specialis principle

96. To answer the question whether BL25 or BOR22 affords a constitutional right to same-sex marriage, it is necessary, for the reasons explained above, to construe those constitutional provisions coherently with BL37 and BOR19(2). Doing so, we conclude that BL25 and BOR22 cannot be relied upon to widen the constitutional right to marry to same-sex couples.

97. It is an established principle of construction that a general provision that might apply to any case must give way to a specific provision dealing with the particular case.[71] This principle is encapsulated in the Latin maxims *lex specialis derogat legi generali*, meaning the specific law prevails over the general, and *generalia specialibus non derogant*, meaning general provisions should not undermine the intended effect of provisions specifically drafted to deal with the particular case.[72]

---

[69] *MK v Government of HKSAR* [2019] 5 HKLRD 259 at [18].

[70] CA Judgment at [22], Case for the Appellant at [33].

[71] *Pretty v Solly* (1859) 26 Beav 606 at 610, *Kwok Cheuk Kin v Director of Lands (No 2)* (2021) 24 HKCFAR 349 at [44(2)].

[72] *Day and another v Governor of the Cayman Islands and another* (2022) 52 BHRC 598 at [30].

98. As this Court noted, in *Kwok Cheuk Kin v Director of Lands (No 2)*, the *lex specialis* principle is "simply one aspect of the more general principle that legislative instruments must be read as a coherent whole".[73] That approach of reading an instrument as a coherent whole is consistent with the approach to construction of provisions of the Basic Law described above.

99. The *lex specialis* principle was applied by this Court in *Kwok Cheuk Kin v Director of Lands (No 2)* in respect of BL40, a specific provision in the Basic Law dealing with the special position of indigenous inhabitants of the New Territories. As such, it was not open to the appellant in that case to rely on general provisions in BL25, BL39 and BOR22 to mount a complaint of discrimination. The Court held that BL40 is "the dominant provision" which "qualifies and limits the application of the anti-discrimination provisions, not the other way round."[74]

100. In the context of the protection of marriage rights, the *lex specialis* principle has been consistently applied by the European Court of Human Rights ("ECtHR") in relation to the relationship between Article 12 of the European Convention on Human Rights ("ECHR") (concerning the right to marry), on the one hand, and Article 8 (concerning right to respect for private and family life) and Article 14 (prohibiting discrimination), on the other hand.

101. Thus, in *Schalk and Kopf v Austria*, the ECtHR held that the ECHR:

> "… is to be read as a whole and its articles should therefore be construed in harmony with one another. Having regard to the conclusion reached above, namely that art. 12 does not impose an obligation on contracting states to grant same-sex couples access to marriage, art. 14 taken in conjunction with art. 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either."[75]

---

73 *Kwok Cheuk Kin v Director of Lands (No 2)* (2021) 24 HKCFAR 349 at [44(2)].

74 *Ibid* at [43]-[44].

75 (2011) 53 EHRR 20 at 703 (see [101]).

102. In *Hamalainen v Finland*, the ECtHR reiterated "that art 12 of the convention is a *lex specialis* for the right to marry" [76] and found in that case that there was no breach of ECHR14 taken in conjunction with ECHR8 and ECHR12. In *Oliari v Italy*, the ECtHR articulated the application of the principle succinctly in stating:

> "Similarly, in *Schalk*, the Court held that art. 14 taken in conjunction with art. 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either. The Court considers that the same can be said of art. 14 in conjunction with art. 12.
>
> It follows that both the complaint under art. 12 alone, and that under art. 14 in conjunction with art. 12 are manifestly ill-founded and must be rejected …"[77]

103. The *lex specialis* principle was also applied by the United Nations Human Rights Committee ("HRC") in relation to a claim by a same-sex couple to the right to marriage based on an alleged infringement of rights under ICCPR16 (concerning the right to recognition as a person before the law), ICCPR17 (concerning the protection of privacy) and ICCPR26 (prohibiting discrimination). In *Joslin v New Zealand*, the HRC held:

> "The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry.
>
> Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. …
>
> In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant."[78]

104. The *lex specialis* principle as applied in the context of constitutional interpretation was recently addressed by Lord Sales giving the

---

[76] (2014) 37 BHRC 55 at [96].

[77] (2017) 65 EHRR 26 at [193]-[194].

[78] Communication No 902/1999 (17 July 2002) at [8.2]-[8.3].

judgment for the Privy Council in *Day and another v Governor of the Cayman Islands and another*[79] in connection with the right to marry under the law of the Cayman Islands. The Privy Council agreed with the Cayman Islands Court of Appeal that s 14(1) of the Cayman Islands Bill of Rights ("CIBOR") was a *lex specialis* dealing with the right to marry and confined that right to opposite-sex couples and that ss 9, 10 and 16 of the CIBOR (concerning rights to privacy and family life, rights to conscience and religion, and non-discrimination) had to be interpreted in the light of that *lex specialis* so that none of those other sections could be construed as including a right to a same-sex couple to marry.

105. Lord Sales held:

> "In the Board's judgment, it is clear that within the scheme of the Bill of Rights s 14(1) constitutes a lex specialis in relation to the right to marry. Therefore, the interpretation of the other general provisions in ss.9, 10 and 16, which do not stipulate for a right to marry, must take account of this and cannot be developed to circumvent the express limits on the right to marry in s 14(1). They cannot establish indirectly by implication a right to marry which is not directly set out in the relevant express provision in the Bill of Rights. Interpreting them in that way, as [counsel for the appellant] urges us to do, would have the effect of making the right in s 14(1) redundant, which would clearly be contrary to the intention of the drafters of the Bill of Rights."[80]

106. In a subsequent decision, *Attorney General for Bermuda v Ferguson*,[81] the Privy Council (by a majority) upheld a prohibition on same-sex marriage under s 53 of the Domestic Partnership Act 2018 of Bermuda. Lord Sales dissented from the majority and distinguished *Day* on the basis that the Bermuda Constitution did not contain a *lex specialis* on marriage. Accordingly, Lord Sales would have allowed the challenge to s 53 on the basis of s 8 of the Bermuda Constitution (guaranteeing freedom of conscience).[82] That basis of reasoning is irrelevant to the present appeal, but it serves to highlight the need

---

[79] (2022) 52 BHRC 598 at [32]-[44].

[80] *Ibid* at [40].

[81] (2022) 52 BHRC 617.

[82] *Ibid* at [146]-[149].

to find a specific law setting an express limit on a particular right, if that is to be relied upon as constituting a *lex specialis* on the particular subject to be applied to regulate a more general right.

(ii) BL37/BOR19(2) is the lex specialis on marriage in Hong Kong constitutional law

107. In our view, in the context of Hong Kong constitutional law, BL37, read together with BOR19(2), is the *lex specialis* in relation to the right to marry. Those provisions, read coherently together, protect the right to marry in terms of opposite-sex marriage and not same-sex marriage. Moreover, they are the sole provisions in the scheme of the Basic Law and the BOR which deal specifically with marriage. As such, the *lex specialis* in Hong Kong on the right to marry confines that constitutional right to opposite-sex marriage and restricts the rights to opposite-sex marriage to the exclusion of same-sex marriage and it is not permissible to interpret the equality rights in BL25 and BOR22 as conferring a constitutional right to same-sex marriage on the grounds either of marriage equality or of recognition of foreign same-sex marriage.

B.3 The appellant's arguments against the application of the lex specialis principle

108. In submitting that the courts below erred in applying the *lex specialis* principle so that BL25 and BOR22 could not be relied upon to expand the right to marry in BL37, the appellant advances a number of discrete arguments.[83] We do not consider that any of the arguments relied upon are persuasive of a different conclusion to that we have reached on Question 1 and Question 3 in this appeal.

109. It is contended that BL37 does not in terms restrict marriage to opposite-sex couples and that this Court's decision in *W v Registrar of*

---

[83] Case for the Appellant at [38]-[47].

Marriages, recognising that biological sex is no longer the determining characteristic for determining whether a person is male or female for the purposes of marriage, means that "extending marriage to same-sex couples represents only a modest change".[84] It is also contended that by not expressly limiting the right to marry to opposite-sex couples in BL37, this provides a distinguishing feature between Hong Kong's constitutional framework and the constitutional frameworks in cases such as *Schalk and Kopf v Austria*, *Oliari v Italy*, *Joslin v New Zealand* and *Day and another v Governor of the Cayman Islands and another*.[85]

110. However, this argument ignores the need to read BL37 coherently with BOR19(2), which does in terms (as the appellant recognises) limit the constitutional right to marry to a right of a man and a woman to marry each other. The decision in *W v Registrar of Marriages* is consistent with the constitutional right being limited to opposite-sex couples and its *ratio decidendi* is that a transgender male to female who has undergone full gender reassignment surgery and been medically certified as having completed the transition from male to female gender is to be treated as a woman for the purposes of the relevant statutory provisions governing the capacity to marry.

111. The appellant further argues that, unlike ECHR14, which requires a breach of some other right or freedom in the ECHR in order for a complaint of discrimination to be established, BL25 and BOR22 provide for autonomous, free-standing equality rights which may be engaged independently so that the appellant's equality challenge is "not impeded by rules on *lex specialis*".[86]

---

[84] *Ibid* at [38].

[85] *Ibid* at [45(1)].

[86] *Ibid* at [39].

112. Whilst the rights in BL25 and BOR22 are indeed free-standing and independent rights, we do not accept the contention that this alone means they are not subject to the principle of *lex specialis*. As explained above, the principle applies where a specific law governs a particular subject-matter and implicitly qualifies reliance on a more general provision that would otherwise apply. Here, BL37 is clearly the *lex specialis* in relation to the constitutional right to marry under Hong Kong law.

113. The appellant contends that the principle of *lex specialis* is only one rule of construction and urges the Court instead to give a generous interpretation to fundamental rights and to understand the Basic Law and Bill of Rights as "living instruments … intended to meet changing needs and circumstances".[87] It is also contended that, had the drafters of the Basic Law wished to limit the right to marry to opposite-sex couples, this "could have been easily spelt out" and that, even if it is to be treated as the *lex specialis* on the right to marry, BL37 generously interpreted does not in terms exclude same-sex couples from that right.[88]

114. It is, of course, well-established that constitutional rights are to be generously interpreted by the courts but that principle is subject to the qualification that it cannot lead to a construction which the language of the instrument is not capable of bearing.[89] Given the clear wording of BOR19(2), with which BL37 must be read, the constitutional right to marry is limited to opposite-sex marriage and there is no warrant for rejecting the conclusion that BL37, as the *lex specialis* on the constitutional right to marry, does not permit reliance on BL25 and BOR22 to found a constitutional right to same-sex

---

87 *Ibid* at [40]-[41].

88 *Ibid* at [42].

89 *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at 223-224, *ZN v Secretary for Justice* (2020) 23 HKCFAR 15 at [29].

marriage. That conclusion is not affected by the argument that the same result could have been worded differently or, even, better worded.

115. The appellant contends that, even if BL37 and BOR19(2) only protect the right to opposite-sex marriage, they do not exclude the extension of marriage to same-sex couples at a statutory level.[90] That contention is uncontroversial. It is, of course, open to the Government to legislate for same-sex marriage at a statutory level. But that is not the focus of the appellant's case on either Question 1 or Question 3, which advances a constitutional right, rather than any statutory right, to same-sex marriage.

116. The appellant further contends that there is a relevant difference in treatment between opposite-sex couples and same-sex couples, for the purposes of BL25 and BOR22, in that the reason why there is a difference in treatment is the sexual orientation of same-sex couples. That being a prohibited basis of differential treatment unless justified, the appellant contends that it falls to the respondent to justify the difference and that the *lex specialis* does not avoid the need for justification.[91]

117. However, this argument suffers from the flaw that the reason for the differential treatment is not the sexual orientation of same-sex couples but rather the fact that, on a proper construction of BL37 and BOR19(2), the constitutional right to marry is provided only to opposite-sex couples and not to same-sex couples. That being so, the principle of *lex specialis* does obviate the need to justify a difference in treatment arising from the proper application of the particular provision, in this case BL37. Just as in *Kwok Cheuk Kin v Director of Lands (No 2)*, where BL40 meant that it was not necessary for the

---

[90] Case for the Appellant at [43].

[91] *Ibid* at [44].

Director of Lands to justify the inherently discriminatory Small House Policy,[92] so too here the limit on the constitutional right to marry to opposite-sex couples does not require justification.

118. Finally, the appellant seeks to contest the effect of the decision of the HRC in *Joslin v New Zealand* that the wording of ICCPR23(2) precludes reliance on the equality guarantees in the ICCPR to support a case for same-sex marriage. A tentative view in respect of ICCPR26 and questioning *Joslin v New Zealand* in *Nowak's CCPR Commentary* ("Nowak")[93] and two academic articles critical of the decision are relied upon in this regard.[94]

119. In our view, none of these references are convincing in seeking to undermine the view in *Joslin v New Zealand* that ICCPR23(2) is the *lex specialis* in relation to marriage in the ICCPR and that therefore the general equality provision in ICCPR26 is unavailable as a basis for asserting a right to opposite-sex marriage. The comment in *Nowak* that "views are evolving" from those of the HRC in *Joslin v New Zealand* is very general and not supported by other direct authority. On the contrary, *Joslin v New Zealand* is referred to in support of the application of the *lex specialis* principle without criticism by Lord Sales in his judgment in *Day and another v Governor of the Cayman Islands and another*.[95] Nor are the academic articles persuasive. One relies on the first instance decision in *Day*, which was overturned on appeal. The other is based on a decision of the HRC arising from the differential treatment in

---

92 (2021) 24 HKCFAR 349 at [44(3)].

93 3rd revised edition (2019), ed. William A. Schabas, at p.787.

94 Kristie A. Bluett, *Marriage Equality under the ICCPR: How the Human Rights Committee Got It Wrong and Why It's Time to Get It Right* (2020) 35(4) Am U Int'l L Rev 605, and Oscar I. Roos and Anita Mackay, *A Shift in the United Nations Human Rights Committee's Jurisprudence on Marriage Equality? An Analysis of Two Recent Communications from Australia* (2019) 42(2) UNSWLJ 747.

95 (2022) 52 BHRC 598 at [54].

Australia arising from the unavailability of the divorce mechanism to different types of unrecognised foreign marriages and hence not concerned with the issue of interpretation raised in *Joslin v New Zealand*.

B.4 Conclusions on Questions 1 and 3

120. It follows that, in relation to Question 1, the appellant cannot rely on the general rights of equality to claim a constitutional right to same-sex marriage as that would be inconsistent with the specific right in BL37 and BOR19(2) limited to opposite-sex marriage and would render those provisions, excluding same-sex marriage, redundant.

121. In relation to Question 3, the non-recognition of the appellant's foreign same-sex marriage is the consequence of the application of the common law conflict of laws rule in Hong Kong that capacity to enter into a marriage is a matter of essential validity which is determined by reference to the law of each party's ante-nuptial domicile.[96]

122. No one domiciled in Hong Kong has capacity to enter into a same-sex marriage, since marriage is confined to opposite-sex couples. The New York same-sex marriage lacks essential validity and is not recognised since, under the law of his ante-nuptial domicile – Hong Kong law – the appellant lacked capacity to contract that marriage. To assert that the equality rights compel recognition of the New York same-sex marriage necessitates a challenge to such lack of capacity, demanding that the rule be changed to permit same-sex marriage. That amounts to a challenge to BL37 and BOR19(2) which fails on the basis of the *lex specialis* principle.

---

[96] *Suen Toi Lee v Yau Yee Ping* (2001) 4 HKCFAR 474 at [39] (Bokhary PJ) and [98] (Lord Millett NPJ), *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127 at [35], Johnston and Harris *The Conflict of Laws in Hong Kong* (3rd edition) [7.092]-[7.094].

123. Thus, the reason for the difference of treatment complained of by the appellant, namely the non-recognition of his same-sex marriage celebrated in New York, when an opposite-sex marriage celebrated in New York would be recognised in Hong Kong, is not the result of a discriminatory application of the conflict of laws rule. Rather, it is the application of the *lex specialis* in BL37 and BOR19(2) that precludes his New York same-sex marriage from being recognised in Hong Kong.

124. Therefore, for essentially the same reason the appellant cannot succeed in this appeal on Question 1, his case on Question 3 also cannot succeed.

C. Question 2

125. Having held that same-sex marriage is not available under Hong Kong law, we turn to consider the appellant's complaint concerning our legal system's "failure to provide any alternative means of legal recognition of same-sex partnerships (such as civil unions or registered partnerships)" as he puts it in Question 2. The appellant seeks a declaration:

> "... that the laws of Hong Kong ..., in so far as they do not allow same-sex couples to marry and fail to provide any alternative means of legal recognition of same-sex partnerships (such as civil unions or registered partnerships), constitute a violation of [BOR14] and/or [BL25]and [BOR22]".

126. This Court has recently had occasion to consider equality claims under BL25 and BOR22 brought by same-sex couples in respect of particular rights or benefits such as dependent spouse visas,[97] spousal medical benefits and joint tax assessments.[98] It has also considered the scope of privacy rights under BOR14 in the context of a transgender person's application for modification of

---

[97] *QT v Director of Immigration* (2018) 21 HKCFAR 324.

[98] *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127.

the gender marker on his identity card.[99] However, the focus of the present complaint is somewhat different. Although it is articulated as a claim based on equality as well as privacy rights, it does not allege discrimination regarding specific benefits but concentrates on the couple's relationship itself. It is centred on the lack of any alternative framework for conferring legal recognition on that relationship and providing for consequences attendant on such recognition.

127. Numerous jurisdictions have introduced schemes for same-sex unions, referred to as civil partnerships, civil unions, registered partnerships and the like. They are obviously not uniform in their scope but cater for a spectrum of rights and obligations. Some schemes provide same-sex couples with rights and obligations which mirror those of a traditional marriage so that such unions may be said to be marriages in all but name. But other same-sex unions span a much narrower range, being mainly concerned with defining the rights and obligations of the partners between themselves and recognising their status as such partners. It should be noted that the appellant, unlike the applicant in *MK*, is not claiming an entitlement to a same-sex union with rights mirroring a marriage. This is a point to which we return in Section C.3.1 of this judgment.

C.1 The need for legal recognition

128. It is an obvious feature of social life that individuals form relationships as couples. Some such relationships may be insubstantial and impermanent but often couples will enter into committed, loving, stable and long-term relationships in which they wish to make their lives together and may wish to found a family with children. The law has acknowledged that such relationships need legal recognition and protection and has provided heterosexual couples with the option of getting married, an institution carrying

---

[99] *Q and Tse Henry Edward v Commissioner of Registration* (2023) 26 HKCFAR 25.

with it a well-established bundle of rights and obligations, both as between the married couple themselves and as between the couple and the outside world. Of course, as an increasing trend, many couples in such stable, committed relationships choose to live together and to raise a family without getting married. Nevertheless, for those heterosexual couples who see benefit in acquiring official recognition of their status associated with well-known rights and obligations, the availability of the legal framework provided by marriage is of great importance.

129. As we have noted, under Hong Kong law, same-sex couples do not have access to the institution of marriage. However, the need for couples such as the appellant and his partner, in committed, stable relationships, to have access to an alternative framework for legal recognition of their relationship has been compellingly advocated for two main reasons.

130. First, such recognition is required to meet basic social needs similar to those experienced by different-sex couples in stable relationships. This has been acknowledged in many decided cases. For instance, in *Vallianatos v Greece*,[100] the Grand Chamber of the ECtHR stated:

> "As the Court has already observed, same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples. Accordingly, the option of entering into a civil union would afford the former the only opportunity available to them under Greek law of formalising their relationship by conferring on it a legal status recognised by the state."

131. The Grand Chamber made it clear that such same-sex unions did not necessarily encompass all the incidents of a marriage, seeing legal recognition of a same-sex relationship as having an intrinsic value. It observed that civil partnerships "provided for by [the law] as an officially recognised

---

[100] (2014) 59 EHRR 12 at [81].

alternative to marriage have an intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive, that they would produce."[101]

132. This was reiterated in *Oliari v Italy*,[102] a case where the applicants complained about the absence of any means of legally safeguarding same-sex relationships in Italy. The ECtHR noted that the relief sought "would only oblige Italy to take legislative measures in this regard, leaving to the state the space to address any legitimate aim by tailoring the relevant legislation. ...". It held that a margin of appreciation existed "in relation to the form and content of such recognition" and further noted that the case at hand:

> "...simply related to the rights and duties of partners towards each other (irrespective of the recognition of rights such as parental rights, adoption or access to medically assisted procreation)."[103]

133. Secondly, the absence of legal recognition has been seen to be essentially discriminatory and demeaning to same-sex couples. Thus, as it was put by the applicants in *Oliari*:[104]

> "The lack of legal recognition of the union, besides causing legal and practical problems, also prevented the applicants from having a ritualised public ceremony through which they could, under the protection of the law, solemnly undertake the relevant duties towards each other. They considered that such ceremonies brought social legitimacy and acceptance, and particularly in the case of homosexuals, they went to show that they also have the right to live freely and to live their relationships on an equal basis, both in private and in public. They noted that the absence of such recognition brought about in them a sense of belonging to an inferior class of persons, despite their needs in the sphere of love being the same."

134. The Court in *Oliari*[105] accepted the needs so expressed by the applicants, holding that:

---

[101] *Vallianatos*, *Ibid*.

[102] (2017) 65 EHRR 26 at [111].

[103] *Ibid*.

[104] *Ibid* at [116].

[105] *Ibid* at [174].

> "... the Court considers that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection—in the form of core rights relevant to a couple in a stable and committed relationship—without unnecessary hindrance. Further, the Court has already held that such civil partnerships have an intrinsic value for persons in the applicants' position, irrespective of the legal effects, however narrow or extensive, that they would produce. This recognition would further bring a sense of legitimacy to same-sex couples."

135. Without taking away the authorities' margin of discretion regarding the scope and content of the rules selected to constitute the scheme of legal recognition, one can readily see how non-recognition of such committed and stable relationships is likely to give rise to real difficulties in many situations. If, just for instance, one of the partners were to be hospitalised, the other partner, having no recognised status as such, might be denied visiting rights or medical information or participation in decision-making regarding the other's treatment despite having been the sick person's devoted partner cohabiting together for years or even decades. To take another example, without an appropriate legal framework, same-sex partners whose assets have been mixed together over the years, might face considerable uncertainty regarding the disposition of such property if their relationship were to come to an end. Problems like these have unsatisfactorily led to recurrent approaches to the courts asking them to deal with each controversy on a case-by-case basis. That is not to say that litigation regarding specific rights would be eliminated if a scheme of legal recognition were in place. But the existence of such a framework would provide a known starting point likely to facilitate resolution of such disputed claims. In our view, such needs must be addressed in Hong Kong where no means of legal recognition for same-sex relationships presently exists.

C.2 Privacy rights are engaged and infringed

136. The Strasbourg Court's jurisprudence considered above is based on ECHR8 which relevantly establishes "the right to respect for ... private and

family life". Claimants have also sometimes placed reliance on ECHR8 in conjunction with ECHR14, a provision which the ECtHR has held merely complements the other substantive provisions of the Convention and has no independent existence because, on its wording, it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by the ECHR.[106] We need not concern ourselves with such issues since BL25 and BOR22, our equality provisions, contain no comparably restrictive wording. They are free-standing rights and not dependent on the court first finding that some other constitutional right is engaged.[107]

137. However, for reasons which we provide in Section C.4 below, we will confine our discussion to the appellant's position under BOR14 which is the equivalent of ECHR8, leaving aside the claim mounted on the equality basis. We will also return in Section C.3.2 below to discuss the scope of BOR14 in connection with positive obligations, but for the present we focus on the prima facie applicability of the privacy guarantee in the present case.

138. While BOR14 speaks of "privacy" and ECHR8 refers to "private life", we agree with Hartmann J who held in *Democratic Party v Secretary for Justice*,[108] that the two concepts are to be treated as indistinguishable. It is significant that BOR10, which guarantees equality before the courts and the right to a fair and public hearing, provides that the press may be excluded "when the interest of the private lives of the parties so requires", suggesting that no distinction is drawn between "privacy" in BOR14 and "private lives" in

---

[106] See eg, *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at [89].

[107] While BOR1(1) has wording that is superficially similar to that found in ECHR14 ("The rights recognised in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"), the equality rights exist independently under BL25 and BOR22 and thus constitute rights independently "recognised in this Bill of Rights" referred to in BOR1(1).

[108] [2007] 2 HKLRD 804 at [58].

BOR10. Moreover, as Hartmann J pointed out, "privacy" in BOR14 is plainly intended to have a much broader scope than the "freedom and privacy of communication" guaranteed by BL30. Accordingly, persuasive guidance may be had from the application of ECHR8 to legal recognition of same-sex relationships in the Strasbourg jurisprudence.

139. It has long been held that ECHR8 includes the right to establish and develop relationships with others. Thus, in *X v Iceland*,[109] a 1976 admissibility ruling, the Commission held that apart from protecting privacy in the narrower sense of avoiding publicity, the right:

> "... comprises also, to a certain degree, the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality."

140. In *Oliari*,[110] the ECtHR noted that:

> "It is undisputed that the relationship of a same-sex couple, such as those of the applicants, falls within the notion of 'private life' within the meaning of art.8. Similarly, the Court has already held that the relationship of a cohabiting same-sex couple living in a stable de facto partnership falls within the notion of 'family life'. It follows that the facts of the present applications fall within the notion of 'private life' as well as 'family life' within the meaning of art.8. Consequently, both art.8 alone and art.14 taken in conjunction with art.8 of the Convention apply."

141. And in *Fedotova v Russia*, the Grand Chamber of the ECtHR accepted:

> "… that the unavailability of a legal regime for recognition and protection of same-sex couples affects both the personal and the social identity of the applicants as homosexual people wishing to have their relationships as couples legitimised and protected by law. Article 8 therefore applies in the present case under its 'private life' aspect."[111]

---

[109] [1976] ECHR 7.

[110] (2017) 65 EHRR 26 at [103]. The earlier case referred to is *Schalk and Kopf v Austria* (2011) 53 EHRR 20 at [89]-[90].

[111] (Application Nos 40792/10, 30538/14 and 43439/14, 17 January 2023) at [144].

142. We have accepted the existence of the need experienced by same-sex couples for access to an alternative framework conferring legal recognition on their relationship in order to meet basic social requirements and to provide them with a sense of legitimacy, dispelling any sense that they belong to an inferior class of persons whose relationship is undeserving of recognition.

143. Plainly, the lack of means to acquire the legal recognition available to heterosexual couples is potentially demeaning of same-sex couples. As this Court held in *Q and Tse Henry Edward v Commissioner of Registration*,[112] "Privacy is a concept inherently linked to a person's dignity". Accordingly, we hold that BOR14 is engaged in the present case.

144. We would also hold that the absence of a legal framework for recognition of the appellant's same-sex relationship constitutes a hindrance of, or an interference with, his rights under BOR14, whereby they are infringed. As the Grand Chamber of the ECtHR held in *Fedotova v Russia*:

> "In the present case, the Court can only conclude that in the absence of official recognition, same-sex couples are nothing more than *de facto* unions under Russian law. The partners are unable to regulate fundamental aspects of life as a couple such as those concerning property, maintenance and inheritance except as private individuals entering into contracts under the ordinary law, rather than as an officially recognised couple (see, *mutatis mutandis*, *Vallianatos and Others*, cited above, §81). Nor are they able to rely on the existence of their relationship in dealings with the judicial or administrative authorities. Indeed, the fact that same-sex partners are required to apply to the domestic courts for protection of their basic needs as a couple constitutes in itself a hindrance to respect for their private and family life (see *Oliari and Others*, cited above, §171)."[113]

145. The examples we have given in [135] of these reasons show that it can be seen, without indulging unduly in flights of imagination, how the absence of legal recognition of same-sex unions may result in arbitrary interference with the private life and dignity of partners in same-sex

---

[112] (2023) 26 HKCFAR 25 at [46].

[113] (Application Nos 40792/10, 30538/14 and 43439/14, 17 January 2023) at [203].

relationships. The point is also made by this Court's decisions in *QT v Director of Immigration*[114] and *Leung Chun Kwong v Secretary for Civil Service*.[115] In these cases, parties to committed, stable relationships were constrained, having no practical alternative means of maintaining the ordinary course of their relationships, to expose themselves to the publicity, stress, uncertainty and expense of litigation. They were obliged to make public details of their private lives and to subject themselves to public scrutiny, and from some quarters, opprobrium. Upon judicial review, administrative decisions adverse to them were quashed as unreasonable. Thus each of these cases can be analysed as a case of arbitrary interference in the private lives of members of same-sex unions as a result of the absence of basic legal recognition of their relationship. To say this is not to insist upon aligning same-sex unions with marriage. Rather, it is to make the point that absence of legal recognition of same-sex unions as committed, loving, stable and long-term relationships between individuals who are mutually dependent on each other can be an occasion of arbitrary interference in the ordinary conduct of the private lives of those individuals.

146. Subject to consideration of the SJ's arguments to the contrary, the appellant's relationship with his same-sex partner is entitled to the protection of the law pursuant to his rights to privacy and family, requiring provision of a scheme for legal recognition in an appropriate form of same-sex union.

C.3 The SJ's contrary arguments

147. Mr Stewart Wong SC[116] advanced four main arguments against the Court's grant of a declaration requiring the constitution of a scheme for legal recognition of same-sex unions. Counsel submitted:

---

[114] (2018) 21 HKCFAR 324.

[115] (2019) 22 HKCFAR 127.

[116] Appearing for the SJ together with Mr Johnny Ma SC and Mr Jonathan Ng.

(1) That establishment of such a scheme is excluded by operation of the *lex specialis* principle ("the lex specialis issue");

(2) That no requirement for establishing such a scheme could be founded on BOR14 since the privacy rights guaranteed are entirely negative in nature and are incapable of imposing a positive obligation to provide such a scheme ("the positive obligation issue");

(3) That insofar as it is suggested that the alternative legal framework is not intended to mirror the rights and obligations incidental to a marriage and is confined to certain "core rights and obligations" with a narrower scope, the limitation to such "core rights" is uncertain and unworkable making it impossible for the Government to comply with any such order ("the unworkability issue"); and

(4) That non-recognition can in any event be justified ("the question of justification").

C.3.1 The lex specialis issue

148. The *lex specialis* argument rests on the premise that the appellant's claim reflected in Question 2 is in substance no different from his claim to be granted access to marriage. The respondent submits that "The limit of a constitutional right to marry cannot be circumvented by calling the relationship, if it is a marriage in substance, any another name ..."[117] Accordingly, so the argument runs, BL37's confining of the right to marry to heterosexual couples – constituting the *lex specialis* – precludes same-sex couples from acquiring a

[117] Case for the Respondent at [8.4].

right to marry by reliance on the more general privacy provisions of BOR14 (or the general equality rights under BL25 and BOR22).

149. It is perhaps understandable that the respondent should view the appellant's case in such terms. It reflects the position taken by MK in *MK v Government of HKSAR*,[118] where Chow J commented: "What MK is contending for is tantamount to a right to same-sex couples to marriage in all but name." His Lordship noted that MK was arguing "that the Government is under a positive obligation to provide a legal status for same-sex couples with exactly the same legal benefits and protections as are enjoyed by married opposite-sex couples."[119] We can well see that such an argument encounters the *lex specialis* principle as an obstacle.

150. It will be recalled that the Judge did not hear argument on behalf of the appellant on what is now Question 2, confining the hearing to the issue of recognising foreign same-sex marriages (now Question 3). The appellant's legal representatives ought perhaps to have made it clear that they were not advancing the same case as MK regarding the nature of the legal recognition claimed. As this was evidently not made plain, it is understandable that Counsel for the Government has evidently assumed that the position adopted by MK was equally adhered to by the appellant. The true position did not come to light in the Court of Appeal's judgment[120] which rejected the Question 2 contention, not on the basis of the *lex specialis* doctrine, but for the principal reason that no positive obligation for establishing a means of legal recognition could be made out.

---

[118] [2019] 5 HKLRD 259 at [46].

[119] *Ibid*, the Judge's emphasis.

[120] [2022] 4 HKLRD 368 at [68].

151. In fact, the position adopted by the appellant has never been that the alternative means of legal recognition of same-sex relationships claimed should confer the same rights as those enjoyed by married couples. Instead, the appellant's complaint throughout has been of a failure to provide "*any alternative means* of legal recognition of same-sex partnerships (such as civil unions or registered partnerships" (our italics). A declaration to that effect was sought in the application for leave to seek judicial review[121] and reflected in the grounds put forward in support.[122] It is replicated in Question 2 on which the Court of Appeal granted leave to appeal to this Court.[123] It is also the position taken in the appellant's written case,[124] the complaint being that the Government has failed to make available "a specific legal framework providing for the recognition and protection of their same-sex unions".[125] The appellant submits that the Court should make a "general declaration" which "makes clear the failure on the part of the Government to fulfil its positive obligation to ensure that same-sex couples have available a specific legal framework providing for the recognition and protection of their same-sex unions",[126] adding that the Court might also wish to conduct a "subject and context specific" proportionality analysis of particular rights which may be relevant. In short, the appellant's case, unlike that advanced on MK's behalf, does not involve claiming the right to marriage by another name and there is no room for application of the *lex specialis* doctrine.

---

[121] Form 86, Relief Sought [4].

[122] For example, Form 86 Grounds [21], [32.2], [79], [91], [92], [95] and [96].

[123] [2022] HKCA 1690.

[124] Case for the Appellant at [54], [58], [63] and [65].

[125] *Ibid* at [79].

[126] *Ibid* at [90].

C.3.2 The positive obligation issue

152. We have held that BOR14 is engaged in connection with the needs experienced by same-sex couples for legal recognition of their relationship. The Government argues, however, that the obligations imposed on it by BOR14 are entirely negative in nature and do not encompass an obligation to put in place a framework for conferring official recognition on the relationship between same-sex couples by some form of registered union. That argument found favour with the Court of Appeal on the basis of a textual analysis of BOR14 in comparison with the wording of ECHR8. It is to that analysis that we now turn.

153. ECHR8 provides as follows:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

154. BOR14 in turn provides:

> "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> (2) Everyone has the right to the protection of the law against such interference or attacks."

155. Before considering some of the authorities, one may start by examining these two provisions simply as a matter of language. How different are they?

(1) They are both relevantly concerned to identify and guarantee as substantive rights, the rights to "private and family life" (ECHR8)

and to "privacy [and] family" (BOR14). We have held that these are indistinguishable rights.

(2) Both provisions contain wording that conveys the need to protect and give effect to those substantive rights: ECHR8 declares that such rights must be respected and not interfered with by public authorities; and BOR14 prohibits arbitrary or unlawful interference with those rights, declaring that everyone has a right to the protection of the law against such interference.

(3) On its face, the protection offered by BOR14 is wider: First, its prohibition against interference with the substantive rights is not confined to interference by public authorities, it protects against such interference by anyone, including fellow residents. Secondly, it gives a right not merely to being free from such interference but a right to the protection of the law against the same. This suggests that the authorities may be positively obliged to repair any deficiencies in the law that may exist in this context. ECHR8, on the other hand, speaks of respecting those rights but says nothing about one being entitled to the protection of the law. It states that there should be no interference by a public authority with the exercise of those rights and goes on to list certain exceptions.

(4) We do not consider that there is any material difference between ECHR8's reference to the "right to respect for his private life" and BOR14's reference to the "right to the protection of the law against such interference or attacks". In both cases, the provision has a dual operation: to affirm the substantive right and to guarantee its protection. The guarantee in both cases is a guarantee of the substantive privacy right. The constitutional protection is against

infringement or violation of that right, whether such infringement or violation is phrased in terms of infringing respect for, or interference with, that right.

156. This reading of BOR14's scope finds support in the Human Rights Committee's General Comment 16 on the scope of ICCPR17 which BOR14 incorporates verbatim. General Comment 16 states:

> "1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour or reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right. ...
>
> 9. States parties are under a duty themselves not to engage in interferences inconsistent with article 17 of the Covenant and to provide the legislative framework prohibiting such acts by natural or legal persons."

157. Thus, the Committee explains that the identical equivalent of BOR14 imposes an obligation to "guarantee" the substantive right of privacy and family against all interference and attack "whether they emanate from State authorities or from natural or legal persons" and, more importantly in the present context, it explains that "[the] obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right". It therefore makes it clear that the "right to the protection of the law" referred to in BOR14 may entail a positive obligation on the state to adopt legislative and other measures to protect and give effect to the substantive rights.

158. It was by giving ECHR8 a broad interpretation that the ECtHR attributed to that provision the existence of positive obligations "inherent" in

making respect for family life "effective". Thus, in *Marckx v Belgium*,[127] a 1979 decision, the Court stated:

> "... the object of [ECHR8] is 'essentially' that of protecting the individual against arbitrary interference by the public authorities. Nevertheless, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective 'respect' for family life."

159. That ECHR8 imposes both negative and positive obligations has become the established Strasbourg position, adding the attribute of protection against interference by individuals and not just public authorities. Thus, in *Oliari*,[128] citing a string of earlier decisions, the Court stated:

> "While the essential object of art.8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a state certain positive obligations to ensure effective respect for the rights protected by art.8. These obligations may involve the adoption of measures designed to secure respect for private or family life even in the sphere of the relations of individuals between themselves."

160. It is noteworthy that in this oft-repeated statement of principle,[129] the ECtHR refers to the imposition on a state of positive obligations "to ensure effective respect" for the protected rights. The focus is again (as it was in *Marckx* in 1979) on what needs to be done to make the rights effective. In our view, it is that substantive consideration, rather than any narrow textual analysis that determines whether a positive obligation arises. In the context of BOR14, which gives everyone the right to the protection of the law against interference with the substantive rights, a positive obligation to take legislative or other measures may arise if positive measures are needed to guarantee effective protection.

---

[127] (1979) 2 EHRR 330 at 342.

[128] (2017) 65 EHRR 26 at [159].

[129] Recently re-iterated in *Fedotova v Russia* (2022) 74 EHRR 28 at [44] in the ECtHR and at [178], [179] and [190] in the Grand Chamber (Application Nos 40792/10, 30538/14 and 43439/14, 17 January 2023).

161. The ECtHR's elaboration of the principles for assessing a state's positive and negative obligations throws further light on the proper approach. Re-iterating another well-known passage, the ECtHR in *Oliari,*[130] stated:

> "The principles applicable to assessing a state's positive and negative obligations under the Convention are similar. Regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole, the aims in the second paragraph of art.8 being of a certain relevance."

162. Thus, whether the obligation may be positive or negative, the court's approach is similar. Having decided that effective protection of the relevant rights requires recognition of a positive obligation, the Court has to go on to consider whether the proposed obligation strikes a fair balance between the competing interests of the individual and the community as a whole. The ECtHR went on to note[131] that "certain factors have been considered relevant for the assessment of the content of those positive obligations on states" including the impact on an applicant where there is discordance between social reality and the law; the coherence of the administrative and legal practices within the domestic system; and the impact on the state, asking "whether the alleged obligation is narrow and precise or broad and indeterminate or about the extent of any burden the obligation would impose on the state".

163. It is by reference to such substantive considerations, rather than a textual analysis of the provisions, that the Court determines whether a positive obligation arises. That approach is consistent with that adopted by Hong Kong authorities where positive obligations on the Government have been recognised.

164. Thus, *Leung Kwok Hung v HKSAR*,[132] was concerned with BL27 which guarantees to Hong Kong residents "freedom of speech …; freedom of

---

[130] (2017) 65 EHRR 26 at [160], again re-iterated in *Fedotova* at [46].

[131] *Ibid* at [161].

[132] (2005) 8 HKCFAR 229.

association, of assembly, of procession and of demonstration …" Also relevant was BOR17 which guarantees the right of peaceful assembly, stating:

> "The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

165. One may note that these provisions involve broad references to "freedoms" or to the limits on restrictions that can be placed on the rights. Textually, they do not seek to impose positive obligations on the Government. Nevertheless, this Court held:

> "that the right of peaceful assembly involves a positive duty on the part of the Government, that is the executive authorities, to take reasonable and appropriate measures to enable lawful assemblies to take place peacefully. However, this obligation is not absolute for the Government cannot guarantee that lawful assemblies will proceed peacefully and it has a wide discretion in the choice of the measures to be used."[133]

166. The emphasis was therefore on the need to give effective protection to the fundamental right in question. The Court cited *Plattform "Ärzte für das Leben" v Austria*,[134] in which the ECtHR interpreted ECHR11 (on freedom of assembly) as imposing a duty on the state to take positive measures to enable lawful demonstrations to proceed. This required recognition of a positive obligation where this was necessary for effectively protecting the right in question. As the ECtHR put it:

> "Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of [ECHR 11]. Like Article 8 [right to respect for private and family life], Article 11 sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be."[135]

---

[133] *Ibid* at [22].

[134] (A/139) (1991) 13 EHRR 204.

[135] *Ibid* at [32].

167. Accordingly, in *Leung Kwok Hung*, it was held that the Government had a positive duty to take reasonable and appropriate measures to enable lawful demonstrations to take place peacefully. That was based on what was required for the effective protection of the rights in question and not on some textual dissection of BL27 and BOR17.

168. Similarly, in *HKSAR v Au Kwok Kuen*,[136] A Cheung J (as the Chief Justice then was) held that under the relevant Articles of the Basic Law and the Bill of Rights, the Government and the police had a positive obligation to take appropriate measures to protect Hong Kong residents' homes and other premises in a private residential property against intrusion by demonstrators. His Lordship stated:

> "Moreover, just like the positive duty of the government (including the police) to take reasonable and appropriate measures to enable lawful demonstration to take place peacefully (*Leung Kwok Hung v HKSAR* [*supra*]), arts.6, 29 and 105 of the Basic Law and art.14 of the Hong Kong Bill of Rights would, in my view, require the Government (including the police) to take reasonable and appropriate measures to protect Hong Kong residents' homes and other premises against intrusion and their privacy at home against interference, provided that the measures, if they are to be taken within private premises, must be taken with the permission of their owner or occupier."[137]

169. BL6,[138] BL29,[139] BL105[140] and BOR14 (set out above) all speak in terms of protection or inviolability of the rights in question but were readily interpreted to give rise to a positive obligation to take measures required for such protection to be effective.

---

[136] [2010] 3 HKLRD 371.

[137] *Ibid* at [74].

[138] BL6: "The [HKSAR] shall protect the right of private ownership of property in accordance with law."

[139] BL29: "The homes and other premises of Hong Kong residents shall be inviolable. Arbitrary or unlawful search of, or intrusion into, a resident's home or other premises shall be prohibited."

[140] BL105(1): "The [HKSAR] shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation for lawful deprivation of their property."

170. That approach was similarly taken in *ZN v Secretary for Justice*,[141] which was concerned with BOR4 which prohibits slavery and the slave trade, servitude and forced or compulsory labour. The Court recognised that the Government was under a positive obligation to make those prohibitions effective while holding that it had a wide margin of discretion in deciding what measures to take. The Court stated:

> "The rights protected under BOR4, like the right of peaceful assembly, involve a positive duty on the part of the HKSARG: see *Leung Kwok Hung v HKSAR* [*supra*] at [22]. ... Since ... the touchstone is whether the protection of the rights under BOR4 is practical and effective, the decision as to how to achieve such protection must necessarily be a matter for the HKSARG, subject, of course, to the supervision of the courts to assess the practical efficacy of the measures adopted."[142]

171. More broadly, while the Court has always recognised[143] the necessity of being faithful to the language of our constitutional instruments, it has eschewed an over-technical textual approach. Thus, for instance, in *W v Registrar of Marriages*,[144] the majority stated:

> "[BL 37] speaks of the 'freedom of marriage of Hong Kong residents' and [BOR19(2)] lays down 'the right of men and women of marriageable age to marry'. We do not consider that there is any difference of substance between the two formulations. It makes no difference that the terms 'freedom' and 'right' are used respectively. They both enjoin rejection of any unduly restrictive or exclusionary approach to the right to marry. Nor does it make any difference that [BOR19(2)] refers to the right as one enjoyed by 'men and women' whereas [BL37] speaks of its enjoyment by 'Hong Kong residents'. It is common ground that a marriage for constitutional as for common law purposes is the voluntary union for life of one man and one woman to the exclusion of all others."

172. In the light of the foregoing analysis, we are respectfully unable to agree with the Court of Appeal's conclusion that no positive obligation to provide an alternative scheme for the legal recognition of a same-sex couple's relationship can be based on BOR14.

---

[141] (2020) 23 HKCFAR 15.

[142] *Ibid* at [88]. See also [93], [100] and [122], as to effective protection being the touchstone for the existence of a positive obligation and its satisfaction.

[143] See, eg, *Director of Immigration v Chong Fung Yuen* (2001) 4 HKCFAR 211 at 223-224.

[144] (2013) 16 HKCFAR 112 at [63].

173. It would appear that the Court of Appeal's decision was heavily influenced by its mistaken view that the ECtHR has interpreted ECHR8 as importing a positive obligation to put in place "a right to a legally recognized union for same-sex couples which is equivalent to marriage in substance though not in name". The Court of Appeal stated:

> "It is now well-settled that under art.8 of the ECHR as interpreted by the Strasbourg Court, corresponding to the positive obligations on the states to ensure effective respect, there is a right to a legally recognized union for same-sex couples which is equivalent to marriage in substance though not in name, giving them the same rights and benefits that married couples have: see the Privy Council's observation in *Roderick Ferguson*, at [21]."[145]

174. As we have already indicated,[146] far from treating the claim for legal recognition as one entitling same-sex couples to all the rights enjoyed by opposite-sex married couples, the ECtHR has made it plain that in setting up a scheme in compliance with the positive obligation in question, the state was allowed "the space to address any legitimate aim by tailoring the relevant legislation", enjoying a margin of appreciation "in relation to the form and content of such recognition".

175. This was made very clear in *Fedotova v Russia*,[147] where the ECtHR stated:

> "The Court acknowledges that the respondent Government have a margin of appreciation to choose the most appropriate form of registration of same-sex unions taking into account its specific social and cultural context (for example, civil partnership, civil union, or civil solidarity act). In the present case they have overstepped that margin, because no legal framework capable of protecting the applicants' relationships as same-sex couples has been available under domestic law. Giving the applicants access to formal acknowledgment of their couples' status in a form other than marriage will not be in conflict with the 'traditional understanding of marriage' prevailing in Russia, or with the views of the majority to which the Government referred, as those views oppose only same-sex marriages, but they are

[145] CA Judgment at [56].

[146] In [131] and [132] above.

[147] (2022) 74 EHRR 28 at [56].

> not against other forms of legal acknowledgment which may exist ... There has accordingly been a violation of Article 8 of the Convention."

176. The Court of Appeal has evidently misread [21] of *Attorney General for Bermuda v Ferguson*,[148] cited in [56] of its judgment just referred to. What Lord Sales said was materially as follows:

> "Under the Convention[149] as interpreted by the Strasbourg Court, there is a right to a legally recognised union *which is not marriage*, and the [Bermudan] Legislature *has passed the DPA*[150] which gives same-sex couples in Bermuda the right to enter a domestic partnership, and *this gives them all the rights that married couples have*. However, this institution is not called marriage. The respondents in this case attach considerable importance to that term and seek in these proceedings to have that name used also for the legally recognised unions which same-sex couples may enter." (Italics supplied)

177. Lord Sales plainly recognised that a same-sex union recognised in the Strasbourg jurisprudence "is not marriage". It was the Bermudan same-sex union legislation that gave domestic partners all the rights that married couples have, not ECHR8 as interpreted by the ECtHR.

178. For the foregoing reasons we are unable to accept the Government's arguments in relation to the positive obligation issue.

C.3.3 The unworkability issue

179. This issue derives from the ECtHR's judgment in *Oliari*[151] where it drew a distinction between "core rights" and "supplementary rights". It saw "core rights" as those relating to the "general need for legal recognition and the core protection of the applicants as same-sex couples" which it considered "to be facets of an individual's existence and identity". At the same time, it recognised that beyond such core protection, debate could arise as to possible

---

[148] (2022) 52 BHRC 617.

[149] The ECHR which applies to Bermuda as a matter of international law and is relevant to the interpretation of its constitutional rights: *Ferguson* at [10].

[150] The Domestic Partnership Act 2018 of Bermuda: *Ferguson* at [1].

[151] (2017) 65 EHRR 26 at [177].

"supplementary rights" that might or might not be associated with a legally recognised same-sex union and may be "linked to sensitive moral or ethical issues". The state had a margin of appreciation "as regards the exact status conferred by alternative means of recognition and the rights and obligations conferred by such a union or registered partnership" with that margin being wider in respect of supplementary rights.

180. On the footing that a positive obligation arises as discussed in the preceding Section of this judgment, we would accept that the Government enjoys a similarly flexible margin of discretion in deciding the content of the rights and obligations to be associated with the scheme of legal recognition to be devised.

181. The distinction between "core" and "supplementary" rights may be of assistance in this context. The touchstone remains the obligation to give effective legal protection to same-sex relationships by providing for at least a "core" of rights necessary for establishing a legal framework for recognising a same-sex relationship and defining the main incidents of such a same-sex union.

182. Numerous statutory schemes for same-sex unions are available as possible models. Examples from common law jurisdictions include schemes that have been enacted in the United Kingdom,[152] in Queensland[153] and New Zealand.[154] An instructive description of the features of one such scheme, enacted in Austria,[155] may be found in *Schalk and Kopf v Austria*.[156] Its purpose was "to provide same-sex couples with a formal mechanism for recognising and

---

[152] Civil Partnership Acts 2004.

[153] Civil Partnerships Act 2011 (Queensland).

[154] Civil Union Act 2004.

[155] The Registered Partnership Act, Federal Law Gazette (135/2009), Vol.I, which entered into force on January 1, 2010.

[156] (2011) 53 EHRR 20 at [16]-[23].

giving legal effect to their relationships" and was formulated after "the legislator had particular regard to developments in other European states."[157] The Court's description of the Austrian scheme provides an illustration of the sorts of provisions that might be considered by the executive and legislative authorities for inclusion as the core rules for establishing the same-sex union, its effects and its dissolution.

183. Thus, consideration would be given to who can form such a union: as to an age requirement; whether it is a monogamous relationship; restrictions based on consanguinity; any requirement for cohabitation; whether it should also be open to different-sex couples, and so forth. There would obviously also have to be rules regarding the formal, public aspects of formation.

184. Regarding the incidents of the same-sex union, consideration may be given to rules regarding the recognised status of each partner; rules requiring them to provide each other with mutual support and maintenance; rules as to their separate and common property; rules regarding legal authority to bind the other partner in everyday transactions; and so forth.

185. How a same-sex union could be dissolved and its consequences would also call for consideration: What grounds would be required for dissolution? What jurisdiction would the court have and would a judicial decree be needed? Would there be rules permitting property adjustments? Would there be intestate inheritance upon dissolution by death of one partner? And so forth.

186. We should emphasise that the foregoing discussion is intended only to be illustrative of possible features of a legal framework, and not prescriptive. Such rules suggest the broad parameters of core rights and obligations that are likely to require consideration, always accepting that the executive and

[157] *Ibid* at [16].

legislative authorities will have a margin of discretion in deciding on their content, subject to the requirement that the BOR14 rights be effectively recognised and protected.

187. That margin of discretion would be greater in deciding upon “supplementary rights” involving interactions between partners in the same-sex union and the outside world. In *Schalk* the Court gave examples referring to fields “such as inheritance law, labour, social and social insurance law, fiscal law, the law on administrative procedure, the law on data protection and public service, passport and registration issues, as well as the law on foreigners”.[158] In other cases, rights such as those concerning public housing, adoption and assisted procreative rights have also given rise to debate. We would accept that individual issues in these areas may require separate consideration on a proportionality analysis, examining whether refusal of access to such rights may be justified or may unjustifiably violate a constitutional right. That is a process which the Court presently faces on a case-by-case basis and which to some extent is bound to continue in respect of debatable cases. However, as we have noted, legal recognition of individuals as partners in a same-sex union would provide a uniform and consistent starting point for considering comparators, differential treatment and justification in a discrimination analysis.

188. In our view, for the foregoing reasons, the fears expressed in relation to the unworkability issue are unfounded.

C.4 Equality rights in this context

189. We have dealt with the Question 2 issues under BOR14 rather than the equality rights guaranteed in BL25 and BOR22 since it appears to us that a discrimination analysis is less well-adapted to the situation at hand. The appellant’s complaint is not so much about discriminatory differential treatment

---

[158] *Ibid* at [22].

as about a failure to give effect to a positive obligation to provide an alternative framework for legal recognition of his same-sex relationship.

190. In the context of Question 2, he is not saying that, taking unmarried different-sex couples as a comparator, he is the victim of direct discrimination in that same-sex couples should be given access to marriage. That was the contention in relation to Question 1 but not Question 2, where the entitlement claimed is to a non-marital alternative.

191. Nor is he saying that he is the victim of *Thlimmenos* discrimination by being given the same treatment as others who are materially in a different category. Again, taking the comparator as unmarried heterosexual couples, they are given the option of marrying, which is not realistically being offered to same-sex couples, making the *Thlimmenos* category inapplicable.

192. Finally, he is not saying that he is the victim of indirect discrimination by virtue of some apparently neutral policy with differential effects which are adverse to same-sex couples. The point throughout is that no appropriate alternative form of non-marital legal recognition is offered.

C.5 The question of justification

193. The respondent submits that the legitimate aim of not conferring legal recognition on same-sex couples in stable, committed relationships is "to protect, uphold and maintain the uniqueness and tradition of marriage as an institution, and as a concept, involving heterosexual couples only, and the traditional family founded thereon".[159] It asserts that:

> "Once the institutions of marriage and family based thereon are open to same-sex couples, or that same-sex relationships are given recognition in the same way as a marriage save in name, wherever such relationships are contracted, the unique status

[159] Case for the Respondent at [54].

> of those institutions as traditionally understood will be undermined, even destroyed."[160]

194. Thus the respondent's case on justification regarding Question 2 is based on treating proposed same-sex unions as conferring on same-sex relationships recognition "in the same way as a marriage save in name". It is on that basis that the respondent submits that the uniqueness of the institution of marriage would be threatened. As we have endeavoured to make clear in the foregoing Sections of this judgment, that is an incorrect understanding of the appellant's case reflected in Question 2. The alternative scheme for recognition sought does not involve conferment of rights and obligations mirroring those of a marriage. In any event, in *QT v Director of Immigration*,[161] this Court considered the "uniqueness" argument as essentially circular and not a basis for establishing a legitimate aim.

195. Even if that error of circularity were avoided, it could not in any case be accepted that non-recognition of same-sex unions which are not "marriages by another name" would be rationally connected with the protection of traditional marriages and families. As the Grand Chamber pointed out in *Fedotova v Russia*,[162]

> "In the present case, there is no basis for considering that affording legal recognition and protection to same-sex couples in a stable and committed relationship could in itself harm families constituted in the traditional way or compromise their future or integrity... Indeed, the recognition of same-sex couples does not in any way prevent different-sex couples from marrying or founding a family corresponding to their conception of that term. More broadly, securing rights to same-sex couples does not in itself entail weakening the rights secured to other people or other couples."

196. Accordingly, in our view, the respondent has failed to make out a case justifying the failure to provide an alternative framework for legal

---

[160] *Ibid* at [55].

[161] (2018) 21 HKCFAR 324 at [66], see also *Leung Chun Kwong v Secretary for Civil Service* (2019) 22 HKCFAR 127 at [71].

[162] (Application Nos 40792/10, 30538/14 and 43439/14, 17 January 2023) at [212].

recognition of same-sex couples in committed and stable relationships by institution of an appropriate form of same-sex union.

C.6 International materials

C.6a ECHR

197. It is of course accepted that the ECtHR plays a different, supra-national role within the ECHR framework in relation to Council of Europe Member States. It is also true that in many cases, the ECtHR is dealing with States whose own constitutional courts may have already upheld rights which their legislatures have not implemented. None of that applies to us. Nevertheless, since its establishment, the Court of Final Appeal has consistently referred to international jurisprudence and especially to the highly developed jurisprudence of the ECtHR for instructive guidance as to how human rights provisions in Hong Kong law should be approached, being mindful of any material differences which may render aspects of such international jurisprudence inapplicable.

198. As Sir Anthony Mason NPJ said, in *Shum Kwok Sher v HKSAR*:.

> "In interpreting the provisions of chap. III of the Basic Law and the provisions of the Bill, the Court may consider it appropriate to take account of the established principles of international jurisprudence as well as the decisions of international and national courts and tribunals on like or substantially similar provisions in the ICCPR, other international instruments and national constitutions."[163]

199. Because of its highly developed and accessible body of decisions, the case-law of the ECtHR in Strasbourg has provided especially valuable guidance. Additionally, the jurisprudence of the United Kingdom's courts dealing with ECHR rights via the Human Rights Act 1998 has proved a significant resource for our courts. In *Koon Wing Yee v Insider Dealing Tribunal*, his Lordship noted that:

---

[163] (2002) 5 HKCFAR 381 at [59].

> "The decisions of the Strasbourg Court on provisions of the Convention which are in the same, or substantially the same terms, as the relevant provisions of the BOR, though not binding on the courts of Hong Kong, are of high persuasive authority and have been so regarded by this Court. Indeed, this proposition is common ground between the parties."[164]

200. As Sir Anthony Mason NPJ, writing extra-judicially, explained, there is much benefit to be had from being able to examine how other courts have resolved similar problems and the reasoning they have adopted:

> "The questions of law and principle which a court of final appeal is called upon to decide are often susceptible of having more than one viable answer. Inevitably there are choices to be made. In many instances, relevant choices have been made, sometimes differing choices, by courts of other jurisdictions. Apart from these choices, the reasoning behind the choice may provide useful assistance."

His Lordship also pointed to another consideration favouring reference to international judicial standards:

> "It is important that the Court's decisions should be seen to conform to internationally accepted judicial standards. Indeed, for Hong Kong there is a double attraction: Hong Kong's reputation as an international financial centre depends upon the integrity and standing of its courts. Further, in the context of Hong Kong's relationship with the central government in Beijing, it is important that the decisions of the Hong Kong courts reflect adherence to the rule of law in accordance with internationally adopted judicial standards."[165]

201. The ECtHR sometimes refers to evolving social conditions in particular Member states but as that Court noted in *Fedotova v Russia*,[166] it does not shy away from declaring certain rights applicable because a majority of the population may disapprove, for instance, of same-sex unions. It is not being suggested in this appeal that an established position (eg, that BL37 is only concerned with heterosexual marriages) should be changed because Hong Kong

[164] (2008) 11 HKCFAR 170 at [27].

[165] Sir Anthony Mason NPJ, *The Place of Comparative Law in Developing the Jurisprudence on the Rule of Law and Human Rights in Hong Kong* (2007) 37 HKLJ 299 at 302-303.

[166] (2022) 74 EHRR 28 at [52].

society has changed. We are concerned with interpreting BOR14 as it stands and applying it to the issue of non-recognition of same-sex relationships.

C.6b The ICCPR

202. A point has arisen concerning the relevance of certain Periodic Reports and Concluding Observations relating to Hong Kong made by the HRC. It is suggested that, looking particularly at the Concluding Observations dated 29 April 2013 on the Third Periodic Report of Hong Kong and those dated 11 November 2022 on the Fourth Periodic Report of Hong Kong, there was no suggestion by the HRC that Hong Kong was in violation of any duty to enact laws recognising same-sex partnerships and that it ought therefore to be concluded that the HRC does not consider that ICCPR17 imposes any such duty.

203. We are, with great respect, unable to agree that the ICCPR reporting process culminating in Concluding Observations such as those relating to Hong Kong, is capable of supporting such a conclusion.

204. The reporting process is governed by ICCPR40 which records an undertaking by States Parties to submit reports on the measures they have adopted which give effect to the rights in the Covenant and on the progress made in the enjoyment of those rights. Having experienced great problems getting States parties to submit such reports,[167] as from 2013, the HRC adopted the practice of issuing a " list of issues prior to reporting", requesting a reply from each State party.[168]

205. ICCPR40(4) then provides that the HRC "shall study the reports submitted by the States Parties" and then it "shall transmit its reports, and such general comments as it may consider appropriate, to the States Parties" who

---

[167] Nowak, p 887, [7].

[168] *Ibid* pp 888-889, [8]-[9].

may, under ICCPR40(5), respond by making observations on the HRC's reports and comments.

206. The process is therefore one of dialogue between the HRC and States parties. As pointed out in Nowak, "The Committee's competence under Art. 40(2) and (4) is defined in the authentic English text with the words 'consideration' and 'study'...".[169] It goes on to explain:

> "The procedure for studying State reports is premised on the principle of constructive dialogue with States parties. The Committee has consistently stressed that in the reporting procedure it is not acting as a court that is required to decide on violations of the Covenant in the reporting procedure and before which the State concerned must defend itself. On the contrary, it has stated that its function is to support States parties in promoting and protecting Covenant rights and thus to contribute to mutual understanding and peaceful, friendly relations among States."[170]

207. Since Concluding Observations are not concerned with establishing violations as opposed to "constructive dialogue with States parties" based on selective lists of issues, one does not look to the reporting process to discover what violations the HRC may consider the State to have committed.

208. That point was made in *ZN v Secretary for Justice*,[171] where this Court stated:

> "The status of Concluding Observations of the HRC is ill-defined. They have no binding status and, although deserving of respect given the eminence of their authors, a distinction is to be drawn between pronouncements by the HRC on issues of violation of the ICCPR and where they otherwise purport to interpret treaty provisions, on the one hand, and where they provide general advice on strategies for enhanced implementation of a treaty and when they opine on matters extraneous to the actual treaty obligations of a State Party, on the other."

209. General Comments are also part of the reporting process under ICCPR40(4) which permits the HRC to "transmit ... such general comments as it may consider appropriate, to the States parties". As Nowak explains:

---

[169] *Ibid* p 897, [28].

[170] *Ibid* p 898, [29].

[171] (2020) 23 HKCFAR 15 at [70].

> "In 1980, the Committee set down several principles for the formulation of General Comments. They are to be addressed to States parties ..., promote cooperation between States parties in the implementation of the Covenant, summarize the experience gained by the Committee in considering State reports, draw attention of States parties to matters relating to improvement of the reporting procedure and the implementation of the Covenant, and stimulate activities of States parties and international organizations in the promotion and protection of human rights. In the view of the Committee, General Comments may relate to implementation of the obligation both to submit reports under [ICCPR40] and to guarantee Covenant rights, to questions relating to the application and the content of individual rights under the Covenant, or to suggestions concerning cooperation between States parties in applying and developing the provisions of the Covenant. In its practice, the Committee has been guided by these principles in formulating General Comments."[172]

210. Thus General Comments provide useful guidance, among many other things, as to the HRC's views regarding the content of individual rights under the Covenant, derived from its experience with reports of States parties as a whole. One obviously does not expect them to deal with violations in particular cases. As we have already noted, General Comment 16, in our view, supports the proposition that ICCPR17 imposes a positive obligation to protect and give effect to the privacy rights which it affirms.

211. Concluding Observations and General Comments may be contrasted with Communications of the HRC issued in proceedings brought under the First Optional Protocol under which a State party accepts the HRC's competence "to receive and consider communications from individuals ... who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant". In such cases, the HRC performs an adjudicative role, hearing argument from the individual claiming to be a "victim" and the State party and arrives at a conclusion on the merits, determining whether there has been a violation in the case at hand. Reference has been made on this appeal, for example, to two such Communications.[173] Such decisions therefore do deal with violations, but they are inevitably sparse as they are limited to State parties

---

[172] Nowak, p 907, [46].

[173] Examples cited in this appeal: *Joslin v New Zealand* (Communication No 902/1999, 17 July 2002) and *C v Australia* CCPR/C/119/D/2216/2012 (1 November 2017).

which have signed up to the Protocol and the particular issue raised in any case depends on the complaint of the alleged victim in question.

212. The point for present purposes is that the scheme of the ICCPR does not endow the absence of comment on positive obligations or violations regarding same-sex partnerships in the Concluding Observations with any significance for the interpretation of BOR14.

D. Relief and disposition of the appeal

213. For the foregoing reasons, we would allow the appeal and set aside the judgment of the Court of Appeal. We ought to emphasise that in arriving at the conclusion that the Government is subject to a positive obligation as explained above, the Court is not seeking to assume an executive or legislative role but is discharging its constitutional duty to interpret and declare the nature and scope of applicable constitutional rights under BOR14.

214. Both parties have asked the Court for an opportunity to make submissions on the form of any relief that may be ordered. We are inclined to accede to that request regarding the declaratory orders consequential on allowing the appeal. We would accordingly make the following Orders, it being understood that the Orders in sub-paragraphs (2) and (3) below may be subject to modification after considering the parties' respective submissions thereon, namely:

(1) It is Ordered that the appeal be allowed and the judgment of the Court of Appeal be set aside.

(2) It is Declared that, the Government is in violation of its positive obligation under Article 14 of the Hong Kong Bill of Rights to establish an alternative framework for legal recognition of same-sex partnerships (such as registered civil partnerships or civil

unions) and to provide for appropriate rights and obligations attendant on such recognition with a view to ensuring effective compliance with the aforesaid obligation.

(3) Operation of the abovementioned Declaration is suspended for a period of two years from the date of the final Order to be made to afford the Government time to comply with its aforesaid obligation.

(4) The parties be at liberty, within 21 days of the date of this judgment, to lodge written submissions on the relief granted, such submissions to be dealt with on the papers.

215. We would make an Order Nisi that the costs here and below be paid by the respondent to the appellant.

Mr Justice Lam PJ:

216. I have had the advantage of reading in draft the joint judgment of Mr Justice Ribeiro PJ and Mr Justice Fok PJ. I respectfully agree with their analysis on Questions 1 and 3.

217. In light of the application of the principle of *lex specialis* by reference to BL37 reading together with BOR19(2), the appellant cannot succeed in his reliance on BL25 and BOR22 to contend for equal treatments with heterosexual couples who are married in terms of the recognition of their status as a couple. It follows that his claims based on discrimination arising from differential treatments on the substance of the rights incidental to the official recognition of a same sex union are not sustainable.

218. Therefore, the applicant has to rely on the right to privacy and family life under BOR14 which is not coterminous with the right to marriage under BL37. Further, in view of BL37, the reliance on BOR14 is only viable if the applicant is advancing a claim which is in substance different from his claim

for access to marriage under Questions 1 and 3. This is acknowledged by their Lordships in Section C.3.1.

219. With the greatest respect, I am unable to fully agree with their Lordships' analysis under Question 2. I would therefore set out my own views below.

220. I would begin by emphasizing that we are not addressing the question of whether in terms of social policy for Hong Kong same sex unions should be recognized with rights and obligations similar to those presently enjoyed by heterosexual couples. That is a question for the Government and the legislature; and social policy is not a question for the Court to decide. Instead, we are concerned with a narrower question confined to the application of BOR14 in light of BL37 and BOR19(2). The narrower question is whether a right to official recognition of a same sex union is embodied within the right to protection against arbitrary or unlawful interference with privacy and family. The answer to this narrower legal question would not provide the full answer to the broader social policy question.

221. In my judgment, the rights and obligations pertaining to BOR14 are materially different from those under ECHR8. Given such difference and the difference between Hong Kong and the member States of the ECHR in terms of social and political developments, the direct application of Strasbourg jurisprudence in Hong Kong diverts attention from the relevant analysis under BOR14.

222. The obligations of the Government under BOR14 are not as extensive as the obligations of the member States under ECHR8. There is a material difference between the duty to protect against unlawful and arbitrary interference under BOR14 and the duty to respect private and family life under ECHR8. Such distinction has been repeatedly acknowledged by the Strasbourg

Court. In the discussion of the general principles in the context of ECHR8, the Court in *Oliari v Italy*[174] started by noting such distinction:

> "While the essential object of art 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a state certain positive obligations to ensure effective respect for the rights protected by art 8."[175]

223. The Court then examined the notion of "respect" [176] and the discussion on legal recognition of same sex unions in the judgment proceeded on the analysis as to whether Italy failed to comply with a positive obligation to "ensure respect for the applicants' private and family life"[177]. The discussion on the most appropriate way to guarantee the protection of a same sex relationship without unnecessary hindrance by conferring "core rights" upon such relationship[178] was made in such context.

224. In contrast, BOR14 protects against "arbitrary or unlawful interference with privacy and family". Conceptually, the notion of "respect" is different from that of "protection against arbitrary or unlawful interference". Whilst I can readily understand that the obligation of a State to "respect" private and family life entails taking positive steps to provide a legal framework for the recognition of a same sex union, I have difficulty with holding that the omission to do so *per se* constitutes "arbitrary or unlawful interference". It is necessary to identify such interference (be it interference from a public authority or from a third party) before one can lay a duty upon the Government to have measures in place to protect against "such interference" under BOR14(2).

---

[174] (2017) 65 EHRR 26 at [159].

[175] Similar statements invariably appear in other Strasbourg judgments discussing ECHR8: e.g. *S.H. v Austria* Grand Chamber No 57813/00, 3 Nov 2011 at [87]; *Fedotova v Russia* Grand Chamber Nos 40792/10 and others, 17 Jan 2023 at [152]. See also the discussion of Arden LJ in *R (Steinfeld) v Secretary of State for Education* [2018] QB 519 on these two facets of the obligations of the state under ECHR8 at [30] to [34] and [63] to [68].

[176] *Oliari v Italy,* supra, at [161].

[177] *Oliari v Italy,* supra, at [164].

[178] *Oliari v Italy,* supra, at [174].

225. In this connection, I have had the advantage of reading in draft the judgment of the Chief Justice. I respectfully agree with his reading of the United Nations Human Rights Committee's General Comment No. 16 and his determination on the substance of the rights protected under BOR14 and the obligations of the Government under BOR14(2).

226. Moreover, the Strasbourg jurisprudence on ECHR8 was developed progressively over the years in tandem with the social and political developments in the member States of the ECHR. There were legislative changes in a significant number of member States and resolutions passed by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe which underpinned the evolution of the Strasbourg jurisprudence from *Sheffield and Horsham v United Kingdom*[179] to *Schalk and Kopf v Austria*[180] and then from *Oliari v Italy*[181] to *Fedotova v Russia*[182]. The Strasbourg Court invariably referred to these developments in its judgments. In the absence of similar developments in Hong Kong and in view of the material difference between ECHR8 and BOR14, this Court should not adopt the Strasbourg jurisprudence as guidance on the substance of the rights conferred under BOR14 in terms of the recognition of same sex union.

227. On proper construction of BOR14, the Government has an obligation to protect the privacy and family of a same sex union from unlawful or arbitrary interference, including such interference from third parties. If there is arbitrary interference with the privacy and family of same sex union in Hong Kong, the Government should put in place a measure or measures to protect

---

[179] (1999) 27 EHRR 163.

[180] (2011) 53 EHRR 20.

[181] (2017) 65 EHRR 26.

[182] Grand Chamber Nos 40792/10 and others, 17 Jan 2023.

against such interference. But the interference has to be identified before the corresponding protection can be considered.

228. Official recognition of a same sex union lies in the realm of interaction between private life and public life and the claim to protection for privacy is narrower[183]. It does not fall solely within the realm of private life because the purpose of such recognition is to enable those in same sex unions to acquire the formal status of a couple which has to be accepted by the society in dealing with them, including their involvement in public affairs. A couple who seeks official recognition has no objection to the declaration to the public that they are partners to a same sex union.

229. However, a same sex couple can have legitimate objections to the repeated need or requirement to reveal private information in order to substantiate their claim that they are in such relationship. In my view, the imposition of such need or requirement is an arbitrary interference under BOR14 and this could be avoided by providing official recognition for such union. The situation is similar to that faced by the applicant in *Q and Tse Henry Edward v Commissioner of Registration*[184]. Absent any official recognition, a same sex partner could encounter difficulties in daily life in respect of affairs arising from the same sex union. Some of those difficulties are set out in the Allen & Overy Report commissioned by the Equal Opportunities Commission published in June 2019[185]. It is noteworthy that the report referred to difficulties suffered by couples in alternative relationships (viz those who are not married)[186], thus not confining itself to difficulties faced by same sex couples.

---

[183] *Democratic Party v Secretary for Justice* [2007] 2 HKLRD 804 at [58] to [60].

[184] (2023) 26 HKCFAR 25.

[185] Appeal Bundle Part B p.967 et seq.

[186] *Ibid* at paras 2.15 to 2.19.

230. These difficulties stem partly from the relevant criteria (statutory or otherwise) used by the authorities or other entities in transacting business. The compatibility of a particular set of criteria with BL25 and BOR22 has to be addressed by the approach laid down by this Court in *Leung Chun Kwong v Secretary for Civil Service*[187] and *QT v Director of Immigration*[188].

231. But there is another aspect to the difficulties that may be encountered. Even if the relevant criteria embraced a union based on a same sex relationship, by virtue of the lack of official status, a same sex couple would need to reveal unnecessarily and repeatedly private and sensitive information concerning their relationship. The extent of the probe into such information depends on the assessment by the handling officers or agents of authorities or entities: some may readily accept the claim of the couple but some may probe further or even reject the claim or demand further evidence substantiating the claim.

232. In this connection, I respectfully agree with the more general observations[189] at [145] in the joint judgment of Mr Justice Ribeiro PJ and Mr Justice Fok PJ on arbitrary interference. The Government has a duty under BOR14(2) to protect against such interference.

233. However, I have great reservations about this Court providing guidance on the way forward by drawing a distinction between "core rights" and "supplementary rights". Such reservations are based on the following reasons.

---

[187] (2019) 22 HKCFAR 127.

[188] (2018) 21 HKCFAR 324.

[189] For my part, I do not place reliance on postulated difficulties in terms of visiting rights or access to medical information of one's partner at hospitals (as these are not matters alluded to in the evidence and we have heard no submissions in that regard).

234. First, the concept of "core rights" is derived from Strasbourg jurisprudence and the focus of the discussion on the need to give protection to same sex union is based on the notion of "respect". As explained above, such analysis cannot be directly transplanted in Hong Kong by reference to BOR14 in relation to the protection against "arbitrary or unlawful interference". The arbitrary interference which I find to exist in the above discussion is narrower in scope than the protection of the "basic needs which are fundamental to the regulation of a relationship between a couple in a stable committed relationship" expounded in *Oliari v Italy*[190]. The measures or scheme(s) that would have to be put in place to address the arbitrary interference need not be as wide ranging as those encompassed by the concept of core rights discussed in the Strasbourg jurisprudence.

235. Take the examples of mutual right to maintenance and support and the regulation of their joint finance and properties, these matters fall entirely within the realm of private life. I cannot see any arbitrary interference of such private life in terms of a routine requirement to disclose unnecessary private information to any third party in the daily lives of a same sex couple.

236. The financial affairs and the properties of such couple, as with other unmarried couples in a stable relationship, are governed by the common law on ownership and co-ownership[191] of properties, common intention constructive trust as well as proprietary estoppel. Compared with legal regime for married couples[192] for the resolution of such issues, the application of these common law concepts do not generate more uncertainties than those addressed in the context of an application for ancillary relief in matrimonial context.

---

[190] Supra, at [169] to [172].

[191] As supplemented by the Partition Ordinance Cap. 352.

[192] Under the Matrimonial Proceedings and Property Ordinance Cap. 192 and the Married Persons Status Ordinance Cap. 182.

237. Unless one harks back to the concept of equality of treatment (which would then run counter to the argument of *lex specialis*), I am unable to see any arbitrary interference stemming from the application of the common law to the private disputes between a same sex couple (as it does in the case of unmarried couple) as opposed to the statutory regimes for married heterosexual couple.

238. Second, the distinction between "core rights" and "supplementary rights" should be examined together with the law as stated by this Court in *Leung Chun Kwong v Secretary for Civil Service*[193]. In that case, this Court reiterated its previous decision in *QT v Director of Immigration*[194] that it is illegitimate to speak in terms of core marriage rights or to regard differences of treatment as not being discriminatory because they relate to such rights[195]. Hence, if core rights are attached to the recognition of a same sex union, the contents of such rights would have to be examined against the non-discriminatory benchmark.

239. It may be recalled that in *QT v Director of Immigration*, this Court held as follows:

> "…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.
>
> 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 … 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 …"[196]

---

[193] (2019) 22 HKCFAR 127.

[194] (2018) 21 HKCFAR 324.

[195] *Leung Chun Kwong v Secretary for Civil Service*, supra, at [54].

[196] *QT v Director of Immigration*, supra, at [66] and [67].

240. One must also have regard to this Court's endorsement of the discussion in the English and Strasbourg cases on the analogous position of those in a same sex union with heterosexual married couples in that judgment[197].

241. Bearing these in mind, notwithstanding what is presently said at [127], [135] and [145] in the joint judgment of Mr Justice Ribeiro PJ and Mr Justice Fok PJ, if it is necessary to attach some core rights to the official recognition of same sex union, there is little scope for the Government (and the legislature) to misalign the core rights attached to a heterosexual married couple with the rights to be conferred upon a same sex couple under the new regime. The exercise would inevitably end up as requiring the Government to put in place a scheme or schemes providing all the core rights and benefits currently enjoyed by a heterosexual married couple be accorded to a partner of a same sex union.

242. As a consequence, the end result is that the new regime (be it a civil partnership or whatever label to be attached to it) would in substance become indistinguishable from marriage. Baroness Hale of Richmond DPSC acknowledged this in *Preddy v Bull*:

> "Civil partnership is not called marriage but in almost every other respect it is indistinguishable from the status of marriage in United Kingdom law."[198]

243. In light of the above, if BOR14 is construed in the same way as the construction placed on ECHR8 in Strasbourg embodying all the rights and benefits described as core rights by Mr Justice Ribeiro PJ and Mr Justice Fok PJ, I cannot see any answer to the submission of Mr Wong SC on *lex specialis* in respect of Question 2. Such a construction is inconsistent with this Court's holding under Question 1 and 3 that the right to equality under BL25 and BOR22 has to be read subject to the application of BL37 as *lex specialis*.

---

[197] *QT v Director of Immigration*, supra, at [46] to [52].

[198] [2013] 1 WLR 3741 at [26], cited in *QT v Director of Immigration*, supra, at [50].

244. Third, given our constitutional order under the Basic Law, the form of official recognition and the substantive rights incidental to such recognition are essentially matters of social policy and should primarily be determined by the Government under a political process. Depending on the substantive rights to be attached to such recognition, there can be different options, including administrative ones. If legislation is deemed to be necessary, it would be a matter for the legislative process. The Court should accord a wide margin of discretion to the Government and the legislature in these regards.

245. The role played by the Strasbourg court under the ECHR is different from the role of this Court under the Basic Law. The Strasbourg Court was established under ECHR19 "to ensure the observance of the engagements undertaken by [its member States]". By ECHR1, the member States undertake the obligation to "secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of [the ECHR]". By ECHR46(1), the member States undertake to abide by the final judgment of the Court. These provisions give the Strasbourg Court the mandate to adjudicate upon the due observance of the treaty obligations of the member States. Pursuant to ECHR46(2), the execution of the judgment of the Court shall be supervised by the Committee of Ministers of the Council of Europe. Further, under ECHR52, the Secretary General of the Council of Europe can request a member State to furnish an explanation of the manner in which its internal law ensures the effective implementation of any ECHR provisions.

246. Since an application to the ECHR is determined by reference to the compliance by a State member with its treaty obligation, it makes no difference whether the non-compliance stems from the executive, legislative or judicial arms of the government of that State. The margin of appreciation accorded by the Strasbourg Court to a State member does not operate on the basis as the

margin of discretion accorded by the Hong Kong courts to the executive and legislative arms due to the differences in institutional competence[199].

247. Under the Basic Law, the judiciary exercises independent judicial power[200]. The executive and legislative power of the Hong Kong Special Administrative Region are vested in other organs[201]. Within our constitutional framework, the Court should not circumscribe the executive and legislative arms of the Government in terms of the models or measures to be adopted in addressing the needs of same sex couples for recognition. For the reasons given above, by virtue of the case law previously laid down in *QT v Director of Immigration* and *Leung Chun Kwong v Secretary for Civil Service*, if we were to delve into the substance of the rights to be attached to the official recognition of same sex union, this Court runs the risk of moving into a realm which is not within the institutional competence of the Judiciary.

248. Fourth, the concept of core rights in the context of Question 2 was advanced only on the first day of the hearing before this Court and a list of core rights was only produced to the Court and Mr Wong on the next day. The concept of core rights for same sex union and the inter-relationship of its introduction in the present context with the law as laid down in *QT v Director of Immigration* and *Leung Chun Kwong v Secretary for Civil Service* has not been examined in the courts below. There is nothing in Mr Pun SC's submissions (who was then the leading counsel for the Applicant) in the Court of Appeal to suggest that he took a different position from that advanced under *MK v Government of HKSAR*[202] under Question 2. On the contrary, the main thrust of

---

[199] See for example *Oliari v Italy*, supra, at [179] to [186]. The concept of margin of discretion in the Hong Kong context was discussed by this Court in *Fok Chun Wa v Hospital Authority* (2012) 15 HKCFAR 409.

[200] See BL19.

[201] See BL15 to 17.

[202] [2019] 5 HKLRD 259.

his submissions was that differential treatment for same sex union is not justified.

249. In such circumstances, there has not been matured and well-developed arguments before us on the essential rights incidental to an official recognition of a same sex union. In particular, we do not have the benefit of any arguments on why the absence of each specific core right in an official recognition would be inimical to the protection against arbitrary interference in terms of avoiding the unnecessary revelation of one's private information. Nor do we have the benefit of submissions in respect of the implications arising from *QT v Director of Immigration* and *Leung Chun Kwong v Secretary for Civil Service* if this Court should adopt the approach of core rights.

250. Insofar as the concept of core rights can be said to be incidental to a same sex union by way of a right to privacy and family life under BOR14, it is at least reasonably arguable that the same should equally apply to a stable and long-term relationship of heterosexual cohabitants[203]. One of the developments in the harmonization of European law is to embrace the recognition of such relationship as well[204]. Likewise, the Allen & Overy Report referred to "couples in alternative relationships". In light of the potentially wide social ramifications that may arise from accepting the argument of core rights for couples who are not married, I would refrain from doing so without first subjecting the argument to examination at different levels of court so that the Respondent would be afforded the full opportunity to address the same.

[203] See the successful challenge by unmarried heterosexual couple in *R (Steinfeld) v Secretary of State for International Development* [2020] AC 1.

[204] See *Principles of European Family Law Regarding Property, Maintenance and Succession Rights of Couples in de facto Unions* (2019) of the European Family Series published by the Commission on European Family Law. An example of legislation to that effect is the Irish Civil partnership and Certain Rights and Obligations of Cohabitants Act 2010.

251. In the circumstances, I am presently unable to endorse the inclusion of the concept of core rights as necessary incidents of official recognition in this appeal. It should be left to the wide margin of discretion of the Government and subject to debates in the legislative process, if necessary.

252. I would like to hear submissions before deciding on the relief to be granted in relation to Question 2, particularly with regard to potential implications (if any) arising from the different formulations of the declaration set out at para 4 of the Form 86 (with the modification that it be confined to violation of Article 14 of the Hong Kong Bill of Rights) and the declaration set out at [260] below in light of the proposed suspension of the operation of the declaration for two years.

Mr Justice Keane NPJ:

253. I agree with the joint judgment of Ribeiro and Fok PJJ.

254. In the light of the importance of this case and the division within the Court on the issue upon which it turns, it is appropriate that I state briefly the steps leading to my conclusion in relation to Question 2. The following is not intended to qualify, in any way, my agreement with the reasons of Ribeiro and Fok PJJ.

255. In this Court, Ms Monaghan KC on behalf of the appellant did not press the argument made before the Court of Appeal that BOR14 was violated by reason of the absence of a legislated regime for same-sex partnerships as an alternative to marriage that aligned the rights and duties of same-sex partners comprehensively with the rights and duties of married persons. Rather, the argument presented for the appellant in this Court was that BOR14 was violated by reason of the absence of any legal recognition of same-sex unions in the law of Hong Kong. This was an adroit piece of advocacy on the appellant's behalf.

256. The broader argument advanced in the Court of Appeal was bound to be rejected, essentially for the same reasons that Question 1 must be resolved against the appellant. Once it is accepted that BL37 is an insurmountable hurdle in the path of the argument that BL25 and BOR22 guarantee the comprehensive availability of same-sex marriage, so BL37 can also be seen to be an insurmountable hurdle in the path of the argument that BOR14 guarantees the conferral of rights and duties on same-sex partners that are, in substance, the same as are enjoyed by married persons. The narrowing of the appellant's argument in this Court meant that the issue to be addressed is whether BOR14 requires some irreducible legal recognition of same-sex partnerships. It is accepted that the determination of the substantive content of the legislation appropriate to provide that recognition is necessarily a matter for the legislative arm of government rather than the judiciary.

257. As to whether BOR14 imposes positive obligations on the HKSAR, BOR14, like ICCPR17 from which it is derived, is not expressed simply as a limitation on the legislative or executive power of the State. Rather, BOR14 expressly mandates a state of affairs in Hong Kong in relation to an individual's privacy, family, home and correspondence. Interpreting BOR14 purposively, one can see that BOR14 both affirms the existence of these rights and guarantees their protection. The prohibition in BOR14(1) is not directed to the legislature or executive but is entirely general in its scope extending to persons other than the protected individual; plainly, legislation may be necessary in order to give practical effect to a prohibition of that kind. These textual indications are confirmed by the Human Rights Committee's General Comment 16 on the scope of ICCPR17 excerpted at [156] of the reasons of Ribeiro and Fok PJJ. Accordingly, one must conclude that, to the extent that the establishment and maintenance of the state of affairs contemplated by BOR14

requires positive action by the legislature, inaction by the legislature is in violation of BOR14.

258. In the case of committed, loving, stable, long-term relationships between partners of the same sex, the absence of any legal recognition means that the partners may be confronted in the ordinary course of their daily lives with a state of affairs in which their privacy, and the dignity associated with private life, are subject to arbitrary or unlawful interference. The absence of legal recognition of their relationship is apt to disrupt and demean their private lives together in ways that constitute arbitrary interference within the meaning of BOR14. In this regard, I refer in particular to [136]-[146] of the reasons of Ribeiro and Fok PJJ. The point may be illustrated by reference to this Court's decision in *QT v Director of Immigration*[205].

259. In *QT*, the appellant was in a stable, committed long term relationship with her partner. That relationship could not be maintained because the Director of Immigration refused to grant QT a dependent visa on the ground that QT was outside the existing policy which was to admit a spouse as a dependent only if he or she was a party to a monogamous heterosexual marriage. It was held that, because QT's relationship with her partner was one of dependency materially indistinguishable from that of married persons for the purposes of the government's policy, the Director's refusal of a dependency visa was *Wednesbury* unreasonable. A decision affected by *Wednesbury* unreasonableness is readily characterised as an example of arbitrary decision-making within BOR14. And because QT was left with no practical alternative in order to preserve her private life with her partner but to engage in litigation, with its attendant publicity, stress, uncertainty and expense, the Director's arbitrary decision-making was an interference in her private life. In this way it can be seen that the absence of legal recognition of same-sex relationships is an

[205] (2018) 21 HKCFAR 324.

occasion of arbitrary interference with the right to privacy and private life. That state of affairs is contrary to the mandate in BOR14.

Chief Justice Cheung:

260. Accordingly, the Court:-

(a) Unanimously dismisses the appeal in relation to Question 1 (same-sex marriages) and Question 3 (recognition of foreign same-sex marriages).

(b) In relation to Question 2 (recognition of same-sex relationships):-

(i) By a majority, allows the appeal and sets aside the judgment of the Court of Appeal.

(ii) By a majority, as indicated in paragraph 214 above and as provided below, subject to receiving written submissions from the parties (whereupon the following Declaration and accompanying Direction may be modified or confirmed):

(i) Declares that, the Government is in violation of its positive obligation under Article 14 of the Hong Kong Bill of Rights to establish an alternative framework for legal recognition of same-sex partnerships (such as registered civil partnerships or civil unions) and to provide for appropriate rights and obligations attendant on such recognition with a view to ensuring effective compliance with the aforesaid obligation.

(ii) Directs that operation of the abovementioned Declaration be suspended for a period of two years from the date of the final Order to be made after

receipt of the parties' written submissions, to afford the Government time to comply with its aforesaid obligation.

(c) Directs that the parties be at liberty, within 21 days of the date of this judgment, to lodge written submissions on the relief granted, such submissions to be dealt with on the papers.

(d) Directs that there be an Order Nisi that the costs here and below be paid by the respondent to the appellant, the parties being at liberty to lodge written submissions regarding costs within 21 days of the date of this judgment, to be dealt with on the papers.

(Andrew Cheung) Chief Justice	(R A V Ribeiro) Permanent Judge	(Joseph Fok) Permanent Judge

(M H Lam) Permanent Judge	(Patrick Keane) Non-Permanent Judge

Ms Karon Monaghan KC, Mr Hectar Pun SC and Mr Anson Wong Yu Yat, instructed by Ho Tse Wai & Partners, assigned by the Director of Legal Aid, for the Applicant (Appellant)

Mr Stewart Wong SC, Mr Johnny Ma SC and Mr Jonathan Ng, instructed by the Department of Justice, for the Respondent

APPENDIX

Relevant provisions

The main constitutional and statutory provisions, as well as provisions from international conventions that require consideration consist of the following.

1. Under the Basic Law:

BL 25

All Hong Kong residents shall be equal before the law.

BL 37

The freedom of marriage of Hong Kong residents and their right to raise a family freely shall be protected by law.

2. Under the Bill of Rights:

BOR 1(1)

The rights recognised in this Bill of Rights shall be enjoyed without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status

BOR 14 Protection of privacy, family, home, correspondence, honour and reputation

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

BOR 19 Rights in respect of marriage and family

(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.

(3) No marriage shall be entered into without the free and full consent of the intending spouses.

(4) Spouses shall have equal rights and responsibilities as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.

BOR 22 Equality before and equal protection of law

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.

3. In relevant Ordinances:

Marriage Ordinance, 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.

Married Persons Status Ordinance, Cap 182 section 2

(1) Save where otherwise appears, this Ordinance applies to persons who are parties to a marriage, whether married before or after the commencement of this Ordinance.

(2) In subsection (1), marriage means ...

(d) a marriage celebrated or contracted outside Hong Kong in accordance with the law in force at the time and in the place where the marriage was performed.

Matrimonial Causes Ordinance, Cap 179, Section 20(1)(d)

A marriage which takes place after 30 June 1972 shall be void on any of the following grounds only –

(d) that the parties are not respectively male and female.

4. Under the International Covenant on Civil and Political Rights:

ICCPR 17

(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

(2) Everyone has the right to the protection of the law against such interference or attacks.

ICCPR 23

(1) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

(2) The right of men and women of marriageable age to marry and to found a family shall be recognized.

(3) No marriage shall be entered into without the free and full consent of the intending spouses.

5. Under the European Convention on Human Rights

ECHR 8

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR 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.

ECHR 14

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as … other status.