



# Chapter 3

## Cases of Public Interest or Concern



Matrimonial Cases



Traffic Accident Claims



Breach of Contract



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Landlord and Tenant Disputes



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Immigration Matters



## HKSAR v Chan Man Sum Ivan

*(HCCC 428 / 2014; CACC 273 / 2015; HCCC 240 / 2017; CACC 400 / 2017; HCCC 130 / 2021)*

This was a case in which the Defendant was charged with murder where the dead body of the victim was not found and all the evidence pointing to the guilt of the Defendant was circumstantial. The case was also an unusual one in the sense that the Defendant was tried three times and his case went to the Court of Appeal twice. The Defendant was privately represented in his first trial. He received legal aid from his first appeal to the Court of Appeal until the conclusion of his third trial.

In this case, the Defendant was charged with murdering his 33-year-old mistress (“the Deceased”) inside her flat in Amoy Gardens in October 2011. The Deceased was filmed by CCTV returning to her flat on 5 October 2011 and was not seen again outside the flat. The Defendant, on the other hand, was seen entering the flat in the evening on 6 October 2011. He left the flat at 20:34 on the same day and returned 22 minutes later, having purchased various items including gloves, deodorizer, a vacuum storage bag and four rolls of 300-foot clingfilm. In the next morning, the Defendant was seen leaving the flat wheeling a trolley on which there was a check-patterned bag. It was the Prosecution case that the Defendant had killed the Deceased on 6 October 2011 and removed her body from the flat in the check-patterned bag on the following day and somehow disposed of it later on.

The dead body of the Deceased was never found and there was no direct evidence of the killing. In his first trial (HCCC 428/2014), the Defendant denied having killed the Deceased. This was disbelieved by the jury who convicted him of murder after trial.

With the assistance of legal aid, the Defendant took his case on appeal (CACC 273/2015), on the grounds that the Judge’s directions regarding the drawing of inferences from circumstantial evidence were inadequate and flawed in several aspects. Particularly, it was highlighted that the Judge failed to direct the jury that an inference could only be drawn against the Defendant if it was the only reasonable inference. The Court of Appeal concluded that the Judge’s failure to give this direction was material and the appeal was allowed, resulting in an order for retrial. The Defendant was also granted costs of his successful appeal to the extent of his legal aid contribution.



In his second trial (HCCC 240/2017), the Defendant changed his line of defence. He admitted killing the Deceased but claimed his actions were either in self-defence or they amounted to manslaughter by way of an unlawful act. The Defendant alleged that on the material day, he and the Deceased had a heated argument when he tried to break up with her, followed by the Deceased's getting emotionally aroused and vigorously hitting the Defendant. During the confrontation, the Defendant used his arm to weigh down her body but he could not recall all the details of what had happened. Moments later, he discovered that the Deceased was dead. He then disposed of her body and cleaned up the scene.

The jury was not convinced by his defence and he was again convicted of murder after the second trial.

The Defendant again took his case to the Court of Appeal (CACC 400/2017). Specifically, it was argued that the Judge failed to direct the jury to ignore hearsay evidence which suggested that the Deceased might intend to blackmail the Defendant and provided a motive for murder by the Defendant. As the Prosecution did not present its case as a motivated murder, it was contended that the hearsay evidence had no probative value and was of considerable prejudicial effect. It was also argued that the Judge failed to direct the jury on the alternative verdict of manslaughter based on provocation, despite the fact that the Defence did not base his case on provocation.

Having canvassed the evidence and the Judge's summing-up in great detail, the Court of Appeal considered that the hearsay evidence was relevant as the Deceased's potential state of mind might explain why the Defendant might have formed a murderous intent. However, the Judge failed to fully explain to the jury the relevance of the hearsay evidence to the Deceased's state of mind. Having admitted the hearsay evidence, from which an inference could be drawn to show that the Deceased might have engaged in provoking conduct, and given the fact that there was evidence of a possible loss of self-control from the Defendant when he testified about the confrontation and struggle he had with the Deceased, the partial defence of provocation should be left open for the jury to consider. The Court of Appeal concluded that, under the unusual circumstances of this case, the Judge had an obligation to direct the jury on the partial defence of provocation even if the Defendant did not explicitly run such a defence.

As a result, the conviction was again quashed and a further retrial was ordered. The Defendant was also granted costs for both the retrial and the second appeal, limited to his respective legal aid contributions.

In his third trial (HCCC 130/2021), the Defendant pleaded not guilty to a charge of murder but offered to plead guilty to manslaughter. It was not accepted by the Prosecution and the case proceeded to trial. The defence run by the Defendant in his second retrial was that the Deceased made provocative threats, prompting a struggle where the Defendant suffocated her. After a 19 days' trial and an unsuccessful application for a permanent stay of proceedings, the jury unanimously found the Defendant not guilty of murder but guilty of manslaughter on the basis of provocation. After considering all the circumstances of the case, the Court sentenced the Defendant to imprisonment for 9½ years.

This case highlights the complexities and challenges of reaching a just verdict in a murder trial where direct evidence and the dead body were lacking. The first appeal shows the importance of accurate and adequate directions to the jury on drawing inferences from circumstantial evidence, whereas the second appeal illustrates how the circumstances of a case may give rise to a need to direct the jury on a defence or partial defence even though they are not part of the case positively presented by defence.





## Sham Tsz Kit v Secretary for Justice (FACV 14/2022)

On 5 September 2023, the Court of Final Appeal (“CFA”) handed down a landmark judgment regarding the rights of same-sex partners in Hong Kong. While the judgment did not go as far as recognising or legalising same-sex marriage in Hong Kong, it was nevertheless described by some as a “giant leap forward” for the rights of same-sex couples.

In the judgment, the CFA ruled by a majority that the Government was in violation of its obligation under Article 14 of the Hong Kong Bill of Rights by failing to put in place an alternative framework for legal recognition of same-sex partnership and to provide for appropriate rights and obligations pertinent to such recognition. Notwithstanding such ruling, the CFA acknowledged the fact that the Government would need time to implement measures to comply with its obligation, thus directing the operation of the above declaration of violation be suspended for a period of two years from the date of the Order.

### Background

The Applicant Hong Kong resident who entered into a same-sex relationship with his partner. They entered into a same-sex marriage in New York in 2013. As same-sex marriage is not legally recognized in Hong Kong, he sought to challenge the constitutional validity of the relevant provisions of the Marriage Ordinance and the Matrimonial Causes Ordinance and the absence of any official recognition thereof by way of judicial review. He was granted leave for the CFA’s determination on three questions:

Question 1: Whether he has a constitutional right to same-sex marriage as enshrined in Article 25 of the Basic Law (“BL 25”) and Article 22 of the Hong Kong Bill of Rights (“BOR 22”);

Question 2: Alternatively, whether 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 (“BOR 14”) and/or BL 25 and BOR 22 ; and

Question 3: Whether the non-recognition of foreign same-sex marriage constitutes a violation of BL 25 and BOR 22.

### Proceedings in Courts below

The Applicant's judicial review application was dismissed in the Court of First Instance and the subsequent appeal was also dismissed by the Court of Appeal.

### CFA's Determination

With the assistance of legal aid, the Applicant was able to present the questions to the CFA for final determination.

The CFA unanimously ruled against Questions 1 and 3 as the laws in Hong Kong only provides for the constitutional freedom of marriage confining to opposite-sex marriage and not to same-sex marriage. However, on Question 2, the CFA by majority accepted the need for same-sex couples to have access to an alternative framework for recognition. Such legal framework conferring official legal recognition of their relationship would enable them to meet basic social requirements and could also provide them with a sense of legitimacy.

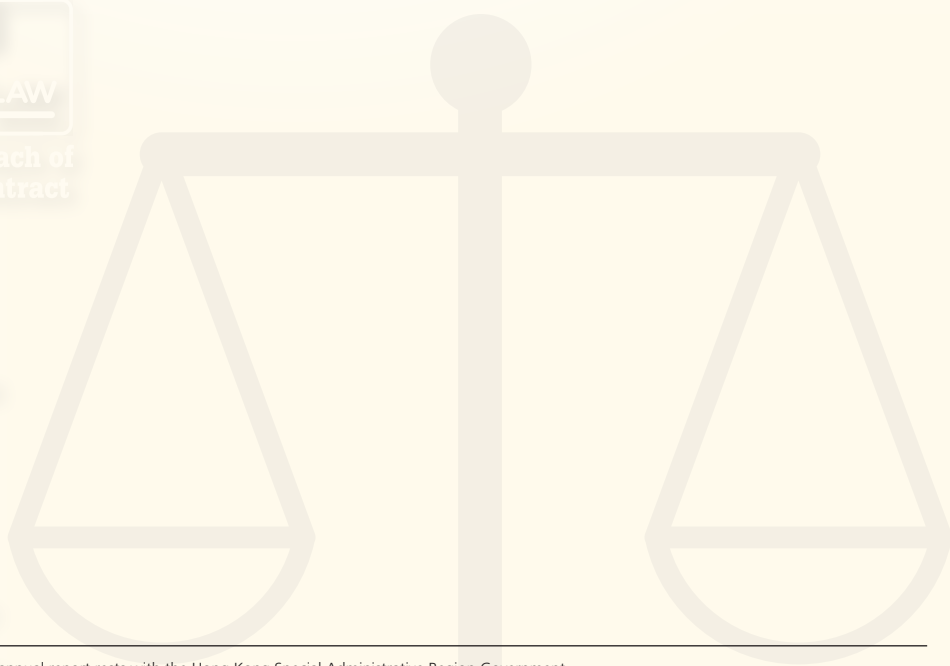
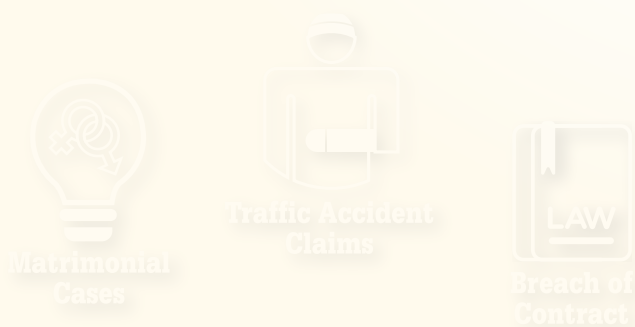
The CFA held that the right to privacy as enshrined in BOR 14 is engaged and is infringed by the arbitrary interference with the private life and dignity of same-sex couples resulting from (1) the real difficulties faced by them in the ordinary course of their private lives, and (2) their exposure to the publicity, stress, uncertainty and expense of litigation in judicial review proceedings. There is hence a need to effectively protect this fundamental right by adopting a framework that provides for legal recognition of same-sex relationship and the requisite rights and obligations attendant on such recognition. By failing to do so, the Government has not complied with the positive obligation in question, thus violating the Applicant's constitutional rights.

The CFA's ruling calls for an alternative legal framework for recognition of same-sex relationship which provides for appropriate rights and obligations attendant on such recognition. For instance, in the judgment, the CFA has highlighted the real difficulty



of hospitalization, where one same-sex partner may be denied visiting rights, medical information or participation in important decision-making regarding the other partner's treatment as he or she does not have a recognized status, as opposed to "husband" and "wife". Another example would be the difficulty in separating the mixed assets of a same-sex couple upon the termination of their relationship.

By establishing an alternative framework for legal recognition of same-sex partners, relevant government authorities may no longer need to deal with each case or application involving same-sex partnerships on a case-by-case basis, thus saving time and effort in having these issues resolved by expensive and time-consuming litigations or judicial reviews.



## Q and Tse Henry Edward v Commissioner of Registration (FACV 8 & 9/2022)

With the assistance of legal aid, the Applicants successfully challenged the Commissioner of Registration's ("the Commissioner") policy requiring female-to-male ("FtM") transgender persons to have undergone full sex reassignment surgery ("SRS") as a condition for altering the gender markers on their Hong Kong identity cards ("HKID cards"), unless they are otherwise medically exempted from doing so ("the Policy").

### Background

The Applicants are FtM transgender persons diagnosed with gender dysphoria. They acquired masculine bodily features after undergoing a lengthy course of medical and surgical treatments and were medically certified as no longer requiring further surgical procedures for psychological well-being and social integration. The Applicants then applied to the Commissioner for amending the gender markers on their HKID cards to reflect their acquired (male) gender. The Commissioner refused their applications ("Refusals") on the basis that they had not undergone full SRS as required by the Policy which, in the case of FtM, involves a highly invasive procedure to remove the uterus and ovaries and construct an artificial penis. This surgery carries certain post-operative risk and has possible complications, and is medically unnecessary for many transgender persons, including the Applicants.

### Proceedings in Courts below

The Applicants commenced judicial review proceedings against the Commissioner to challenge the Refusals as the same amount to an unlawful interference with their constitutional rights to privacy under Article 14 of the Hong Kong Bill of Rights ("BOR 14"), which 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."*



The judicial reviews were dismissed by the Court of First Instance and subsequent appeals were also dismissed by the Court of Appeal. The Court of Appeal held that the Policy engaged “core values relating to personal or human characteristics in terms of gender identity and physical integrity” so that it must be subject to the court’s vigilant scrutiny by the more stringent standard. The Applicants subsequently obtained leave to appeal to the Court of Final Appeal (“CFA”).

### CFA’s Determination

It was undisputed that the Applicants’ BOR 14 rights included their rights to gender identity and physical integrity. The Policy, as submitted by the Applicants, encroached upon such rights. The focus of the Applicants’ appeals before the CFA was on whether the criterion of full SRS could be justified as proportionate and as having struck a reasonable balance between the Policy’s societal benefits and the Applicants’ BOR 14 rights.

The CFA held that the Policy was disproportionate in its encroachment upon the Applicants’ BOR 14 rights. The CFA was unable to accept the following three justifications advanced by the Commissioner.

Firstly, the CFA did not accept a full SRS was the only workable, objective and verifiable criterion for amending the HKID card gender marker. The availability of a medical exemption under the existing Policy, as well as examples in other jurisdictions revealed that other criteria were workable without causing administrative difficulty.

Secondly, the CFA did not accept that practical administrative problems would arise if other criteria were adopted because of incongruence between a transgender person’s physical appearance and the HKID card gender marker since the kind of incongruence which most commonly arose was the discordance between the gender marker and a transgender person’s outward appearance, not the appearance of genital area. As such, leaving the gender marker unamended simply because a transgender person had not undergone full SRS led to greater confusion or embarrassment and rendered the gender marker’s identification function deficient.

Lastly, the CFA did not accept the exceedingly small risk of reversal of FtM transition resulting in pregnancy justified the full SRS requirement.

The CFA held that the Policy was disproportionate in its encroachment upon the Applicants' BOR 14 rights and considered that the Policy did impose an unacceptably harsh burden on individuals concerned and did not reflect a reasonable balance with societal benefits of the Policy.

The CFA unanimously allowed the Applicants' appeals and quashed the Refusals. It also granted a declaration that the Refusals and the Policy violated the Applicants' BOR 14 rights and were unconstitutional.

