

香港終審法院

THE HONG KONG COURT OF FINAL APPEAL

This Summary is prepared by the Court's Judicial Assistants

and is not part of the Judgment.

The Judgment is available at:

<https://www.hkcfa.hk/en/work/cases/index.html>

or

<https://legalref.judiciary.hk/lrs/common/ju/judgment.jsp>

PRESS SUMMARY

Q

Tse Henry Edward

v

Commissioner of Registration

*FACV Nos. 8 & 9 of 2022 (heard together) on appeal from CACV Nos.
183 & 184 of 2019*

[2023] HKCFA 4

APPELLANTS: Q and Tse Henry Edward

RESPONDENT: Commissioner of Registration

JUDGES: Chief Justice Cheung, Mr Justice Ribeiro PJ, Mr Justice Fok PJ, Mr Justice Lam PJ and Lord Sumption NPJ

COURTS BELOW: Court of First Instance (Au J); Court of Appeal (Poon CJHC, Kwan VP and Barma JA)

DECISION: Appeals unanimously allowed

JUDGMENT: Mr Justice Ribeiro PJ and Mr Justice Fok PJ delivering the Judgment with which the other members of the Court agreed

DATE OF HEARING: 4 January 2023

DATE OF JUDGMENT: 4 February 2023

REPRESENTATION:

Lord Pannick KC, Mr Hectar Pun SC and Mr Earl Deng, instructed by Haldanes, assigned by the Director of Legal Aid, for the Appellants

Ms Monica Carss-Frisk KC, Mr Stewart Wong SC and Ms Bonnie Y.K. Cheng, instructed by the Department of Justice, for the Respondent

SUMMARY:

1. Every Hong Kong Identity Card (“**HKID card**”) contains on its face the holder’s photograph and a gender marker indicating the holder as male or female. The gender marker merely operates as an element for verifying the holder’s identity; it neither establishes nor signifies recognition of the holder’s sex as a matter of law. However, for transgender persons seeking to have the gender marker amended to reflect their acquired gender (i.e. the gender with which they intrinsically identify, as opposed to the gender assigned at birth), the Commissioner of Registration (“**Commissioner**”) adopts a policy (“**Policy**”) requiring them to have undergone full sex reassignment surgery (“**SRS**”) unless they are medically exempted from doing so.
2. The appellants are female to male (“**FtM**”) transgender persons who have identified themselves as male since their youth. Having been diagnosed with gender dysphoria, they each underwent a lengthy course of medical and surgical treatments, including psychiatric treatment, hormonal treatment, mastectomy (the removal of breasts) and real life experience (living life as male with professional support and guidance). As a result, they have acquired masculine bodily features, and the gender dysphoria of each of them has been medically certified to have been sufficiently attenuated to enable their social integration and psychological well-being without the need for additional surgical procedures.
3. In the light of these changes, the appellants applied to the Commissioner to amend the gender markers on their HKID cards. 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 transsexualism, involves a highly

- invasive surgery to remove the uterus and ovaries and construct an artificial penis. This surgery carries certain post-operative risks and possible complications, and is medically unnecessary for many transgender persons, including the appellants.
4. The appellants brought judicial review proceedings to challenge the Refusals which they contended violate their constitutional right to privacy under Article 14 of the Hong Kong Bill of Rights (“BOR 14”). The judicial reviews were dismissed by both the Court of First Instance and the Court of Appeal. Leave to appeal to this Court were granted by the Court of Appeal.
 5. There was no dispute between the parties that:
 - (a) the appellants’ BOR 14 rights included their rights to gender identity and physical integrity;
 - (b) the Policy encroached upon such rights by causing the appellants regular humiliation, distress and loss of dignity in routine activities involving the production and inspection of their HKID cards, and requiring them to choose between suffering these consequences and undergoing a highly invasive and medically unnecessary surgery; and
 - (c) such encroachment was rationally connected with the legitimate aim of establishing a clear administrative guideline for deciding when an amendment to the HKID card gender marker was to be accepted.
 6. The focus of these appeals was on whether the condition of full SRS underlying the Policy could be justified as proportionate and as having struck a reasonable balance between the Policy’s societal benefits and the appellants’ BOR 14 rights.

The applicable standard of scrutiny

7. This Court agreed with the courts below that it was appropriate to apply the “no more than reasonably necessary” standard in assessing the proportionality of the Policy since it concerned core values relating to intimate personal characteristics which engaged a narrower standard of scrutiny.

Proportionality: reasonable necessity

8. Differing from the courts below, this Court held that the Policy was disproportionate in its encroachment upon the appellants' BOR 14 rights. This Court was unable to accept the following three justifications advanced by the Commissioner.
9. First, this Court did not accept that 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 of different policies adopted in other jurisdictions showed that other criteria were plainly workable without causing administrative difficulty. Should a criterion other than full SRS were to be adopted, any possibility of questionable medical certification could be addressed by the Commissioner stipulating what constituted acceptable certification.
10. Secondly, this Court did not accept that full SRS was justified by a need to avoid administrative problems that would allegedly arise if other criteria were to be adopted causing incongruence between a transgender person's physical appearance and the HKID card gender marker. The kind of incongruence which most commonly caused problems arose out of the discordance between the gender marker and a transgender person's outward appearance, not the appearance of the genital area. In the great majority of cases, leaving the gender marker unamended simply because a transgender person had not undergone full SRS produced greater confusion or embarrassment, and rendered the gender marker's identification function deficient. This Court did not deny that there were areas of society where genuine and difficult issues arose concerning the appropriate treatment of transgender persons, but the resolution of such difficulties normally did not bear on the HKID card gender marker.
11. Lastly, this Court did not accept that the exceedingly small risk of reversal of FtM transition leading to pregnancy justified the full SRS requirement.

Reasonable balance between the Policy's societal benefits and the appellants' rights

12. Since the Policy had failed the proportionality test, it was strictly unnecessary to go on to consider whether it had struck a reasonable balance. However, this Court considered that the Policy did impose an unacceptably harsh burden on the individuals concerned and did not reflect a reasonable balance with the societal benefits of the Policy.

Disposition

13. Accordingly, this Court unanimously allowed the appeals and quashed the Refusals. This Court also granted a declaration that the Refusals and the underlying Policy requiring FtM transgender persons to undergo full SRS as a necessary condition for amending the gender markers on their HKID cards, violated the appellants' BOR 14 rights and were unconstitutional.

