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In the Matter of the Application by Leung Chun-Kwong for Leave to Apply for Judicial Review

Written Submissions by the International Commission of Jurists

Introduction

1. The International Commission of Jurists ("ICJ") respectfully submits these written comments *In the Matter of Applicant Leung Chun-Kwong v. The Secretary for the Civil Service (Putative First Respondent) and the Commissioner of Inland Revenue (Putative Second Respondent)*, pursuant to an application filed with the Hong Kong Special Administrative Region Court of First Instance on 24 December 2015, to be heard on 15 December 2016.

2. The ICJ is an international non-governmental organization, established in 1952 and headquartered in Geneva, Switzerland. It consists of some 60 eminent jurists representing different justice systems throughout the world and has national sections and affiliated organizations in all regions of the world.¹ The ICJ has regional offices around the world, including in Bangkok, Thailand, where its Asia Pacific Programme is based. The ICJ works to advance the rule of law and the progressive development and implementation of international human rights law. In this context, it endeavours to promote States' compliance with their international human rights legal obligations, to support efforts to combat impunity and ensure legal accountability for human rights violations and access to effective remedies and reparations for victims. The ICJ holds consultative status at the Council of Europe, the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization and the African Union. The ICJ has also cooperated with various bodies of the Organization of American States and the Inter-Parliamentary Union.

3. The present submissions discuss two main points. *First*, they examine the approach taken by the European Court of Human Rights ("ECtHR") to such matters. In the jurisprudence of the European Convention on Human Rights ("ECHR"), two people who are lawfully and genuinely married to one another -- whether opposite or same-sex -- are deemed as of right to enjoy 'family life' with each other and, as a result, to be entitled to respect for and protection of their right to family life under Article 8 of the ECHR. We note that the Applicant in the present case and his partner contracted a lawful and genuine

¹ For more information, see: www.icj.org

marriage in New Zealand on 18 April 2014. Hence, following ECHR jurisprudence, this Court may take the view that they enjoy 'family life' with one another and, therefore, are likewise entitled to respect for and protection of their right to family life, which is similarly guaranteed under Article 14 of the Hong Kong Bill of Rights. In the alternative, should this Court take the view that the Applicant and his spouse are not entitled to be treated as a married couple under Hong Kong laws, it may consider adopting the so-called functional approach used by the ECtHR to ascertain whether people, including unmarried same-sex couples, enjoy 'family life' with each other within the meaning of Article 8 of the ECHR. Through such an approach this Court would be able to determine whether the Applicant and his partner in this case are entitled to respect for and protection of their right to family life. *Second*, the present brief makes some short remarks about discrimination on the grounds of sexual orientation under the ECHR and in European Union ("EU") law. In light of these submissions, the intervener finally draws the attention of this Court to the fact that under both ECHR and EU law same-sex couples found to be deserving of respect for and protection of the right to family life are also -- as of right -- entitled to the same rights and benefits conferred to their heterosexual counterparts without discrimination, including on the grounds of sexual orientation.

4. Article 25 of the Hong Kong Basic Law provides that "all Hong Kong Residents shall be equal before the law." This is echoed by Article 22 of the Hong Kong Bill of Rights, which states that, "all persons are equal before the law and are entitled without any discrimination to the equal protection of the law." Thus, Article 22 of the Hong Kong Bill of Rights prohibits any discrimination and guarantees to all persons equal and effective protection against discrimination on any ground, including sex. This provision has been interpreted by the Court of Appeal to prohibit discrimination based on sexual orientation. Specifically, in *Leung T.C. William Roy v. Secretary of State for Justice*,² the Court of Appeal held that the challenged statute in that case significantly affected homosexual men in an adverse way as compared to heterosexuals and therefore violated the constitutional right to equality. Further, the Court specifically held that "denying persons of a minority class the right to sexual expression in the only way available to them, even if that way is denied to all, remains discriminatory when persons of a majority class are permitted the right to sexual expression in a way natural to them." The Court ruled the challenged statute in that case to be 'disguised discrimination' "founded on a single base: sexual orientation."³
5. In addition, the Hong Kong Bill of Rights incorporates in domestic law the provisions of the International Covenant on Civil and Political Rights ("ICCPR"). Therefore, in its determination of the present case, this Court may find it helpful to have regard to pertinent interpretations of the ICCPR that have been provided by the United Nations ("UN") Human Rights Committee, the body of experts mandated to monitor the ICCPR and interpret its provisions. Of particular relevance to the present case, the Human Rights Committee has held that the prohibition of discrimination on the grounds of "sex" in Article 26 of the ICCPR, enshrining the right to equality before the law and equal protection of the law without any discrimination, is to be taken as including sexual orientation.⁴
6. Furthermore, the Court of Appeal has recognized that "decisions of the European Court of Human Rights on provisions of the European Convention that bear similarity to the Basic Law and the ICCPR are of considerable persuasive

² *Leung T.C. William Roy v. Secretary of State for Justice* [2006] 4 H.K.L.R.D. 211 (CA), para. 48.

³ *Ibid.*

⁴ *Toonen v. Australia*, UN Human Rights Committee, UN Doc. CCPR/C/50/D/488/1992 (4 April 1994).

authority.”⁵ The Court of Final Appeal held that in interpreting the Basic Law and Bill of Rights, the “court may consider it appropriate to take into account 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.”⁶

I. Same-sex married couples and “functional families” in ECHR Jurisprudence

7. Article 14 of the Hong Kong Bill of Rights guarantees the right of everyone to enjoy the protection of the law from arbitrary or unlawful interference with one’s family. Similarly, Article 8 of the ECHR expressly guarantees the right to respect for private and family life by stating that, “everyone has the right to respect for his private and family life.”
8. As mentioned above, under the jurisprudence of the ECtHR, the protection of Article 8 always extends to those that have contracted lawful and genuine marriages with one another, *ipso jure*. Thus, the concept of “family life” in the case-law of the Strasbourg Court encompasses the notion of families based on marriage. So long as the marriage is lawful and genuine, the ECtHR will consider same-sex married couples as entitled to the protection of family life as per Article 8 just as much as it would insofar as heterosexual couples lawfully and genuinely married are concerned. To do otherwise would constitute discrimination on the grounds of sexual orientation, which the ECHR prohibits.
9. There have been cases though where the absence of formal legal ties did not prevent the ECtHR from first ascertaining that the individuals concerned enjoyed family life with each other within the meaning of Article 8 and then, in light of this, upholding their right to respect for their family life, as protected by that provision of the European Convention.⁷ In those cases, the ECtHR carried out a fact-based inquiry into factors such as “whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together”⁸ to ascertain whether they enjoyed ‘family life’ within the meaning of Article 8 of the ECHR notwithstanding the fact that they were not married to one another. This ‘functional approach’ to assessing the existence of those family ties that deserve Convention protection characterizes the Court’s approach to ascertaining the existence of ‘family life’ for Article 8 purposes in cases involving same-sex couples as well.
10. The case of *Schalk and Kopf v. Austria* (2010) was significant as it established that unmarried same-sex couples, just as much as unmarried heterosexual couples, are capable of entertaining relationships constituting ‘family life’ pursuant to Article 8 of the ECHR. In those circumstances, Article 8 would guarantee their ‘family life’ the same respect and protection that by analogy it would afford to the family life enjoyed by heterosexual unmarried couples. Indeed, the *Schalk and Kopf* judgment noted that “... the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership,

⁵ *Law Society of Hong Kong v A. Solicitor* CACV280/2003, 25 November 2004, at para. 28.

⁶ *Shum Kwok Sher v. HKSAR* (2002) 5 H.K.C.F.A.R. 381, at para. 59.

⁷ See *Marckx v. Belgium*, ECtHR, Application No. 6833/74, Judgment of 13 June 1979, para. 40, where the Court held that “members of the ‘illegitimate family’ enjoy the guarantees of Article 8 on an equal footing with the members of the traditional family”; See also *Van der Heijden v. The Netherlands*, ECtHR, Application No. 42857/05, Judgment of 3 April 2012, para. 50.

⁸ *Emonet v. Switzerland*, ECtHR, Application no. 39051/03, Judgment of 13 December 2007, paras 34-36.

*falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would."*⁹

11. In *Kozak v. Poland*,¹⁰ the ECtHR held that courts must be discerning when interpreting the definition of 'a family' and must take into consideration societal developments, including a broader acceptance of sexual minority rights. The Strasbourg Court therefore could not accept a blanket exclusion of same-sex couples from tenancy succession rights.
12. In *Pajić v. Croatia*,¹¹ the ECtHR held that an unmarried same-sex couple's stable relationship of two years came within the definition of "family life" under Article 8 of the ECHR. The ECtHR noted that a considerable number of States of the Council of Europe had taken steps to recognize and protect same-sex couples' relationships, and that it would be artificial to maintain that a same-sex couple cannot enjoy "family life".
13. In *P.B and J.S v Austria*,¹² In *P.B and J.S v Austria*,¹³ the Strasbourg Court held that a "cohabiting same-sex couple living in a stable *de facto* partnership [fell] within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would",¹⁴ and it was therefore protected by Article 8. Further, that there had been a substantial difference in treatment in comparison to opposite-sex couples when assessing an extension of one partner's life insurance.
14. The basis for these findings is that both same-sex and opposite-sex couples may enjoy "family life" under Article 8, and when they do, then same-sex couples are deserving of the same rights and benefits that domestic law affords to opposite-sex couples, including in the field of taxation, health benefits, property and social issues.
15. Indeed, the right to equality before the law, equal protection of the law without discrimination based on sexual orientation, and to enjoy all human rights equally, including the right to respect for one's family life, is firmly enshrined in international human rights law, including the ICCPR and the ECHR. As the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* helpfully summarize, "Human beings of all sexual orientations and gender identities are entitled to the full enjoyment of all human rights."¹⁵ "Everyone has equal access to social security and other social protection measures, without discrimination on the basis of sexual discrimination or gender identity. States shall take necessary legislative, administrative and other measures to ensure equal access, without discrimination on the basis of sexual orientation...to social security and other social protection measures including employment benefits...health insurance...family benefits..."¹⁶
16. In addition, there are several significant EU recommendations that have specifically called for recognition of the principle that same-sex partnerships as a "family" are to be afforded equal legal recognition of their rights and benefits. Similarly, within the Council of Europe, Recommendation 1470 (2000) of the

⁹ *Schalk and Kopf v. Austria*, ECtHR, Application no. 30141/04, Judgment of 24 June 2010, para. 94.

¹⁰ *Kozak v. Poland*, ECtHR, Application no. 13102/02, Judgment of 2 March 2010.

¹¹ *Pajić v. Croatia*, ECtHR, Application no. 68453/13, Judgment of 23 February 2016.

¹² *P.B. and J.S. v. Austria*, ECtHR, Application no. 18984/02, Judgment of 22 July 2010.

¹³ *P.B. and J.S. v. Austria*, ECtHR, Application no. 18984/02, Judgment of 22 July 2010.

¹⁴ *P.B. and J.S. v. Austria*, para. 30.

¹⁵ Yogyakarta Principle 1 <http://www.yogyakartaprinciples.org/principles-en/>.

¹⁶ *Ibid*, Principle 13.

Parliamentary Assembly of the Council of Europe, for instance, recommends that States should "review their policies in the field of social rights and protection of migrants in order to ensure that homosexual partnerships and families are treated on the same basis as heterosexual partnerships and families."¹⁷

II. Discrimination on the basis of sexual orientation under the ECHR and in EU law.

17. The case-law of ECtHR makes clear that not every difference in treatment will amount to prohibited discrimination under the ECHR. However, the Strasbourg Court has held that "differences based on sexual orientation require particularly serious reasons by way of justification."¹⁸

18. Although Article 14 of the ECHR does not specifically include sexual orientation among the grounds on which discrimination is prohibited, the ECtHR has espoused the doctrine according to which the Convention is a living instrument,¹⁹ and in its case-law the Strasbourg Court has repeatedly held that sexual orientation is to be included within the meaning of "other status" under Article 14 as an additional ground on which discrimination is proscribed.²⁰ Indeed, the ECtHR has repeatedly confirmed that the prohibition of discrimination under Article 14 of the ECHR "duly covers questions related to sexual orientation and gender identity".²¹ In *Smith and Grady v. the United Kingdom*, for example, the ECtHR reiterated that, "when the relevant restrictions concern 'a most intimate part of an individual's private life'", such as is the case with respect to differences in treatment based on sexual orientation, "there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8 § 2 of the Convention".²² Moreover, in the case of *Alekseyev v. Russia*, the Strasbourg Court held that: "when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation [...] it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention".²³

¹⁷ Recommendation 1470 (2000) of the Parliamentary Assembly – Situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe, adopted by the Assembly on 30 June 2000, para. 7(ii)(d), available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Publications/LGBT_en.pdf

¹⁸ *S.L. v. Austria*, ECtHR, Application no. 45330/99, Judgment of 9 April 2003, para. 37, citing *Smith and Grady v. United Kingdom*, ECtHR, Applications Nos. 33985/96 and 33986/96, Judgment of 27 September 1999.

¹⁹ *Tyrer v. the United Kingdom*, ECtHR, Application No. 5856/72, Judgment of 25 April 1978, para. 31.

²⁰ See, for example, *Salgueiro da Silva Mouta v. Portugal*, ECtHR, Application No. 33290/96, Judgment of 21 December 1999, para. 28; *Fretté v. France*, ECtHR, Application No. 36515/97, Judgment of 26 February 2002, para. 32; *S.L. v. Austria*, ECtHR, Application No. 45330/99, Judgment of 9 January 2003, para. 37; and *E.B. v. France* [GC], ECtHR, Application No. 43546/02, Judgment of 22 January 2008, para. 50; *Kozak v. Poland*, ECtHR, Application No. 13102/02, Judgment of 2 March 2010, paras 91-92; *Alekseyev v. Russia*, ECtHR, Application Nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, para. 108; *X v. Turkey*, ECtHR, Application No. 24626/09, Judgment of 9 October 2012, para. 50.

²¹ *Identoba v. Georgia*, ECtHR, Application No. 73235/12, Judgment of 12 May 2015, para. 96.

²² *Smith and Grady v. the United Kingdom*, ECtHR, Application Nos. 33985/96 and 33986/96, Judgment of 27 September 1999, para. 89; see also, *Karner v. Austria*, ECtHR, Application No. 40016/98, Judgment of 24 July 2003, paras 37 and 42; and *X and Others v. Austria* [GC], ECtHR, Application No. 19010/07, Judgment of 19 February 2013, para. 99.

²³ *Alekseyev v. Russia*, ECtHR, Application Nos. 4916/07, 25924/08 and 14599/09, Judgment of 21 October 2010, para. 108: "Where a difference of treatment is based on sex or sexual orientation, the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not only require that the measure chosen be generally adapted to the objective pursued; it must also be shown

19. Furthermore, the fact that there is "a predisposed bias on the part of the heterosexual majority against a homosexual minority" does not amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.²⁴ Thus, discrimination on the grounds of sexuality/sexual orientation is considered 'suspect', and the ECtHR subjects it to 'particularly severe scrutiny'.
20. In the specific context of discrimination on the grounds of sexual orientation as alleged in the present case, the Strasbourg Court has found violations in respect of the enjoyment of the right to private and family life, *inter alia*, when applicants have been refused child custody;²⁵ in respect of adoption matters;²⁶ in connection with granting of parental responsibility;²⁷ in connection with army discharge;²⁸ when people have been denied the right to succeed to a deceased partner's tenancy;²⁹ social security cover;³⁰ and access to marriage or other form of legal partnership recognition.³¹
21. In its case law, the ECtHR has held that there is to be no discrimination against a *de facto* same-sex couple on the grounds that they are not married if the State does not recognize same-sex marriage, or if their marriage is not recognized under State law. In addition to undermining 'family life', it is a question of discrimination on the basis of sexual orientation and this is a violation of Article 8 in conjunction with Article 14 of the ECHR.
22. In the case of *Karner v. Austria*,³² the Strasbourg Court held that same-sex couples must generally be granted the same rights as opposite-sex ones. Any difference of treatment based on the apparently neutral marriage requirement is discriminatory if it has no objective and reasonable justification. "37. ... Just like differences [in treatment] based on sex, differences [in treatment] based on sexual orientation require particularly serious reasons by way of justification ..." In *D.H. and Others v. the Czech Republic*, the ECtHR held that a failure to treat same-sex couples differently to opposite-sex couples because of their inability to marry and therefore providing them with an alternative qualifying means for that right or benefit, was indirect discrimination and required an objective and reasonable justification.

that it was necessary in the circumstances"; *X v. Turkey*, para. 50: Indeed, "[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention"; *Pajić v. Croatia*, ECtHR, Application No. 68453/13, Judgment of 23 February 2016, para. 59 and *Salgueiro da Silva Mouta v. Portugal*; *E.B. v. France*; *X and Others v. Austria*; and *Vallianatos and Others v. Greece* cited therein.

²⁴ *S.L. v. Austria*, ECtHR, Application No. 45330/99, Judgment of 9 January 2003, para. 44.

²⁵ *Salgueiro da Silva Mouta v. Portugal*, ECtHR, Application No. 33290/96, Judgment of 21 December 1999.

²⁶ *Fretté v. France*, ECtHR, Application No. 36515/97, Judgment of 26 February 2002; and *Gas and Dubois v. France*, ECtHR, Application No. 25951/07, Judgment of 15 March 2012; *X and Others v. Austria* [GC], ECtHR, Application No. 19010/07, Judgment of 19 February 2013.

²⁷ *Salgueiro da Silva Mouta v. Portugal*.

²⁸ *Lustig Prean and Beckett v. the United Kingdom*, nos 31417/96 and 32377/96, ECtHR, judgment, 27 September 1999; *Smith and Grady v. the United Kingdom*, nos 33985/96 and 33986/96, ECtHR, judgment, 27 September 1999; *Perkins and R. v. the United Kingdom*, nos 43208/98 and 44875/98, ECtHR, judgment, 22 October 2002; and *Beck, Copp and Bazeley v. the United Kingdom*, nos 48535/99, 48536/99 and 48537/99, ECtHR, judgment, 22 October 2002.

²⁹ *Kozak v. Poland*, ECtHR, Application No. 131021/02, Judgment of 2 March 2010.

³⁰ *P.B. and J.S. v. Austria*, ECtHR, Application No. 18984/02, Judgment of 22 July 2010.

³¹ *Schalk and Kopf v. Austria*, ECtHR, Application No. 30141/04, Judgment of 24 June 2010; *Vallianatos and others v. Greece* [GC], ECtHR, Application Nos 29381/09 and 32684/09, Judgment of 7 November 2013; and *Oliari and Others v. Italy*, ECtHR, Application nos. 18766/11 and 36030/11, Judgment of 21 July 2015.

³² *Karner v. Austria*, ECtHR, Application No. 40016/98, Judgment of 24 October 2003.

23. In the case of *Taddeucci and McCall v. Italy*³³, the Strasbourg Court held that it is a violation of Article 14 and Article 8 of the ECHR to exclude a same-sex couple, who were unable to marry, from benefits available to married opposite-sex couples. While as an unmarried same-sex couple they were afforded the same treatment as an unmarried opposite-sex couple, they were not in a comparable situation to the latter, since they were unable to marry.
24. In light of the above, *a fortiori*, under the case-law of the ECtHR, same-sex spouses who have contracted a lawful and genuine marriage should not be denied benefits guaranteed to heterosexual married spouses simply because the Respondent State does not recognize same-sex marriages.
25. Turning to the EU law, Article 12 of the Council Directive 2000/78/EC prohibits direct or indirect discrimination based on sexual orientation with respect to "employment and social protection." Article 21 of the EU Charter of Fundamental Rights, expressly prohibits discrimination based on sexual orientation.³⁴
26. Furthermore, in its 2009 Annual Report, the EU Agency for Fundamental Rights has recognized that, "any measures denying to same-sex couples benefits ... available to opposite-sex married couples, where marriage is not open to same-sex couples, should be treated presumptively as a form of indirect discrimination on grounds of sexual orientation", and that "international human rights law complements EU law, by requiring that same-sex couples either have access to an institution such as ... registered partnership[,] that would provide them with the same advantages ... [as] marriage, or ... that their *de facto* durable relationships extend such advantages to them".³⁵
27. In light of the above, *a fortiori*, when the individuals concerned have contracted a lawful and genuine same-sex marriage, EU law will protect them should they be denied access to benefits that their heterosexual counterparts enjoy by virtue of the recognition afforded to their opposite-sex marriage; denial of such benefits to same-sex spouses in those circumstances would constitute proscribed discrimination based on sexual orientation in EU law.

Conclusion

28. The principles of equality before the law and equal protection of the law without any discrimination, together with the right to respect for one's "family life" in conjunction with freedom from discrimination, are the core issues in this matter. Internationally, courts, including the ECtHR, are recognizing that same-sex couples have the same rights as opposite-sex couples and are in need of legal recognition and protection of their relationships, married or unmarried.
29. The intervener respectfully draws to the attention of this Court the fact that, all things being equal, before the Strasbourg Court the Applicant in the present case and his spouse would be regarded as entitled to respect for their "family life" since, pursuant to ECHR jurisprudence, those who have contracted lawful and genuine marriages – be they same-sex or opposite-sex couples – enjoy "family life" with one another within the meaning of Article 8 of the ECHR *ipso jure*. They would therefore be entitled to be afforded any consequential rights and benefits that would accrue to their heterosexual counterparts under the law of the

³³ *Taddeucci and McCall v. Italy*, ECtHR, Application No. 51362/09, Judgment of 30 June 2016.

³⁴ http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:OJ.C_.2010.083.01.0389.01.ENG.

³⁵ EU Agency for Fundamental Rights, 2009 Annual Report, pages 58 to 59, available at http://fra.europa.eu/sites/default/files/fra_uploads/480-FRA-AnnualReport09_en.pdf.

Respondent government without discrimination. Furthermore, the ECHR clearly prohibits any interference with Article 8 rights solely based on discrimination on the basis of sexual orientation. The intervener also draws this Court's attention to the fact that the same would be equally true under EU law.

30. Under Article 8 of the ECHR, the Applicant and his partner would be regarded as entitled to respect for their "family life" and afforded their consequential rights and benefits accordingly. The refusal to grant them the same rights as that of a married opposite-sex couple is an interference with a core element of their "family life" under Article 8 and their right to respect for that life. Even though Hong Kong does not yet recognize equal access to legal marriage for same-sex couples, according to ECtHR and EU law, limiting or prohibiting particular rights and benefits allowed to married opposite-sex couples, while failing simultaneously to provide means for same sex couples to qualify, constitutes prohibited discrimination based on sexual orientation. There is a substantial difference of treatment in comparison with heterosexual couples who are able to marry and for that marriage to be legally recognized and be afforded consequential benefits. Further, there is no justification in this discrimination and no legitimate aim for the difference in treatment based on sexual orientation, for or by the State in its exclusion under the Civil Service Regulations or the Inland Revenue Department.

Dated 29 November 2016



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