

Secretary for Justice v Chan Wah

FACV 11 and 13/2000

(A Case where EOC acted as Amicus Curiae)

Background

Two non-indigenous villagers challenged the validity of the village representative election arrangements in the villages they lived in. This case involved a number of constitutional and administrative law issues, and the EOC was involved in this case by acting as Amicus Curiae* for issues relating to the Sex Discrimination Ordinance (SDO). The relevant points in the Court's decision as related to discrimination issues are detailed below.

The Court's decision

First, in the villages concerned, non-indigenous females married to male indigenous villagers had the right to vote, while non-indigenous males married to female indigenous villagers were not entitled to the same right. The Court held that this amounted to sex discrimination against men under the SDO.

Second, due to the above arrangement, married non-indigenous females enjoyed the right to vote, whereas single non-indigenous females did not. This amounted to marital status discrimination under the SDO.

Third, in order to have the right to vote, married female indigenous villagers must have resided in the village for seven years while there was no such requirement for married male indigenous villagers.

*Amicus Curiae: one (as a professional person or organisation) that is not a party to a particular litigation but that is permitted by the court to advise it in respect to some matter of law that directly affects the case in question. (Source: Merriam-Webster Dictionary)

Fourth, female indigenous villagers were excluded from standing as candidates in elections, while there was no such prohibition against male indigenous villagers. These amounted to sex discrimination against women under the SDO.

The Court of Final Appeal restated the following general legal principles which are relevant to all sex discrimination cases:

1. In considering whether a particular arrangement is discriminatory or not, the Court will adopt the "but for" test, to look at whether there is a less favourable treatment on the ground of a person's sex. For example, if a female would have received the same treatment as a male but for her sex, then there is discrimination.
2. The intention or motive of the defendant to discriminate is not a necessary condition to liability, though it may be a relevant consideration. A prima facie case of discrimination will arise when a particular arrangement has the effect of favouring some persons because of their sex or marital status.