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Refusal to give married same-sex Hong Kong couple public housing ‘unconstitutional’, rules High Court

Decision comes after legally married pair were refused public housing despite meeting all eligibility criteria. Housing Authority had denied claim because it said marriage must be between a man and a woman.

By Jasmine Siu and Lilian Cheng

South China Morning Post (04.03.2020) – <https://bit.ly/2Q0X4nA>
– The Hong Kong government’s policy of denying legally married same-sex couples the right to apply for public housing is

unlawful and unconstitutional, the High Court has declared.

The court on Wednesday allowed a judicial review mounted by permanent resident Nick Infinger over the Housing Authority's decision to bar him and his husband from renting a public housing flat.

Mr Justice Anderson Chow Ka-ming acknowledged the government was pursuing a legitimate aim of supporting traditional family formations through providing for their housing needs, and that public flats were highly limited.

But the judge also concluded that the authority had failed to justify its differential treatment that had "resulted in an unacceptably harsh burden on same-sex couples lawfully married overseas, including the applicant".

So he quashed the authority's decision and ordered Infinger's application be referred back for fresh consideration with priority.

The case was the first judicial challenge to affect low-income same-sex couples after the city's LGBT community won several high-profile court cases against the government in recent years.

It was put forward by the same lawyers – Michael Vidler and barrister Timothy Parker – who in 2018 successfully challenged the city's immigration policy to grant same-sex partners spousal visas previously available only to heterosexual couples, in a case mounted by a British citizen, known in court as QT.

Vidler said: "Today's judgment will have a real and positive impact on the lives of low-income LGBTI people in Hong Kong."

Infinger said the ruling "highlights yet another example of the discriminatory and unconstitutional government policies that LGBTI people in Hong Kong face every day". *HRWF LGBTQI*

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“How many judgments against the government does it take before the government stops relying on discriminatory policies and introduces LGBTI discrimination legislation in Hong Kong?” he said in a statement issued through Vidler’s firm.

The court heard Infinger, who was 25 when he filed the legal challenge, married his husband in Canada and applied for public housing under the category of “ordinary family” in March 2018.

His legal team found he had satisfied all the eligibility criteria: he was married; both he and his spouse were permanent Hong Kong residents over the age of 18; and neither owned any domestic properties or exceeded the limits on income or assets.

But the authority rejected the bid on September 7 of the same year, stating with reference to the Oxford English Dictionary that he was ineligible because the relationship between the applicant and family members must be either husband and wife, parent and child, grandparent and grandchild.

The policy meant Infinger was only eligible for non-elderly one-person flats.

Parker argued that the existing framework amounted to “direct and deliberate” exclusion of same-sex couples from housing benefits.

But Abraham Chan Lok-shung SC, for the authority, said the government was entitled to deny public housing to same-sex couples because there were not enough flats to meet the demand of the city’s low-income residents.

The authority, however, could not provide reliable data on how many married same-sex couples would apply for family flats if it were not for its policy, or how relaxing this rule would

affect the overall availability of public housing.

Chow concluded: "I am not satisfied that the differential treatment under the [policy] is a proportionate means of achieving the family aim."

Rainbow Action, a local LGBT rights group, welcomed the court ruling and urged the government to immediately introduce a sexual orientation discrimination ordinance to protect homosexuals.

In a reply to Post inquiries, a spokesman for the authority said from its records, it had only received the one application from same-sex couples. The authority would carefully study the judgment and seek legal advice for taking appropriate follow-up actions, he added.

"As the authority needs to carefully study the judgment and take appropriate follow-up actions accordingly, we are unable to estimate the impact of the judgment on demand for public rental housing," he said.

The spokesman emphasised that according to the established policy for public rental housing applications, the relationship between the applicant and family members must be either husband and wife, parent and child, grandparent and grandchild. In light of the definition of "husband and wife", the authority did not accept the application of the applicant and his same-sex spouse.

Anthony Chiu Kwok-wai, a member of the authority's subsidised housing committee, believed there was a high chance that the authority would appeal, given the chain effects on housing resources that the court ruling might have.

"There might be many more gay couples who previously did not show an interest who will apply for public housing, thus affecting the waiting time for family applicants, the transfer of titles," Chiu said.

“It also affects the number of people purchasing subsidised housing, as family applicants would have a higher chance to get a flat under the current policy.”

Chiu said the authority had not provided any estimated figures in the past, and he would raise the item for discussion in their coming meeting next Tuesday.

Currently, the average waiting time for family applicants stands at 5.4 years, with 151,900 applications in line.

But for the 108,500 non-elderly one-person applications, homes are allocated under the quota and points system. Nine points will be given to an applicant every year, while a singleton has to accrue 438 points to get a public housing flat.

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