



### Summary of Judicial Decision

#### **Infinger Nick v The Hong Kong Housing Authority HCAL 2647/2018; [2020] HKCFI 329**

**Decision** : **Application for judicial review allowed**  
**Date of Hearing** : **27 September 2019**  
**Date of Judgment** : **4 March 2020**

#### Background

1. This judicial review application concerns the Housing Authority (“**HA**”)’s Public Rental Housing (“**PRH**”) policy which excluded same-sex married couples from applying for PRH as “Ordinary Families”.
2. The Applicant was a Hong Kong permanent resident who entered into a same-sex marriage with his male partner in Canada (“**Partner**”). He challenged that the PRH Policy, and HA’s decisions of finding him not eligible for applying PRH and not registering his PRH application:-
  - (i) constituted unjustified discrimination against the Applicant and the Partner on the ground of sexual orientation and therefore violated their right to equality under Article 25 of the Basic Law (“**BL**”) and Article 22 of the Hong Kong Bill of Rights (“**HKBOR**”);
  - (ii) were *Wednesbury* unreasonable for violating the principle of equality; and
  - (iii) constituted unjustified restriction of the Applicant’s and the Partner’s right to private and family life without distinction as to sexual orientation under Article 14 of HKBOR in conjunction with Article 1(1) of HKBOR.
3. Leave to apply for judicial review on the aforesaid grounds was granted by the Court of First Instance (“**CFI**”) on paper on 23 November 2018. The substantive application for judicial review was heard on 27 September 2019 before the CFI. On 4 March 2020, the CFI allowed the application for judicial review.

#### Issues in dispute

4. The principal issue identified by the CFI was whether HA’s policy to exclude same-sex married couples from eligibility to apply for PRH as “Ordinary Families” was unlawful and/or unconstitutional for being in violation of Article 25 of BL and/or Article 22 of HKBOR.



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## Department of Justice's Summary of the Court's rulings

(Full text of the CFI's judgment at

[https://legalref.judiciary.hk/lrs/common/search/search\\_result\\_detail\\_frame.jsp?DIS=126959&QS=%2B&TP=JU](https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=126959&QS=%2B&TP=JU))

5. The CFI allowed the judicial review application on the grounds that the PRH policy constituted unlawful discrimination in violation of Article 25 of BL and/or Article 22 of HKBOR (paras. 1-2). The Court did not consider it necessary to deal with the other grounds of review (para. 54).
6. The CFI found that there was no relevant difference between heterosexual and same-sex married couples for the purpose of applying for PRH, hence the exclusion of same-sex married couples under the PRH policy constituted differential treatment based on sexual orientation (para. 36).
7. Having found that the exclusion of same-sex couples constituted differential treatment, the CFI then went on to consider the lawfulness of the same by applying the 4-step justification test:
  - (1) **Legitimate aim:** The CFI accepted that the aim of (i) ensuring a fair and rational allocation of the scarce PRH resources; and (ii) supporting existing and the institution of traditional heterosexual families as a whole could be regarded as a legitimate aim (paras. 50-51(1)). The CFI however rejected HA's argument that the differential treatment was justified by a separate but complementary aim to ensure the administrative effectiveness in implementing the overall PRH policy (paras. 52-53);
  - (2) **Rational Connection:** The differential treatment under the PRH policy may be regarded as rationally connected to the legitimate aim as the availability of adequate housing could support existing traditional families constituted by heterosexual marriage and have positive impact on marriage plans / family planning of heterosexual couples (para. 51(2));
  - (3) **Proportionality:** There was however a lack of (reliable) evidence before the CFI which permitted the CFI to conclude that the exclusion of same-sex couples from the PRH policy would make any real difference to the overall availability of PRH to traditional heterosexual families or unmarried couples intending to form traditional families (e.g. statistics of eligible same-sex couples, impact analysis on the waiting time for PRH). Hence



the policy was not a proportionate means of achieving the legitimate aim (para. 51(3)); and

- (4) **Fair balance between societal interest and individual rights:** Following from (3), the CFI found the differential treatment under the PRH policy resulted in an unacceptably harsh burden on same-sex couples (para. 51(4)).
8. Regarding HA's argument on the scarcity of PRH resources and the lower standard for assessing proportionality, the CFI found that:
- (1) While the scarcity of PRH resources would be a relevant factor in the overall assessment of the proportionality of the differential treatment under the PRH policy, it should not be overly emphasized (para. 42); and
  - (2) Taking into account the resources argument, the appropriate standard for assessing proportionality in the present case should be somewhere in the middle of the continuous spectrum of reasonableness (para. 44). The CFI did not accept that a lower standard or intensity of review should be applied in a case of indirect discrimination (para. 46).
9. The CFI allowed the judicial review application and granted a declaration that the PRH policy to exclude same-sex couples who have entered into lawful and monogamous marriages overseas from eligibility to apply for PRH as Ordinary Families under the General Application category was unlawful and unconstitutional for being in violation of Article 25 of BL and Article 22 of HKBOR. The HA's decisions of finding the Applicant not eligible for applying for PRH and not registering his PRH application were brought up and quashed, and the Applicant's PRH application was remitted to the HA for fresh consideration (paras. 56-57).

**Civil Division**

**Department of Justice**

**March 2020**