CACV 81/2020 and CACV 362/2021, [2024] HKCA 185

On Appeal From [2023] HKCA 1178

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

# COURT OF APPEAL

CIVIL APPEAL NO 81 OF 2020

(ON APPEAL FROM HCAL NO 2647 OF 2018)

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BETWEEN

INFINGER, NICK Applicant

and

THE HONG KONG HOUSING AUTHORITY Respondent

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

and

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

# COURT OF APPEAL

CIVIL APPEAL NO 362 OF 2021

(ON APPEAL FROM HCAL NO 2875 OF 2019)

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BETWEEN

NG HON LAM EDGAR Applicant

LI YIK HO Substituted Applicant

and

THE HONG KONG HOUSING AUTHORITY Respondent

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

(heard together)

Before: Hon Poon CJHC, Barma JA and Au JA in Court

Dates of Written Submissions: 28 November, 12 and 19 December 2023

Date of Decision: 26 February 2024

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D E C I S I O N

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Hon Au JA (giving the Decision of the Court):

On 17 ‍October 2023, this court handed down its judgment (“**the CA Judgment**”) dismissing the respective respondents’ appeals.

By way of two identical Notices of Motion dated 14 ‍November 2023 filed respectively under CACV ‍81/2020 and CACV‍ 362/2021, the respective respondents in each of these appeals seek leave to appeal the CA Judgment to the Court of Final Appeal.

The facts and issues in the appeals, as well as this court’s reasons for dismissing them, are set out in the CA Judgment. We will not repeat them here. Unless otherwise stated, we will also adopt in this decision the abbreviations used in the CA Judgment.

After reviewing the Notices of Motion, we see no reason to deviate from the usual practice to consider this application on paper pursuant to paragraph‍ 3 of Practice Direction‍ 2.1

Section‍ 22(1)(b) of the Hong Kong Court of Final Appeal Ordinance, Cap‍ 484 provides that an appeal shall lie to the Court of Final Appeal at the discretion of this court or the Court of Final Appeal if the question involved in the appeal is one which, by reason of its great general or public importance, or otherwise, ought to be submitted to the Court of Final Appeal for decision.

In the Notices of Motion, the respondents have set out the following six questions which they say are of great general or public importance:

1. Does BL36 confer on opposite-sex married couples:
   1. a constitutional right, as defined by the eligibility rules in existence as at 1 July 1997, to exclusively apply for PRH units as spouses under the “Ordinary Families” category;
   2. a constitutional right, as defined by the eligibility rules in existence as at 1 July 1997, to exclusively apply to purchase HOS units under the spousal category.
2. Is the applicants’ reliance on BL25 and BOR22 precluded by a coherent and holistic interpretation of the Basic Law in line with BL36, BL37 and BOR19?
3. Are same-sex couples and opposite-sex couples proper comparators in relation to the differential treatment conferred by the PRH and HOS Spousal Policies under challenge, in circumstances where:
   1. It is the HA’s policy decision to align with and support the broader and unchallenged governmental objective of promoting population growth by increasing hosing availability.
   2. Opposite-sex couples as a general category (and notwithstanding exceptions in individual cases) possess inherent procreative capacities not possessed by same‑sex couples.
4. Where it has already been found that there is a logical connection between the Family Aim and the HOS Spousal Policy, is it open to the court to nonetheless find that the connection is “*de minimis*”, especially where there is no affirmative evidence to that effect?
5. Where the HOS Spousal Purchase Policy has not been challenged or found unlawful, is the administrative coherence between the HOS Spousal Policy and the HOS Spousal Purchase Policy a relevant factor in assessing the proportionality of the HOS Spousal Policy?
6. In assessing the proportionality of the PRH and HOS Spousal Policies:
   1. Should the court take into account the BL36 right to social welfare enjoyed by opposite-sex couples as set out in paragraph (1)(a) above, as well as more generally opposite-sex couples’ interest in being able to hitherto apply exclusively for PRH and/or HOS units under the spousal category?
   2. Is empirical or statistical evidence necessary when considering whether the PRH Spousal Policy would increase the number of PRH units available to opposite‑sex couples, in circumstances where (i) it is undeniable that whenever a PRH unit becomes available and is allocated to a same-sex couple, at least one eligible traditional family will be unable to enjoy that unit for the duration of its occupancy; and (ii) the PRH Spousal Policy serves as a long term housing policy.
   3. Is empirical or statistical evidence necessary when considering whether the HOS Spousal Policy would increase the number of HOS units available to opposite‑sex couples, in circumstances where (i) some same-sex couples are likely to be deterred by the HOS Spousal Policy to apply to purchase a HOS flat, and (ii) whenever a HOS unit becomes available and is allocated to a same-sex couple, at least one eligible traditional family will be unable to enjoy that unit for the duration of its occupancy.

We agree that these questions are of great general or public importance. The relevance and impact of BL36 on the constitutionality or lawfulness of the existing policies concerning the allocation of public or subsidized housing (in that whether those policies are discriminatory against same sex spouses validly married overseas) are clearly issues of great general or public importance. These questions are all either directly or indirectly connected to those issues.

Further, despite the applicants’ contrary submissions, we are of the view that the grounds of appeal as set out in the Notices of Motion cannot be said to be unarguable.

In the premises, and for the above reasons, we will grant leave to the respondents to appeal the CA Judgment to the Court of Final Appeal for the questions and under the grounds of appeal as set out in the Notices of Motion.

We further order on a *nisi* basis that:

1. The costs of these applications be in the cause of the appeal.
2. Mr Infinger’s own costs in this application under CACV  81/2020 and Mr Li Yik Ho’s own costs in this application under CACV 362/2021 shall be taxed in accordance with legal aid regulations.

(Jeremy Poon) (Aarif Barma) (Thomas Au)

Chief Judge of the Justice of Appeal Justice of Appeal

High Court

Written submissions by Mr Abraham Chan SC and Mr John Leung, instructed by Woo, Kwan, Lee & Lo, for the Respondent in both actions

Written submissions by Mr Timothy Parker and Mr Geoffrey Yeung, instructed by Messrs Haldanes, assigned by the Director of Legal Aid, for the Applicant in CACV ‍81/2020

Written submissions by Mr Jin Pao SC and Mr Azan Marwah, instructed by Daly & Associates, assigned by the Director of Legal Aid, for the Substituted Applicant in CACV 362/2021