



“Our Work Will Go On”

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UK Privy Council Backs Government of Bermuda in Defeat for Marriage Equality

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March 14, 2021 – Today, Bermuda’s highest judicial body, the Privy Council’s Judicial Committee, sided with the Government of Bermuda’s appeal and delivered a disappointing defeat to Bermuda’s marriage plaintiffs and OUTBermuda.

By a vote of 4 to 1 in the case of ***Attorney General of Bermuda v. Ferguson (and others)***, the Privy Council agreed that the Government of Bermuda may regulate and restrict marriage licenses only to those between a man and a woman – actions which do not violate the Bermudian constitution (although they would have violated the Human Rights Act 1981, but for its amendment by the Bermuda Government to permit sexual orientation discrimination). The judgment reverses previous decisions reached by Bermudian courts that declared same-sex couples may constitutionally marry in Bermuda, as they have now done since 2017.

In effect, the Privy Council ruled that the Government could amend its Human Rights Act to take away human rights. The Privy Council also made it clear that a future Bermuda Government could, at the stroke of a pen, reinstate those human rights.

Given the disappointing ruling, OUTBermuda’s attorneys cited the powerful dissenting judgment of Lord Sales, one of the leading judges in the UK Supreme Court, in which he castigates the Privy Council for failing to recognize the clear human rights violation by the Bermuda Government. No doubt, as often happens with powerful dissenting judgments, future generations and future courts will be inspired by them.

It is also noteworthy that the Bermuda Government delayed the hearing in the Privy Council, to a date after the retirement of the former President of the Court, Lady Hale. Lady Hale was considered a highly respected progressive most likely to have led the court in another direction. Some seasoned commentators conclude that the current UK Supreme Court clearly appears to be stepping back from the progressive views it previously espoused. (See: <https://www.thejusticegap.com/under-lord-reed-the-court-has-retreated-into-itself/> and <https://lrb.co.uk/the-paper/v44/n02/conor-gearty/in-the-shallow-end>.)

Although the Privy Council turned aside previous marriage court victories, there are uncounted numbers of same-sex couples who have been granted Bermudian marriage licenses since 2017 leading up to the passing of the Domestic Partnership Act. It is not clear yet how the Government will manage the many marriages that have taken place since the passing of the Act.

Lead co-plaintiff Roderick Ferguson said, “To my fellow LGBTQ+ Bermudians, I wish to say to you what I also need to hear at this moment. You matter. Your hurt matters. You deserve better than this. The Bermuda Government’s crusade against same-sex marriage was waged to convince you that there’s something shameful about your sexuality. Don’t believe that tired old lie.”

“Our supporters often say ‘love wins.’ This time it didn’t. Still, love cannot win unless we show up for the fight, so thank you to OUTBermuda, my fellow plaintiffs, and our legal team, for the courage and passion you’ve shown. This loss doesn’t diminish how proud I am of what we’ve done together. Finally, I’d like to take this moment to honor all people burdened with the grief of justice delayed and justice denied. Our work as a society is not done until everyone’s humanity is recognized both in law and in life.”

Ferguson’s disappointment was mirrored by fellow plaintiffs, OUTBermuda, Maryellen Jackson, Dr. Gordon Campbell, the Parlor Tabernacle of the Vision Church of Bermuda and Sylvia Hayward.

“We always knew our struggle would be long and difficult, yet we always held out hope,” said OUTBermuda Chair Adrian Hartnett-Beasley. “To be clear, this lawsuit should never have been needed. Human rights are fundamental, and should never be lost or need to be won by lawsuit, legislation or popular vote.”

He added, “Our work will go on. Marriage was just one of many issues facing our LGBTQ+ community here on the island. OUTBermuda continues to advocate for equality, justice and dignity for all LGBTQ+ Bermudians. This decision just highlights that OUTBermuda must continue our work. We will do so with deep gratitude to all the advocates and benefactors who stood by us, and generous corporate allies like Carnival Cruise Lines who enabled us to plead our case.”

OUTBermuda Deputy Chair Zakiya Johnson Lord added, “We hold our heads high. Our struggle is unfinished, but our message resounds with the love that strengthens our families, our community, and all of Bermuda. There is little doubt that the work we do, including occasionally advocating in the courts, has helped highlight the unfairness and inequalities facing our community.”

Johnson Lord also pointed to Bermuda’s own swiftly changing acceptance. “When our litigation began, expert polls confirmed that a slight majority of Bermudians opposed same-sex marriage. Just a short 5 years later, the same pollsters revealed last year that a clear majority of Bermudians now favour same-sex marriage. The world has changed, and so has Bermuda – to make all our lives better.”

According to OUTBermuda, work will continue to educate the population and Bermuda’s political leaders about human rights. The group’s leaders expect that the next Bermuda Government will Re-Amend Bermuda’s Human Rights Act to reinstate the full protection of sexual orientation, as existed in Bermuda prior to the Domestic Partnerships Act 2018 (which banned lawful same-sex marriages) since this is the will of the people of Bermuda.

The Judicial Committee of the Privy Council (JCPC) is the highest court of appeal for all British territories, some Commonwealth countries and a few UK bodies. The Judicial Committee consists of senior judges who are Privy Councillors: they are predominantly Justices of the Supreme Court of the United Kingdom and senior judges from the Commonwealth. This judicial body is often referred to as the *Privy Council*.

Bermuda Timeline on Same-Sex Marriage:

- Marriage equality for Bermuda’s same-sex couples has been legal since the May 2017 decision in *Godwin and DeRoche*. Since then, the Bermuda Government sought to remove that right through the Domestic Partnership Act of 2018 (DPA), however both the Supreme Court (6 June 2018) and the Court of Appeal (23 November 2018) found this action to be unconstitutional and marriage equality was upheld.
- Since May 2017, therefore, Bermuda same-sex couples have had their marriages celebrated and recognized in Bermuda and around the world. There is no precise estimate of their number however.
- It is not clear what the effect the Privy Council ruling will be on marriages which lawfully took place after the DPA was passed, yet during the period when the Court of Appeal ruled to permit such marriages. The Government must immediately tell us their intention and fulfill our legitimate expectation that all same-sex

marriages lawfully performed since 2017 will always be deemed legal. Our families and children deserve full respect.

About OUTBermuda: OUTBermuda is a registered charity (#973), which promotes and supports the wellbeing, health, dignity, security, safety and protection of the LGBTQ community in Bermuda. Its website is www.OUTBermuda.org. Through its mission, OUTBermuda helps advance human rights, and the promotion of equality and diversity relating to the LGBTQ community in Bermuda.

For media inquiries and interview requests, please contact:

Adrian Hartnett-Beasley ahartnettbeasley@gmail.com Mobile +1 441-505-1256 (Bermuda)

Bob Witeck bob@witeck.com Mobile 202-997-4055 (U.S.)