

[Case Information]

First heard before Tokyo District Court, Civil 17th Division (Judgment rendered on 30 March 1994)¹, appealed by the defendant before Tokyo High Court, Civil 4th Division (Judgment rendered on 16 September 1997)

Plaintiff : OCCUR² and three other member persons

Defendant : Local Government of Tokyo

No third parties are involved in the case

[Relevant Provisions]

The Constitution, Article 21 & 26

- Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed (21).
- All people shall have the right to receive an equal education correspondent to their ability, as provided by law (26).

State Redress Act, Article 1 (1)

- If a public servant, in conducting its official duty, intentionally or negligently inflict damage on others, the government or a local government shall compensate for such damages

Local Autonomy Act, Article 244 (2) (3)

- A local government, unless justified otherwise, shall not prevent its people from utilizing public facilities (2).
- A local government shall not unjustly discriminate its people in relation to their use of public facilities (3)

Tokyo Seinen no Ie (Youth House) Act, Article 8 (1) (2)

- Committee shall not authorize the use of the House if it finds any one of the followings:
 1. risk of disturbance in the order
 2. risk of difficulty in the management of the facility
 3. Any other kind of risks that the committee finds it unavoidable

[Facts established by the Court]

1. Seinen no Ie in Futyu (“Youth House”) is a public facility belonging to Tokyo local government, offering locations to hold seminars and study groups, established with an aim of facilitating healthy development of youth. In light of its purpose, men and women are not allowed to sleep in the same room.
2. On 4 December 1988, OCCUR applied to the Youth House to use its facility on 11 and 12 February 1999, and the permission were issued on 10 January 1999. It was the first time for OCCUR to use the Youth House, and it did not notify the Youth House that it was a group of Gay people.
3. On 11 and 12 February 1999, OCCUR (18 male members) stayed at the Youth House. There were three other groups staying at the Youth House on the

¹ Citation only available in Japanese: 東京地裁平三（ワ）第一五五七号 for Tokyo District Court Judgement, and 東京高裁平成六年（ネ）第一五八〇号 for Tokyo High Court judgment

² In Japanese, “Association of Active Gay and Lesbian”. English name is taken from the Verb “Occur” / <http://www.occur.or.jp/about.html>

same day: Youth Christian Group, Youth Soccer Group, and Female Chorus Group. In the evening of 11 February 1999, a meeting was held between the leaders of the groups, with the attendance of a facility staff, as it was the regular course of conduct at the Youth House. During the meeting, the leader of OCCUR explained that the OCCUR is a group of gay people and that its mission is to support the human rights of gay people. No question was raised from the leaders of other groups.

4. After the meeting, however, elementary school students of the Soccer group teased member of OCCUR in the common shower room and in the dining room. OCCUR took these happenings as serious discriminatory incidents, and, in the morning of 12 February 1999, urged the Youth House to hold an urgent leader meeting to discuss these incidents with other leaders.
5. The meeting was held at around 15 hours 12 February 1999, but the Soccer Group has already left the House and it was held between the leader of OCCUR, Youth Christian Group, Female Chorus Group, and a staff of the Youth House. During the meeting, both of the leaders denied involvement of their members in teasing of members of OCCUR. Individual meetings were subsequently held between the leader of OCCUR and the leaders of other groups, in which the Christian Group argued, quoting Bible, that Homosexuality shall not be allowed.
6. On 26 February 1999, OCCUR brought letters to the Youth House, requesting the manager of the Youth House to express its view on the incidents happened on 11 February 2009, to apologize for the staff member who acted favourably to other groups in the urgent meeting, to make concrete proposals to improve condition of the Youth House so that Gay people have easier access to it, and to hold a meeting with OCCUR on 1 March 1999. The manager declined to hold a meeting.
7. On 1 March 1999, OCCUR decided to use the Youth House again to hold a study group, and applied for the permission for 3 & 4 May 1999. The manager of the Youth House did not immediately grant the permission but decided to leave the matter with the education office of Tokyo local government. The manager also instructed the staff of the Youth House, not to accept the application form from OCCUR until the matter is decided by the education office.
8. OCCUR requested the meeting again, which was held on 24 March 2009. The meeting, attended by a few members of OCCUR and the manager and another staff member of the Youth House, was held for two hours. OCCUR members came to the meeting in order to accuse the manager, so the atmosphere was very severe. The manager read out answers to the requests of OCCUR that he believes OCCUR was right in protesting what had happened on 11 February 1999, but he did not conceive that the incidents reached the level of discrimination, that he believes that the staff member attended the meeting tried to act fair but acted overly for which he apologize, and that he thinks OCCUR is free to act as gay group, but as a manager of the Youth House, a public facility founded for the purpose of facilitating healthy development of youth, he cannot encourage its activities. The manager stated that he would like to decline the OCCUR's use of the Youth House from the next time.
9. The manager, during the meeting, stated that beliefs and activities of OCCUR is not supported by the consensus of Japan's people. He also stated that

homosexuality brings negative effect on other youth, and that having two gay people in one room creates the impression that there are sexual conducts involved.

10. On 9 April 1999, the education office of Tokyo local government, asked by the manager to decide on whether to issue permission to OCCUR, received a call from the lawyer of OCCUR, who asked a staff of the education office to discuss the matter with OCCUR. The staff stated, during the conversation, that “We don’t really know what kind of activities OCCUR is engaging in and for what purpose it intends to use the Youth House”, that “isn’t it Occur who started the incidents happened in the Youth House?” and that “it might have some bad effect on children to be in the dame facility with Gay people”.
11. Members of OCCUR visited the Youth House on 11 April 1999, and tried to submit the application form filled with necessary information, but the staff of the Youth House declined to accept the application in accordance with the instruction from the manager. The staff asked to wait until the decision of the education office is rendered.
12. On 13 April 1999, the lawyer and members of OCCUR visited and submitted a letter to the education office, in which they requested the education office to issue permission, to hear the observation from OCCUR when deciding the matter, and to take measures to prevent discriminations against gay people in public facilities under its control.
13. The education office, upon receiving the letter from OCCUR, decided to leave this matter in the Tokyo educational committee who has an authority to issue permissions regarding the Youth House. OCCUR members requested to the educational committee to hear its observation and to allow them to attend the discussion on this issue.
14. On 26 April 1999, the educational committee discussed this matter, to which OCCUR members and the lawyer were allowed to attend. It started as a public discussion, had 13 minutes of closed hearing, and the lawyer presented his opinion during the hearing.
15. The lawyer stated that the homosexuality is not something harmful and that they are hurt and tend to picture themselves negatively because of misunderstandings. He also explained mission and activities of OCCUR.
16. The discussion went to the closed session again, in which the manager of the Youth House stated that the policy of the Youth House is not to allow men and women sleep in the room, even if they were married couples, and that if he allows gay people to stay in the same room, it would be same as letting men and women stay in the same room, and he will not be able to maintain the principal policy and order of the Youth House.
17. The educational committee, on the same day, rendered its decision not to grant the permission to OCCUR because it found that there are justifiable reasons under Tokyo Seinen no Ie (Youth House) Act, Article 8 (1) (2).
18. The educational committee, published its opinion, which stated that “it does not deny any activities or mission of OCCUR and does not preclude it from using public facilities, but the Youth House was founded with an aim to facilitate health development of youth so the policy of not allowing men and women sleep in the same room should strictly be respected. This policy is premised on preventing youth from engaging in sexual conducts in public facilities, and there is a similar risk if gay people are allowed to sleep in the

same room. The policy needs to be respected and it applies to the gay people in this instance.”

19. On 26 April 1999. The staff of education office told OCCUR that they prepared other place for OCCUR’s use during the day time, but OCCUR rejected this proposal.
20. OCCUR used another place on 3 & 4 May 1999 as it initially intended to do at the Youth House. It paid 43200 yen.
21. After the decision by the educational board, OCCUR has requested to use the Youth House during the day, and this was permitted.
22. There are very few youth houses that allow men and women to sleep in the same room, but families are usually allowed to stay in the same room.

[Arguments of the plaintiff]

Unlawful acts by Tokyo local government

1. The statements made by the manager of the Youth House on 24 march 1999 (para. 8, 9) degrade members of OCCUR and inflict unbearable harm on them. These statements are unlawful defamation.
2. The statements made by the staff of education office is also unlawful defamation for same reasons (para. 10)
3. The manager of the Youth House, by telling its stuff not to accept the application from OCCUR, breached its duty as a public servant, based on unjustified prejudicial opinion against OCCUR and thus it is an unlawful act (para. 7, 11)
4. The educational committee, by not issuing permission to OCCUR, committed unlawful act (para. 18).
 - a. As rights for association and education are protected under Constitution 21 & 26, the request of OCCUR is based on this right. Further, Tokyo Seinen no Ie (Youth House) Act, Article 8 (1) (2) must be interpreted in light of Local Autonomy Act, Article 244 (2) (3), prohibiting discrimination or unjustifiable restriction. Based on these, educational committee can only deny granting the permission when there is grave and imminent danger. The committee should have tried less restrictive alternative measures.
 - b. If the permission cannot be issued to gay people, they will not be able to use the Youth House at all. Heterosexual people can use the Youth House by simply staying in different rooms. This decision by the committee deprives the gay people of chance to use the Youth House completely, and this is unjustifiable discrimination, restricting its right to association and education. It violates equal protection under article 14 of Constitution.

Responsibility of defendant

5. These unlawful acts were committed either intentionally or negligently thus, the defendant is responsible for the harm suffered under State Redress Act, Article 1 (1)

Harm Suffered by Defendant

6. Financial harm: extra amount of money that it had to pay for alternative premise. 4,1154 yen.

7. Non-Financial harm: by denial of the permission, the OCCUR's social reputation was harmed and it was deprived of opportunity to improve its image. Not less than 3,000,000yen.
8. Mental harm suffered by the members of OCCUR by the statements of the manager and the staff of the education office. At least 500,000 each.
9. Attorney's fees.

[Arguments of defendant]

1. It accepts that the statements were made by the manager, but the manager was the only one attending the meeting from his side and OCCUR had a number of people sitting in the meeting who sometimes raised their voice and banged a table. The meeting took place in a very aggressive mood, and there was no calm discussion. His statements were made in that context and also they reflected his mere idea on homosexuality and were not intended to hurt or degrade members of OCCUR. Further, the statements were made where only small number of people were present and did not degrade OCCUR's social reputation. Thus they were not unlawful acts amounting to defamation.
2. Regarding the statements allegedly made by the staff of the education office, it denies such occurrence. Plaintiff is blaming on the staff by discretionally taking portions of the staff's statements. The staff was trying to find out what the association OCCUR is about, and what really happened in the Youth House on 11 February 1998. The statements made in that context were not intended to nor does not tantamount to harmful degrading statements. In particular, these statements were made during the telephone conversation between the staff and the lawyer of OCCUR. Thus, they were not unlawful acts amounting to defamation.
3. The fact that the manager instructed its staff not to accept the application from OCCUR is not by any means unlawful act. He gave such instruction because the usual practice was issuing the permission at the same time the application is submitted, but in this case the decision to issue permission was pending consultation to the education office, thus the Youth House could not accept the application. The staff asked OCCUR to wait until the final decision is made. Nothing infringed on OCCUR's right to use public facility and thus the manager did not conduct any unlawful act.
4. The decision of the educational committee is justified act based on following reasons:
 - a. The Youth House is founded with an aim of facilitating healthy development of youth, and many users of the facility are minors at the stage of developing its personality who are immature and vulnerable in relation to, inter alia, sexual issues.
 - b. Thus at the Youth House, men and women are not allowed to stay in the same room. There is a possibility of sexual conduct if men and women are allowed to stay in the same room, and that will go against the aim and purpose on which the Youth House is founded. Also, if someone engages in sexual conduct at the Youth House, it will have negative effect on other youth who are present in the facility. Further,

if men and women stay in the same room, this will be subjected to teasing and other improper reactions which make it difficult to maintain the order of the Youth House. In addition, there is no national consensus on allowing men and women to stay in the same place in public facilities.

- c. These reasons apply, as they are, to the situation where two gay people are to stay in the same room, because gay people may engage in sexual conduct, like men and women, if they were allowed to stay in the same room.
 - d. Also the educational committee enjoys wide discretion because the matter of youth education requires professional and technical judgment. Unless its act goes beyond such discretion, it is not an unlawful act.
5. At the time these incidents happened, there were few reliable sources regarding homosexuality. Under this circumstance, the manager and the staff tried its best to understand the situation and acted in accordance with what they could best learn. Thus there is no accusable intent or negligence on their part. Educational board also under such circumstance considered the situation carefully and reached its conclusion, basing its decision on principal that equally applies to heterosexuals, without judging the purpose or activities of OCCUR. Thus, there is no intent or negligence under the term of state redress act.

[Findings made by the district court]

1. Regarding the statements made by the manager of the Youth House, these are the statements made in the meeting in very severe atmosphere. At the time of these incidents, knowledge about homosexuality were very scarce in general and dictionaries had different descriptions about homosexuality, from positive comments to negative comments. The latter were stronger. In light of the fact that there were negative understanding toward homosexuality in the society at that time, the statements made by the manager did not degrade OCCUR's social reputation and did not harm integrity of OCCUR by going beyond what one have to endure in the society at that time.
2. The statements of the staff of the education office were made in the context of posing questions or telling her impression about OCCUR, and those statements, in light of the fact that there were negative understanding of homosexuality in the society at that time, does not tantamount to unlawful degrading statements nor go beyond what one had to endure in the society at that time.
3. It wads unlawful that the manager instructed not to accept the application from OCCUR. It should have received the application, as is the rule, and wait until the decision of the education office is made to issue permission. Thus this non acceptance of the application is unlawful act.
4. The decision by educational board is unlawful for following reasons
 - a. Re; arguments by the defendant
 - i. Public facilities, like the Youth House, is aimed at facilitating healthy development of youth, and is different from hotels where a room is offered in exchange with certain amount of

money. It would be against such purpose of the Youth House, to freely allow users to freely engage in sexual conducts. Therefore it is not inappropriate to consider possibility of sexual conduct when deciding whether to permit its use or not. As heterosexuals might engage in sexual conducts, homosexuals might also engage in sexual conducts if they are allowed to sleep in the same room. It is thus not inappropriate to take into consideration the possibility of sexual conducts vis a vis homosexuals when deciding their application to use the Youth House. What is taking into consideration here is the possibility of sexual conducts, and not the fact that applicants are homosexuals.

- ii. The argument by the defendant that “[i]f someone engages in sexual conduct at the Youth House, it will have negative effect on other youth who are present in the facility” is not persuasive. Both heterosexuals and homosexuals will not engage in sexual conducts where there are other people’s eyes, and even if others learn about it, it cannot be said that such knowledge will have bad effects on youth.
 - iii. The argument that “if men and women stay in the same room, this will be subjected to teasing and other improper reactions which make it difficult to maintain the order of the Youth House” is not persuasive. This will not be the case for heterosexuals, and neither to homosexuals. If such reactions arise, that is not because two homosexuals are staying in the same room, but is because of unjustifiable prejudice against homosexuals. This will allow the Youth House to preclude those reactors from using the facility, but does not allow the Youth House to preclude those homosexuals who suffer from the reactions.
 - iv. The argument that “there is no national consensus on allowing men and women to stay in the same place in public facilities” is not persuasive. It is not that a consensus on different conclusion is developed, but the truth is that not many people have yet given thoughts on homosexuals and nothing has developed yet.
- b. Considering Articles 21 & 26 of the Constitution, and Article 244 of Local Autonomy Act, OCCUR has right to access public facilities. Also, Tokyo Seinen no Ie (Youth House) Act, Article 8 (1) (2) must be interpreted in light of Local Autonomy Act, Article 244 (2) (3), prohibiting discrimination or unjustifiable restriction regarding the use of public facilities.
- i. If homosexuals are not permitted to stay in the same room, they will not be able at all to use the Youth House. This is because while men and women can choose to stay in different rooms, same cannot be done by homosexuals unless there are substantial amount of rooms available in the Youth House. This is a great disadvantage to homosexuals, and amounts to depriving them of the right to use the Youth House.

- ii. Thus, the simple general possibility that they might engage in sexual conduct cannot justify placing homosexuals in such disadvantageous position. There needs to a concrete and substantial possibility of sexual conducts. This applies the same to heterosexuals when the facility does not have enough rooms to separate them.
 - iii. In this instant case, the educational committee did not go into assess whether there is concrete and substantial possibility of sexual conducts, but instead it based its conclusion on the simple general possibility that homosexuals may engage in sexual conducts if they were to stay in the same room.
 - iv. Considering the aim and purpose of activities of OCCUR, and what has been explained by the OCCUR during the negotiations, there were no such concrete and substantial possibility that they might have engaged in sexual conducts if they were allowed to stay at the Youth House.
 - v. Even if the Youth House considered that there are such possibilities, it should have taken other measures to minimize such possibilities by, for example, placing conditions on the way OCCUR uses the facility.
- c. Responsibility
- i. The manager acted in breach of his duty as public servant by not accepting the application when he should have done so.
 - ii. The educational committee also acted negligently by not taking proper considerations and as a result reaching wrong conclusion.
 - iii. Thus the plaintiff should be responsible for the harm suffered by the defendant, based on State Redress Act, Article 1 (1).
- d. Compensation 267,200 yen
- i. Financial harm: 37,200 yen for extra amount of money that OCCUR had to pay for alternative place.
 - ii. Non financial harm: 100,000 yen for extra work resulting from unlawful acts of the manager and the educational committee.
 - iii. Attorney's fee: 130,000 yen

[Additional arguments submitted by the appellant before the High Court]

1. Even though the manager and the staff of the Youth House did not accept the application, there was a pending decision at the education office and later at the educational board. Rooms were secured for OCCUR in case of positive decision by the office or the committee. The procedure was already in place and thus mere non acceptance of application paper cannot be regarded as denial of application.
2. The educational committee enjoys wide discretion when deciding whether the matter falls into the categories of Tokyo Seinen no Ie (Youth House) Act, Article 8 (1) (2), because the matter of youth education requires professional and technical judgment. Unless its act goes beyond such discretion, it is not an unlawful act.

3. The OCCUR was using the Youth House, even after the decision of educational committee, for day uses. It is only the over night stay that is not allowed for them, and thus it cannot be concluded that they are totally precluded from using the Youth House.
4. The concept of concrete and substantial possibility of sexual conduct is difficult, vague and unreliable. The consistent decision and proper operation cannot be maintained once such concept is introduced to the Youth House. The criteria needs to be clear and reliable.

[Replies submitted by the respondent before the High Court]

1. It does not matter whether the process was initiated internally. Such things cannot be regarded as an acceptance, and therefore there was a denial of application.
2. Tokyo Seinen no Ie (Youth House) Act, Article 8 (1) (2) must be interpreted in light of Local Autonomy Act, Article 244 (2) (3) and in the spirit of the Constitution 21 & 26. What this means is that the provisions of the Youth House Act need to be interpreted strictly and objectively. It does not leave room for discretion of the educational committee.
3. It is the core benefit of the Youth House to be able to stay over night. This has a substantial impact on the activities of youth organizations. Deprivation of over night stay cannot be regarded as small disadvantage.
4. Only thing that the Youth House needs to do is to check whether there are bases to suspect concrete and substantial possibility of sexual conducts, and this is not difficult at all.

[Findings made by the High Court]

The high court endorses the findings of the district court and adds some extra findings to it (This is what the High Court says in its judgment and is not my summary of the High Court's judgment).

1. The appellant claims that there was virtually an acceptance since process was already put in place. However, even if internal process was initiated, it cannot be regarded as acceptance of application. Legally, there needs to be proper application submitted to the Youth House, and thus denial of receiving the application is unlawful act.
2. Only groups of people of more than six people can use the Youth House, and in such cases, there is less possibility of having sexual conducts than when a group of two persons are using the facility. This applies to both heterosexuals and homosexuals. Also, there is no patrolling at night and it is ultimately left to the users whether to be abided by the rule not to engage in sexual conducts. It is thus impossible to completely ban sexual conducts at the Youth House. Further, in exceptional cases such as disable people need help of others, the youth House has allowed man woman to stay in one room. Considering all these, it should be allowed to take into consideration the possibility of sexual conduct when issuing the permission, but it should not unduly restrict the users' right to use the facility.
3. The idea of separating man and woman in different rooms is based on various considerations, including the possibility of sexual conduct, and has been developed as social custom. This principal was developed with regard to

man and woman, and homosexuals were not given any consideration when this principal was established and developed. If this principal is applied to homosexuals, only on the bases that there is a possibility of sexual conduct, homosexuals are totally precluded from the use of the Youth House, where there are not enough rooms to place everyone in separate rooms. Further, it is a core feature of the Youth House to be able to use it over night, and this cannot be regarded as minor benefit. Homosexuals has right to use the Youth House and benefit from its features.

4. This principal, while diminishing the possibility of sexual conducts in general, cannot completely eliminate the possibility. This is ultimately left to the users. The effect of this principal is thus limited.
5. To apply this principal of limited effect, which was developed on heterosexuals, systematically to homosexuals to minimize the already low possibility of sexual conducts and completely preclude homosexuals from using the Youth House is undue restriction on the homosexual's right to use public facilities.
6. If there is concrete and substantial risk of sexual conducts, that will go against aim and purpose of the youth House and the denial of the use is justified. However, there is no such indication in this case.
7. The educational committee does not enjoy broad discretion. The mere fact that it is an educational facility does not give such discretion to the committee. Its decision should be guided by purpose, nature and actual operation of the facility. The Youth House is a premise for youth but does not differ from other public facilities that it should be open to any persons. The fact that it is a premise for youth does not permit undue restriction on the rights of one category of potential users.
8. Therefore, the decision by the educational committee is unlawful decision based on wrong interpretations of Tokyo Seinen no Ie (Youth House) Act, Article 8 (1) (2) and Local Autonomy Act, Article 244 (2) (3).
9. Even though the understating towards homosexuality was immature in the society at the time of these incidents, public organs including the educational committee, should act wise and careful with broad view taking into minorities like homosexuals into consideration, in discharging its duties. The indifference or ignorance of the public organ shall not excuse themselves from liabilities.
10. Non financial harm cannot be based on mere "extra work". It needs to be supported by individual claims of concrete work that they were required to do by the unlawful act of appellant. 100,000 is subtracted from the total amount of compensation.