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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

IN THE MATTER OF AN APPLICATION BY GRAINNE CLOSE and SHANNON SICKLES

and

CHRISTOPHER FLANAGAN-KANE and HENRY FLANAGAN-KANE FOR JUDICIAL REVIEW

Before: Morgan LCJ, Stephens LJ and Treacy LJ

MORGAN LCJ (delivering the judgment of the court)

[1] This is an appeal from an Order of O'Hara J dismissing the appellants' claims that the prohibition on same sex marriage in Article 6(6)(e) of the Marriage (Northern Ireland) Order 2003 ("the 2003 Oder") unlawfully discriminated against them in violation of Article 14 ECHR in the ambit of Articles 8 and 12 ECHR. Mr Lavery QC and Ms McMahon appeared for the appellants, Dr McGleenan QC and Mr McAteer for the Department of Finance and Personnel ("the Department") and the Attorney General for Northern Ireland, Mr Larkin QC, participated pursuant to an appearance to a devolution notice. We are grateful to all counsel for their helpful oral and written submissions.

The claim

[2] The Appellants each of whom are in same sex relationships entered into civil partnerships in Northern Ireland in December 2005. Both couples have children; Grainne Close and Shannon Sickles have a daughter aged 4 and Christopher and Henry Flanagan-Kane have a son aged 8. Both couples wish to enter into a civil marriage but assert that they are prohibited from doing so by Article 6(6) of the 2003 Order which provides:

"(6) For the purposes of this Article and Article 7 there is a legal impediment to a marriage if-

(a) that marriage would be void by virtue of Article 18 of the Family Law (Miscellaneous Provisions) (Northern Ireland) Order 1984 (prohibited degrees of relationship);

(b) one of the parties is, or both are, already married or a civil partner;

(c) one or both of the parties will be under the age of 16 on the date of solemnisation of the intended marriage;

(d) one or both of the parties is or are incapable of understanding the nature of a marriage ceremony or of consenting to marriage; or

(e) both parties are of the same sex."

[3] The claim at first instance sought the following relief:

(a) An Order of Certiorari to quash Article 6)(6)(e) of the 2003 Order;

(b) In the alternative a declaration that the said subsection be read down so that individuals of the same sex may lawfully enter in to a civil marriage;

(c) A declaration that the said subsection is unlawful, ultra vires and of no force or effect; and

(d) A declaration that petitions of concern were not to be used in matters seeking to advance, promote and protect human rights.

[4] Although the petition of concern point was not pursued before the trial judge or in this court it requires some explanation. Section 42(1) of the Northern Ireland Act 1998 ("the 1998 Act") provides that if 30 members petition the Assembly expressing their concern about a matter which is to be voted on by the Assembly, the vote on that matter shall require cross-community support. Cross-community support is defined in section 4 of the 1998 Act as meaning:

"(a) the support of a majority of the members voting, a majority of the designated Nationalists voting and a majority of the designated Unionists voting; or

(b) the support of 60 per cent of the members voting, 40 per cent of the designated Nationalists voting and 40 per cent of the designated Unionists voting;"

[5] The Northern Ireland Assembly has voted on the introduction of same sex marriage on five occasions. On 1 October 2012 the Assembly rejected such a motion by 50 votes to 45. There was a further vote on 29 April 2013 on the same issue; they voted 42 in favour and 53 against. A petition of concern was lodged as indeed was the case in every subsequent Assembly vote. On 29 April 2014 after the introduction of same sex marriage in England, Wales and Scotland the vote was 43 in favour and 51 against. On 27 April 2015 just before the referendum on the issue in the Republic of Ireland the vote was 47 in favour and 49 against. The final vote was on 2 November 2015 just as the legislation enabling same sex marriage became operative in the Republic of Ireland. The vote was 53 in favour and 51 against. Because of the petition of concern the motion did not pass as the 60% threshold overall was not reached and the 40% threshold for unionists was not reached.

Trial Judge's Conclusion

[6] The ground on which the remaining reliefs were sought was that Article 6(6)(e) of the 2003 Order unlawfully discriminated against the appellants on the basis of sexual orientation contrary to section 6 of the Human Rights Act 1998 ("the HRA") and Article 14 ECHR. The judge considered that the appropriate exercise was to consider the effect of the relevant Strasbourg decisions on the appellants' case. That case law established that the Convention did not impose an obligation on a Council of Europe state to provide access to same sex marriage.

[7] The judge noted that if there was a trend, it was undoubtedly towards recognition of same sex marriage in more and more countries. Unfortunately, for the appellants there was no sign whatever of the Strasbourg Court moving in that direction. It had had three opportunities to consider the issue during this decade and had turned its face firmly against it.

[8] On the basis of that case law he felt driven to conclude that the Convention rights of the appellants had not been violated. It was not the role of a judge to decide on social policy. That was for the Executive and the Assembly under our constitution. In certain limited circumstances the courts could intervene but this was not one of them. Put simply, the Strasbourg Court did not recognise a "right" to same sex marriage. That being the case, the current statutory provisions in Northern Ireland did not violate any rights. Those rights did not exist in any legal sense.

Statutory background

[9] Part 2 of the 1998 Act sets out the legislative powers of the Northern Ireland Assembly. It is common case that marriage is a matter in respect of which the Assembly has competence. Section 1 and Schedule 1 to the Northern Ireland Act 2000 enabled the Parliament of the United Kingdom to make Orders in Council for Northern Ireland in respect of matters within the competence of the

Northern Ireland Assembly during a period of suspension of the Assembly. It was during such a period that the 2003 Order was made.

[10] In order to solemnise a marriage in Northern Ireland Article 3 of the 2003 Order provides that each of the parties must give the Registrar notice of intention to marry. If satisfied that there are no legal impediments, Article 7 of the 2003 Order provides that the Registrar shall issue a marriage schedule which will enable the marriage to be solemnised on the relevant date. Article 6 sets out a procedure for objections and Article 6(6)(e) provides that there is a legal impediment to a marriage if both parties are of the same sex. Article 13(1)(e) of the Matrimonial Causes (Northern Ireland) Order 1978 ("the 1978 Order") provides that a marriage between parties who are not respectively male and female is void.

[11] Section 1 of the Civil Partnership Act 2004 provides that a civil partnership is a relationship between two people of the same sex ("civil partners") which is formed when they register as civil partners of each other. The arrangements for registration in Northern Ireland were established by the Civil Partnership Regulations (Northern Ireland) 2005 ("the 2005 Regulations"). The Civil Partnership (Opposite-sex Couples) Regulations 2019 extended the opportunity to form a civil partnership to opposite sex couples in England and Wales.

[12] Section 1 of the Marriage (Same Sex Couples) Act 2013 ("the 2013 Act") provides that marriage of same sex couples is lawful in England and Wales. Schedule 2, Part 1 paragraph 2(1) as originally enacted stated that under the law of Northern Ireland, a marriage of a same sex couple under the law of England and Wales was to be treated as a civil partnership formed under the law of England and Wales and accordingly the spouses were to be treated as civil partners. Section 9 of the 2013 Act enables the Secretary of State to make Regulations to provide for the conversion of civil partnerships to same sex marriages in England and Wales.

[13] Prior to the restoration of devolved government in Northern Ireland in January 2020 the Westminster Parliament passed the Northern Ireland (Executive Formation etc) Act 2019. Section 8 required the Secretary of State to make regulations by 13 January 2020 providing that two persons who are of the same sex are eligible to marry in Northern Ireland, and two persons who are not of the same sex are eligible to form a civil partnership in Northern Ireland. Section 8(5) enabled the Secretary of State to make provision for the right to convert a marriage into a civil partnership and a civil partnership into a marriage.

[14] The Marriage (Same-sex Couples) and the Civil Partnership (Opposite-sex Couples) Regulations 2019 were passed on foot of the legislation and provided that two persons of the same sex could marry in Northern Ireland and that any marriage solemnised in any part of the United Kingdom or elsewhere is not prevented from being recognised under the law of Northern Ireland as a marriage only because it is

the marriage of a same sex couple. Similar provision was made for opposite sex civil partnerships.

Unlawful Act, Amendment and Standing

[15] It is common case that the hearing proceeded before the trial judge on the basis that it was an application under section 7 of the HRA alleging an unlawful act on the part of the Department. It seems clear that there was little discussion about the nature of the unlawful act and the case was presented exclusively on the issues of whether there was discrimination on the grounds of sexual orientation enabling the court to find an obligation to provide same-sex marriage to same-sex couples.

[16] In the course of the oral hearing of the appeal the Attorney General raised the issue of the status of the 2003 Order for the purpose of the Human Rights Act. Section 21(1)(f)(iii) of the HRA provides that primary legislation means any Order in Council amending a public general Act. Section 21(1) states that amend includes repeal. It is now common case that the 2003 Order repeals provisions affecting a number of such Acts and is, therefore, primary legislation. The claim as presented was based upon section 6(1) of the HRA alleging that a public authority had acted in a way which was incompatible with the Convention right. That subsection does not apply to an act if as a result of one or more provisions of primary legislation, the authority could not have acted differently. It is now accepted that it is not possible for the appellants to identify an unlawful act as the Registrar General could not have completed a marriage schedule under Article 7 of the 2003 Order as there was a legal impediment to him doing so.

[17] The appellants sought an adjournment to respond and sought leave to amend their Order 53 Statement in various respects. First, it was proposed that the General Registry Office should be joined on the basis that it had unlawfully refused to permit the marriage of the same-sex couples. Additional affidavits setting out engagement with the General Registry Office were advanced. Secondly, a number of additional declarations were sought:

(a) A declaration pursuant to section 4 of the HRA that Article 6(6)(e) of the 2003 Order is incompatible with Article 14 taken with Articles 8 and 12 of the ECHR insofar as it prevents individuals of the same sex entering civil marriage;

(b) A declaration that paragraph 115 of Schedule 29 to the Civil Partnership Act 2004 be read down so that individuals in civil partnerships may apply to marry;

(c) In the alternative a declaration that paragraph 115 of Schedule 29 to the Civil Partnership Act 2004 was incompatible with Article 14 taken with Articles 8 and 12 of the ECHR;

(d) A declaration that Article 6(6)(e) of the 2003 Order was ultra vires and not law, being incompatible with Articles 8, 12 and 14 of the ECHR and, therefore, outside the legislative competence of the Assembly by virtue of section 6(2)(c) of the Northern Ireland Act 1998;

(e) An Order of Certiorari to quash the ongoing refusal of the General Registry Office to permit the marriage of same-sex couples;

(f) a declaration that the respondent through the General Registry Office was acting unlawfully by refusing to permit same-sex couples to marry; and

(g) An order compelling the respondent to take all reasonable and necessary steps to permit the lawful marriage of same-sex couples.

[18] Section 38 of the Judicature (Northern Ireland) Act 1978 gives the Court of Appeal all the jurisdiction of the original court for the purpose of hearing and determining the appeal. The court has, therefore, a relatively broad discretion but that discretion must be exercised in the context that this is an appellate court which should be careful to not take on a first instance role inappropriately. The essence of the proceedings before the learned trial judge was reliance upon Article 14 ECHR in the context of a complaint about a legal impediment to marriage between couples of the same sex.

[19] That essence is captured in the declaration sought at (a) above. We considered that the remaining matters raised fresh cases either because they involved quite different statutory provisions, new claims under Articles 8 and 12, different claims directed at the General Registry Office and Orders for Mandamus. Accordingly we have only allowed the amendment to add the declaration set out at (a) in [17] above.

[20] The amended claim gave rise to further issues concerning the standing of the appellants raised by the Attorney General. In general a person seeking to establish standing in a judicial review application must show that they are a person aggrieved. The context of the application will influence the assessment. The issue of standing in claims under section 4 of the HRA was examined by the Supreme Court in Re NIHRC's Application [2018] UKSC 27.

[21] The leading judgment on behalf of the majority on this issue was given by Lord Mance. The substance of his approach was set out at [62] of his opinion:

> "62. True it is that ss.3 and 4 of the HRA are not made expressly subject to the "victimhood" requirement which affects ss.6 and 7 : *R. (Rusbridger) v Attorney General [2004] 1 A.C. 357*, at [21], per Lord Steyn; though they must undoubtedly be subject to the usual rules regarding standing in public law proceedings. However, a capacity

> to commence general proceedings to establish the interpretation or incompatibility of primary legislation is a much more far-reaching power than one to take steps as or in aid of an actual or potential victim of an identifiable unlawful act. Further, Parliament's natural understanding would have reflected what has been and is the general or a normal position in practice, namely that ss.3 and 4 would be and are resorted to in aid of or as a last resort by a person pursuing a claim or defence under ss.7 and 8 : see *Lancashire County Council v Taylor [2005] EWCA Civ 284; [2005] 1 W.L.R. 2668*, at [28], reciting counsel's submission, and [37]–[44], concluding that, to exercise the court's discretion to grant a declaration to someone who had not been and could not be "personally adversely affected" would be to ignore s.7. This being the normal position, it is easy to understand why there is nothing in s.7 to confer (the apparently unlimited) capacity which the Commission now suggests that it has to pursue general proceedings to establish the interpretation or incompatibility of primary legislation under ss.3 and/or 4 of the HRA, in circumstances when its capacity in the less fundamental context of an unlawful act under ss.6 and 7 is expressly and carefully restricted."

[22] There are three relevant conclusions which are apparent from this paragraph. First, the victimhood requirement for the issue of proceedings under section 7 of the HRA does not apply in a claim under section 4 but the claimant must establish standing. Secondly, a claim under section 4 should be a claim of last resort and should only generally be pursued where a claim under section 7 is not available. Thirdly, a claimant will need to establish that they are a person adversely affected if they are to establish standing in a section 4 claim. As Lady Hale stated at [17] of Re NIHRC, R (Steinfeld and another) v Secretary of State for International Development [2018] UKSC 32 is an example of such a case.

[23] The Attorney General submitted that the appellants could not establish the requisite standing. First, although some of the appellants had engaged in discussion with the General Registry Office about lodging a notice of intention to marry as required by Article 3 of the 2003 Order no such notice had been lodged. In the absence of a determination by the Registrar under Article 6 of the 2003 Order the appellants could not be persons adversely affected.

[24] We do not accept that submission. There was no purpose to be served by lodging a notice of intention to marry. The legislation itself established the legal

impediment to the solemnisation of the marriages sought. Steinfeld is clear authority for the proposition that in such cases adverse effect is established.

[25] Secondly, the Attorney General correctly pointed out that addressing any incompatibility of Article 6(6)(e) of the 2003 Order alone would not enable the appellants to lawfully marry. Article 6(6)(b) of the 2003 Order prohibits those in a civil partnership from marrying. That provision was inserted by Schedule 29, paragraph 115 of the Civil Partnership Act 2004 which is, of course, primary legislation. It is clear, however, that a similar provision would be necessary even if same sex marriage were made lawful in this jurisdiction. The underlying purpose of both marriage and civil partnership would be completely undermined if one could be in a civil partnership with one person and in a marriage with another. This prohibition does not, therefore, go to the core of the issue in this appeal. The 1978 Order made any such marriage void but this again is merely repetitive of the bar on the grounds of sexual orientation. It does not introduce any new concept.

[26] In our view the legal impediment to the appellants in Article 6(6)(e) of the 2003 Order is the focus of the inability of the appellants to marry and they have standing to challenge its compatibility with the Convention by seeking a declaration under section 4 HRA.

ECtHR case law

[27] The issues with which this appeal has been concerned have been the subject of a number of decisions in the ECtHR. In Schalk and Kopf v Austria [2010] 53 EHRR 20 the applicants were a same-sex couple who were refused permission to marry on the basis that domestic law defined marriage as being between two persons of the opposite sex. They complained, first, that they had been victims of a breach of Article 12 of the Convention:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

[28] The Court noted that when the Convention was adopted marriage was clearly understood in the traditional sense of being a union between partners of different sex. It concluded, however, that the court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Article 9 of the Charter of Fundamental Rights of the European Union dropped the reference to men and women. The commentary indicated that there was no obstacle to recognising same-sex relationships in the context of marriage but there was no explicit requirement that domestic laws should facilitate such marriages.

[29] At that time no more than 6 out of 47 Council of Europe states provided for same-sex marriage. The court said that marriage had deep-rooted social and cultural

connotations which may differ largely from one society to another. It should not rush to substitute its own judgement in place of that of the national authorities who were best placed to assess the response to the needs of society. The conclusion was that Article 12 of the Convention did not impose an obligation to grant a same-sex couple access to marriage.

[30] The second ground upon which the application was pursued was based on a complaint of breach of Article 14 taken in conjunction with Article 8. Although it was undisputed that the relationship of a same-sex couple fell within the notion of private life within the meaning of Article 8 the court concluded that the relationship of the applicants as a cohabiting same-sex couple living in a stable partnership also fell within the notion of family life just as the relationship of a different sex couple in the same situation would.

[31] The court held that differences based on sexual orientation required particularly serious reasons by way of justification. General measures of economic or social strategy, however, usually gave rise to a wide margin of appreciation for the state. One of the relevant factors can be the existence or non-existence of common ground between the laws of the contracting states. The court accepted that the applicants were in a relatively similar situation to different sex couples. They alleged discrimination because they still did not have access to marriage and, secondly, no alternative means of legal recognition was available to them.

[32] The court concluded that the right to marry could not be derived from Article 14 taken in conjunction with Article 8 in light of the conclusion that Article 12 did not impose such an obligation on contracting states. The Convention had to be read as a whole and its articles should, therefore, be construed in harmony with one another.

[33] The court noted that a Registered Partnership Act had come into force in 2010 which was available to the applicants. The court rejected the argument that such an alternative should have been provided earlier. The court's view was that the issue was one of evolving rights with no established consensus where states must enjoy a margin of appreciation in terms of the timing of the introduction of legislative changes. Three members of the court dissented on the latter point. Those members considered that having identified a relatively similar situation and emphasised differences based on sexual orientation, serious reasons by way of justification were required. The existence or non-existence of common ground between the laws of the contracting states could only be a subordinate basis for the application of the concept of the margin of appreciation.

[34] The Grand Chamber touched on this area in Hamalainen v Finland (2014) 37 BHRC 55 GC. The applicant was born male and married a woman. From April 2006 the applicant lived as a woman and underwent gender reassignment surgery in 2009. The applicant and her spouse wished to remain married. Marriage was only

permitted between persons of the opposite sex but the rights of same-sex couples were protected by the possibility of contracting a registered partnership. The applicant asked the local registry office to change her male identity number to a female one. The office refused because the applicant's wife did not give her consent to the transformation of their marriage into a registered partnership.

[35] The case was argued on the basis that there was an interference with the applicant's right to respect for private life in that she was not granted a new female identity number. The Grand Chamber, however, concluded that the issue to be determined was whether there was a positive obligation on the state to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married. In the implementation of a positive obligation under Article 8 where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the state will be restricted. Where, however, there is no consensus within the member states as to the relative importance of the interest at stake or the best means of protecting it and especially where the case raises sensitive moral or ethical issues the margin will be wider.

[36] The Grand Chamber concluded that if the applicant's claim was accepted it would in practice lead to a situation in which two persons of the same sex could be married to each other. The court noted the case law which suggested that the regulation of the effects of a change of gender in the context of marriage fell within the margin of appreciation. No special arrangements had to be put in place where the applicants could continue their relationship in all its essentials and could give it a legal status akin to marriage through a civil partnership. There was no European consensus on allowing same-sex marriage and the issue in that case raised sensitive moral or ethical issues. The Grand Chamber considered that the differences between a marriage and a registered partnership were not such as to involve an essential change in the applicant's legal situation. There was no violation of Article 8 of the Convention.

[37] Oliari v Italy [2015] 65 EHRR 26 concerned two male applicants who were in a committed stable relationship with each other and wanted to be married. Their application was refused and at that time Italy had no alternative by way of a civil union or registered partnership. The court dealt with this on the basis that in the absence of marriage, same-sex couples like the applicants had a particular interest in obtaining the option of entering into a form of civil union or registered partnership. This would be the most appropriate way in which they could have their relationship legally recognised, guaranteeing them protection in the form of core rights relevant to a couple in a stable and committed relationship without unnecessary hindrance.

[38] The court considered that the case concerned the general need for legal recognition and the core protection of the applicants as same-sex couples. There had been a movement towards legal recognition of same-sex couples which had

continued to develop rapidly in Europe. The court had to attach importance to that. The Italian government had failed to put forward any prevailing community interest to balance against the interests of the applicants.

[39] The court also noted that the Constitutional Court in Italy had notably and repeatedly called for new radical recognition of the relevant rights and duties of homosexual unions. That reflected the sentiments of the majority of the Italian population as shown through official surveys. It was on that narrow ground that three judges concurred with the result. The court rejected the claim of a violation of Article 12 in line with its previous case law and concluded that the claim based on Article 14 taken in conjunction with Article 12 could not give rise to an obligation on the state to recognise same-sex marriage but found for the applicants on the basis of a failure to provide legal recognition and access to core rights. A similar approach was subsequently taken in Orlandi v Italy (14 December 2017).

Domestic Case law

[40] We are required by section 2(1) of the HRA to take the jurisprudence of the ECtHR into account. The learned trial judge did so by relying on the Ullah principle. We consider that the approach which a court should take was helpfully set out by Lord Mance in D and V v Commissioner of Police of the Metropolis (Liberty and others intervening) [2018] UKSC 11 at [152]-[153]:

> "152. Finally, I do not accept that Lord Bingham's well-known cautionary remarks in *R (Ullah) v Special Investigator [2004] 2 AC 323* were confined to the international level (whatever relevance that would mean they had domestically). They were, and have correctly been understood in later authority, such as *R (Al-Skeini) v Secretary of State for Defence (The Redress Trust intervening) [2008] AC 153*, as guidance relating to the general approach which domestic courts should take. The general aim of the Human Rights Act 1998 was to align domestic law with Strasbourg law. Domestic courts should not normally refuse to follow Strasbourg authority, although circumstances can arise where this is appropriate and a healthy dialogue may then ensue: see eg *R v Horncastle [2010] 2 AC 373* ; *Manchester City Council v Pinnock (Secretary of State for Communities and Local Government intervening) [2011] 2 AC 104*, para 48 and *R (Chester) v Secretary of State for Justice [2014] AC 271*, paras 27–28. Conversely, domestic courts should not, at least by way of interpretation of the Convention rights as they apply domestically, forge ahead, without good reason. That follows, not merely from *Ullah*, but, as Lord Hoffmann

> said in *In re G (Adoption: Unmarried Couple) [2009] AC 173*, para 36, from the "ordinary respect" attaching to the European Court of Human Rights and "the general desirability of a uniform interpretation of the Convention in all member states".
>
> 153. There are however cases where the English courts can and should, as a matter of domestic law, go with confidence beyond existing Strasbourg authority: see eg *Rabone v Pennine Care NHS Foundation Trust (Inquest intervening) [2012] 2 AC 72*. If the existence or otherwise of a Convention right is unclear, then it may be appropriate for domestic courts to make up their minds whether the Convention rights should or should not be understood to embrace it. Further, where the European Court of Human Rights has left a matter to states' margin of appreciation, then domestic courts have to decide what the domestic position is, what degree of involvement or intervention by a domestic court is appropriate, and what degree of institutional respect to attach to any relevant legislative choice in the particular area: see *In re G* [2009] AC 173, paras 30–38, per Lord Hoffmann, para 56, per Lord Hope of Craighead and paras 128–130, per Lord Mance."

[41] Applying that guidance we consider that the jurisprudence of the ECtHR makes it clear that Article 12 does not establish a right to same sex marriage. Secondly, the case law establishes that same sex couples in loving relationships have rights under Article 8 of the Convention both in respect of private life and family life. Article 8 cannot, however, supply what Article 12, the *lex specialis,* does not supply and cannot, therefore, provide a means of establishing a right to same sex marriage. Thirdly, the issue of how to recognise same sex relationships is within the ambit of both Articles 8 and 12 and therefore, a matter to which Article 14 of the Convention applies. Fourthly, states enjoy a margin of appreciation in Convention law on the application of discrimination caught by Article 14. The questions in this appeal are, therefore, whether intervention by a domestic court is appropriate, whether that intervention should include a determination that the prohibition of same sex marriage violated rights under Article 14 and what if any institutional respect to attach to the legislative choice.

[42] As explained above the law of marriage is a transferred matter within the competence of the Northern Ireland Assembly. The ECtHR has already held in Magee v United Kingdom (2001) 31 EHRR 35 that regional differences of treatment resulting from the application of different legislation depending on the geographical location of an applicant do not give rise to claims under Article 14 on the basis of

"other status". As Lord Reed explained in R (on the application of A and B) v Secretary Of State for Health [2017] UKSC 41 the position is different when the same legislation operates differently on individuals depending upon their place of residence. The fact that England, Wales and Scotland have decided to make provision for same-sex marriage did not and does not impose an obligation on Northern Ireland to follow suit.

[43] The Attorney General relied on R (on the application of DA and others) v Secretary Of State for Work and Pensions [2019] UKSC 21 to support his submission that in this area of social policy the court should apply the manifestly without reasonable foundation test in assessing justification. Lord Wilson carefully reviewed the application of this test in domestic jurisprudence in his opinion and noted that in Stec v United Kingdom (2006) 43 EHRR 47 and Carson v United Kingdom (2010) 51 EHRR the Grand Chamber, addressing complaints of discrimination arising out of the rules for entitlement to social security benefits, held that it should respect the national legislature's determination of where the public interest lay when devising economic or social measures unless it was manifestly without reasonable foundation. Having reviewed the authorities Lord Wilson indicated that he accepted that the weight of authority mandated enquiry into the justification of the adverse effects of rules for entitlement to welfare benefits by reference to that test. The majority of the court agreed.

[44] The Attorney General submitted that this was an area of social policy where the same approach should follow. We do not accept that submission. DA was one of a line of cases dealing with the question of discrimination in the receipt of Social Security benefits. As recognised by Lady Hale in that case the Social Security benefit system inevitably, because of its complexity, gives rise to various anomalies and is an area in which the court should be careful not to create further anomalies by its interference.

[45] We consider that the correct approach is that set out by Lord Mance in Re NIHRC's Application at [115]:

> "115. Looked at from the perspective of the European Court of Human Rights, there is no doubt that this is a situation where that court would afford the UK, represented in this context by the Northern Ireland Assembly, a large margin of appreciation. That is evidenced by *A, B and C v Ireland*, although as pointed out in the concurring judgment of Judge López Guerra, joined by Judge Casadevall in that case, the margin is not unlimited at the Strasbourg level. Here, however, the Convention rights have been domesticated, and the

position in that context is on any view different. As Lord Hoffmann put it in *Re G [2009] 1 A.C. 173*, at [37]:

> "In such a case, it is for the court in the United Kingdom to interpret arts 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch."

See also my judgment, at [128]–[130], where I pointed out that:

> "Sections 3, 4 and 6 of the Human Rights Act 1998 define the courts' role in relation to the new domestic Convention rights. Courts must act compatibly with them (unless primary legislation precludes this, when all that courts can do is make a declaration of incompatibility)."

But I added this important note of caution:

> "In performing their duties under ss.3 and 6, courts must of course give appropriate weight to considerations of relative institutional competence, that is 'to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies': see *Brown v Stott [2003] 1 A.C. 681*, 703, though the precise weight will depend on inter alia the nature of the right and whether it falls within an area in which the legislature, executive or judiciary can claim particular expertise: see *R. v Department of Public Prosecution, Ex p. Kebilene [2000] 2 A.C. 326* , 381 per Lord Hope of Craighead.""

We consider that such an element of flexibility is also supported by the observations of Lord Hope in Re G [2008] UKHL 38 at [48]:

> " It is, of course, now well settled that the best guide as to whether the courts should deal with the issue is whether it lies within the field of social or economic policy on the one hand or of the constitutional responsibility which resides especially with them on the other: see, for example, *R (ProLife Alliance) v British Broadcasting Corpn*

> *[2004] 1 AC 185*, para 136, per Lord Walker of Gestingthorpe. The fact that the issue is a political issue too adds weight to the argument that, because it lies in the area of social policy, it is best left to the judgment of the legislature. But the reason why I differ from the Court of Appeal's approach is that it lies in the latter area as well. Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."

We also note that in R (Steinfeld and another) v Secretary of State for International Development [2018] UKSC 32 Lord Kerr, giving the judgment of the court, did not take issue with a submission that where the difference of treatment is based upon sexual orientation a court must apply a "strict scrutiny" to the assessment of any asserted justification and particularly weighty and convincing reasons are required to justify it.

Consideration

[46] Article 14 of the Convention provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A claim under Article 14 generally raises four questions:

(1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?

(2) Has there been a difference of treatment between two persons who are in an analogous situation?

(3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"?

(4) Is there an objective justification for that difference in treatment?

[47] It is common case that the circumstances fall within the ambit of Articles 8 and 12 and it is apparent that access to marriage and same sex marriage in Northern Ireland is based on sexual orientation. The answer to the second question requires more careful consideration. The recognition of marriage as a legal status consisting of a voluntary union for life of one man and one woman to the exclusion of all others was pronounced in Hyde v Hyde [1861-73] All ER 175. The introduction of the 2005 Regulations in Northern Ireland was intended to reflect the need for the recognition of a similar legal status for persons of the same sex who wished to express their commitment to each other in the same way. It is common case that the civil partnerships into which each of the appellants has entered provide all the legal rights associated with marriage and that any differences are minor and immaterial to this appeal.

[48] The policy of the legislature was to ensure that access to marriage should continue to be available to those of the opposite sex but that those of the same sex should have a corresponding opportunity to reflect their commitment. This has been accurately described as incorporating a separate but equal status. It is a policy which the ECtHR continues to support in its recent case law and which is followed even today in many of the states of the Council of Europe. We accept, however, that the status in each case is different. As stated in the Government Equalities Office consultation published in March 2012 civil partnership and marriage are two entirely separate regimes with different pieces of legislation covering each of them. When making a declaration of marital status to an employer or public authority an individual who is either married or in a civil partnership will often effectively be declaring their sexual orientation at the same time. We do not accept, therefore, the submission on behalf of the Department that because marriage and civil partnership offer the same core rights there is no difference between them. There is a difference and it requires justification.

[49] The test for justification and the authorities on which it is based were set out by Lady Hale in R (Tigere) v Secretary of State for Business, Innovation and Skills [2015] UKSC 57 at [33]:

> "I turn to the issue of justification. It is now well-established in a series of cases at this level, beginning with *Huang v Secretary of State for the Home Department [2007] 2 AC 167*, and continuing with *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening) [2012] 1 AC 621*, and *Bank Mellat v HM Treasury (No 2) [2014] AC 700*, that the test for justification is fourfold:
>
> (i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right;

(ii) is the measure rationally connected to that aim;

(iii) could a less intrusive measure have been used; and

(iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?"

[50] As the trial judge recognised there has been a clear trend towards providing legal rights and recognition for same sex couples who wish to form long lasting relationships. Although other countries had already started along that path before the United Kingdom passed the Civil Partnership Act in 2004 there was still some ambivalence about the entitlement to such rights in the Council of Europe which was not resolved until the decision of the ECtHR in Schalk and Kopf. Looking at the period between 2004 and 2014 it seems clear that the aim of the exclusion of same sex couples from marriage was to acknowledge the historical nature of marriage as a commitment between a man and a woman which had an embedded cultural significance for those who had entered into it. The provision of a civil partnership alternative was necessary to justify that aim and in light of the aim the difference in treatment could not have been less intrusive.

[51] In Northern Ireland it is clear from the Assembly debates that the principal objection to the introduction of same sex marriage was to maintain and uphold that cultural tradition. It is true that for some there was an overriding religious aspect to their view and the Minister for Finance also expressed regret about the introduction of civil partnerships but the argument broadly centred on whether the rights of same sex couples should be provided for separately. During this period there was no support in the Assembly for same sex marriage and the opinion poll evidence did not suggest support until 2014 when there was a poll with a majority of 50.5% to 49.5% in favour. Ireland, along with most other Council of Europe states had not introduced same sex marriage and the UK Government in its consultation in 2012 on the introduction of same sex marriage asserted that there was no Convention obligation to introduce same sex marriage in Scotland or Northern Ireland.

[52] Having regard to the package of measures for same sex couples introduced under the 2004 Act, the controversial social policy issue involved, the views of the Assembly, the absence of evidence of broad support in Northern Ireland for a different approach to the rights of same sex couples during this period and the position in the Council of Europe where a clear majority of states had not introduced same sex marriage we consider that during this period a fair balance was struck between the rights of the appellants and the interests of the community in the legitimate aim of preserving the established nature of marriage. That period included the time frame within which these proceedings were lodged.

[53] In 2015 there were some significant developments. Scotland had passed a Same Sex Marriage Act in 2014. Ireland carried out a referendum on the introduction of same sex marriage in May 2015 which was carried with a majority of more than 60%. That was the first time a state had legalised same sex marriage by a popular vote. The legislation giving effect to that result was passed in November 2015. In the same month a majority of members of the Assembly voted in favour of the introduction of same sex marriage in this jurisdiction and the vote did not pass solely because a petition of concern had been introduced. The opinion poll evidence in Northern Ireland suggested that by the end of 2015 there was a clear majority in favour of the introduction of same sex marriage.

[54] The statutory purpose of the petition of concern mechanism was to ensure protection for the traditions of both unionist and nationalist communities. That is clear from the mechanism for designation which requires members to identify as unionist, nationalist or other. It is also true that opinion poll evidence in 2014 and 2015 suggested that there was less enthusiasm for the introduction of same sex marriage in the unionist community than among other groups in the Assembly. We consider, however, that where the petition of concern is utilised to defeat the will of the Assembly on an issue dealing with a difference of treatment on the grounds of sexual orientation the scrutiny required by the courts is enhanced.

[55] The changes effected in Scotland and Ireland were of considerable significance in this jurisdiction. There are strong ties of kinship and friendship between many people in Northern Ireland and those countries. To some extent people look to them as the source of their culture and traditions. There are long standing bonds in business and employment and of course Northern Ireland's only land border is with the Republic of Ireland. People who were married in those jurisdictions did not have their marriages recognised here and those who had formed civil partnerships here were prohibited from solemnising marriages in their own neighbourhood unlike their friends and relatives in those jurisdictions. In our view the events of 2015 and their consequences increasingly called into question the balance between the interests of those favouring tradition and the interests of those denied the opportunity to be seen as equal and no longer separate.

[56] Whether that balance had shifted sufficiently by the end of 2016 to justify the courts interfering in this sensitive social issue is a moot point. By January 2017 the Executive had collapsed and the Assembly did not sit to deal with business until January 2020. The only legislative vehicle during that period was the Westminster Parliament. In March 2010 the United Kingdom Government, the Scottish Ministers, the Welsh Ministers, and the Northern Ireland Executive Committee had entered into a Memorandum of Understanding dealing with various aspects including parliamentary business. Paragraph 14 of that memorandum provided as follows:

> "The United Kingdom Parliament retains authority to legislate on any issue, whether devolved or not. It is ultimately for Parliament to decide what use to make of that power. However, the UK Government will not normally legislate with regard to devolved matters except with the agreement of the devolved legislature. The devolved administrations will be responsible for seeking naganKanesuch agreement as may be required for this purpose on an approach from the UK Government."

[57] Since the passage of the 2013 Act the UK Government had considered it appropriate to recognise the interests of same sex couples by providing them with access to same-sex marriage in England and Wales. The justification, therefore, for not taking action in the absence of any Assembly in Northern Ireland was based primarily on adherence to the devolution understandings. Where, as was clear from the history set out above, the interests of same sex couples in the provision of marriage was now becoming dominant we do not accept that adherence to the understandings in circumstances where the Assembly was not operating could provide any justification for continued interference with the rights of same-sex couples.

[58] We accept that there was an issue emerging at that time about the access of same-sex couples to both marriage and civil partnership whereas heterosexual couples only had access to marriage. In Steinfeld the Supreme Court seemed to suggest that the introduction of same-sex marriage in England and Wales could have been delayed while the policy issues around this difference was addressed but we do not understand that this would justify a prolonged delay of the nature which occurred before the 2019 Act provided access to same-sex marriage. We are satisfied that it was clear by the time of the delivery of the first instance judgment in this case in August 2017 that the absence of same-sex marriage in this jurisdiction discriminated against same-sex couples, that a fair balance between tradition and personal rights had not been struck and that therefore the discrimination was not justified.

Conclusion

[59] In light of the legislative developments there is no purpose to be served by making a declaration under section 4 of the HRA.