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(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

IN THE MATTER OF P (A CHILD) (COMPATIBILITY OF THE ADOPTION ORDER (NORTHERN IRELAND) 1987 WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS)

GILLEN J

[1] I have prepared this judgment in an anonymised form. Nothing must be published which might lead either directly or indirectly to the identification of the child or the parties involved in the case.

[2] This is an application by the mother ("X") of a child ("P") who is now 8 years of age and her male partner ("Y") that articles 14 and 15 of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order") contravene article 8 of the European Convention of Human Rights and Fundamental Freedoms ("the Convention") in conjunction with article 14 of the Convention and that the infringement of the Convention cannot be justified by the State. Mr O'Hara QC who appeared on behalf of X and Y with Ms Hughes submits that the court should declare that the provisions of the 1987 Order are incompatible with articles 8 and 14 of the Convention and should then declare that the applicants are eligible to be considered as adoptive parents under the 1987 Order regardless of the fact that they are unmarried. A notice pursuant to Order 121 Rule 3A of the Rules of the Supreme Court (NI) 1980 ("the Rules") was served on the Secretary of State for Northern Ireland to the effect that the court was considering the compatibility of a provision of subordinate legislation with certain Convention rights. Accordingly the Crown was joined as a party to these proceedings. I further deemed it appropriate that the child should be represented in this matter and I invited the Official Solicitor to assist the court by representing her pursuant to Order 110 Rule 1 of the Rules.

Background

[3] The relevant facts in this case are very few but the legal issues very difficult. X is the mother of P who is now 8 years of age. Y is not P's father. The child's father is W who, according to Mr O'Hara, has had no relationship whatsoever with X since before P's birth. He has not contributed financially or otherwise to the upbringing of P. The relationship between X and Y started before P's birth and has continued uninterrupted since then, a period of approximately 8 years. They have cohabited for more than 7 years. Mr O'Hara submits that P has been treated by Y as if she was his own daughter. They are in all respects a stable family unit save that the adults are not married and P is not Y's daughter in any legal sense. In the final skeleton argument skilfully prepared and set before me by Mr O'Hara and Ms Hughes it states:

> "X and Y have not been married in either a religious or civil ceremony. They do not have religious or moral beliefs which require marriage or encourage them in that direction and they do not believe that a civil wedding would in any way add or strengthen their relationship."

Both X and Y wish to be eligible to become the adoptive parents of P.

Domestic Law

[4] Article 14 of the 1987 Order, where relevant, reads as follows:

> "Adoption by a Married Couple
>
> 14.-(1) An adoption order may be made on the application of a married couple where each has attained the age of 21 years but an adoption order should not otherwise be made on the application of more than one person. …."

[5] Where relevant, article 15 of the 1987 Order reads as follows:

> "Adoption by One Person
>
> 15.-(1) An adoption order may be made on the application of one person where he has attained the age of 21 years and –
>
> (a) is not married, or

(b) is married and the court is satisfied that –

(i) his spouse cannot be found, or

(ii) the spouses have separated and are living apart, and the separation is likely to be permanent, or

(iii) his spouse is by reason of ill health, whether physical or mental, incapable of making an application for an adoption order.

….

(3) An adoption order shall not be made on the application of the mother or father of the child alone unless the court is satisfied that –

(a) The other natural parent is dead or cannot be found, or

(b) There is some other reason justifying the exclusion of the other natural parent, and where such an order is made the reason justifying the exclusion of the other natural parent shall be recorded by the court."

Accordingly it is not permissible under the domestic law as it now stands for X and Y to become P's joint adoptive parents.

[6] To complete the statutory background it is relevant that I set out the contents of article 40 of the 1987 Order, where relevant, as follows:

"Status conferred by adoption

40.-(1) An adopted child shall be treated in law –

(a) Where the adopters are a married couple, as if he had been born as a child of the family (whether or not he

was in fact born after the marriage was solemnized);

(b) In any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter)."

[7] In other words the effect of an adoption order under article 14(1) is set out in article 40(1)(a) of the 1987 Order, and the effect of an adoption order under article 15(1) is set out in article 40(1)(b).

The Convention

Article 8 of the Convention is as follows where relevant:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 14 where relevant, states as follows:

> "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".

[8] It is important to note that the Convention contains no freestanding guarantee of equal treatment without discrimination. Article 14 is restricted to a prohibition of discrimination in relation only to the substantive rights and freedoms set out elsewhere in the Convention. However the application of the article does not presuppose a breach of any of the substantive provisions of the Convention. Such an interpretation would render article 14 ineffective.

Accordingly a measure which in itself conforms with a substantive article of the Convention may violate art. 14 because it is discriminatory in nature. (See Belgian Linguistic Case (No 2) (1968) 1 EHRR 252, ECtHR para 9). In terms Article 14 complements the other substantive provisions of the Convention and its protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the provisions of the Convention. (See Frette v France (2004) 38 EHRR 21 ("Frette's Case").

Submissions

[9] I should say at the outset that I am grateful to counsel on behalf of all the parties of – Mr O'Hara QC and Miss Hughes on behalf of the applicants, Mr McCloskey QC and Mr McMillen on behalf of the Crown and Mr Lavery QC and Mr McGuigan on behalf of the Official Solicitor – who have so compellingly deployed the arguments at their disposal with conspicuous skill and clarity both in skeleton arguments and in submissions before me. In so far as this judgment does not refer to a number of authorities which were brought to my attention, this is no reflection on the industry of counsel in the choice of cases put before me.

Applicants' Submissions

(1) I can distil the salient submissions as follows:

(i) It is the aim of the applicants to be considered as an adoptive couple and/or for Mr Y to be eligible to be considered as an adoptive father without Ms X's rights being extinguished. Under current domestic law, X and Y cannot be considered as an adoptive couple because they are unmarried due to the absolute bar represented by articles 14 and 15 of the 1987 Order. Counsel did not assent the right of every unmarried adult person to become an adoptive parent, but rather that X and Y should be eligible to be considered as an adoptive couple. He freely accepts that thereafter enquiries can and should be made about Y's suitability, the stability of his relationship with X, the welfare of P and other relevant issues. What he challenges is that those inquiries are precluded by virtue of the fact that Y is not married to X.

(ii) Articles 14 and 15 of the 1987 Order prevent this court and the relevant Trust focusing on what is supposed to be the most important consideration in relation to the adoption of the child, namely the child's welfare by having regard to the various issues and factors identified in article 8 of the 1987 Order.

(iii) Mr O'Hara emphasised that he was not arguing that there is a right to adopt. Moreover he accepted that the existence of family life is ultimately a question of fact, the test being one of substance not form. He recognised that the scope of family life is very broad and thus would probably encompass the circumstances of X and Y. In effect therefore he accepted that the applicants already have an established and sustained family life. However it was his case that the interests of the child were negated by the statutory insistence on marriage and there was a need to provide for effective enjoyment of family life rather than confining all aspects of family life to formal relationships.

(iv) Mr O'Hara advanced the argument that article 14 can be invoked without a breach of article 8 being proved provided the facts of the case fall within the ambit of article 8. It was his submission that issues relating to adoption do fall within the Convention and in particular within the ambit of article 8. In Frette's case (see vii below) he submitted, the right to family life was successfully invoked in the context of adoption.

(v) Counsel argued that whilst there is no right to adopt, the State, in this instance has chosen to provide for adoption even though it is not obliged to do so by the Convention. Once this step is taken, the State must not permit discrimination on any impermissible ground such as marital status. It was his submission that the applicant's fall within the phrase "other status" as an unmarried couple under article 14. He argued that there was a clear difference in treatment between married and unmarried couples and in terms married and unmarried fathers. Unless good reason exists, differences in legal treatment of the kind in this case can be properly stigmatised as discriminatory. In his submission discrimination against unmarried couples could not be justified by reference to a notional "acceptable" view taken by society. A democratic tolerant society respects those views and can only discriminate against them where it is justifiable to do so. It is insufficient that a majority does not approve the fact that people such as the applicants live together without getting married.

(vi) Adoption by unmarried couples has been provided for in Great Britain by the Adoption and Children Act 2002. Counsel drew my attention to the passage of the bill through Parliament. The original bill would have permitted adoption by any individual or any couple regardless of sex or sexuality, marital status or cohabitation arrangements, subject only to conditions as to suitability. The original bill was scrutinised by the Joint Committee of Human Rights which concluded that the bill was compatible with the European Convention on Human Rights, the Human Rights Act and the Convention on the rights of the child. The bill was amended by the House of Lords to allow regulations to be made providing that only single people or married couples would be eligible to be considered as adoptive parents. The Joint Committee on Human Rights reviewed the bill as amended and reported that "a blanket ban on unmarried couples becoming eligible to adopt

children would amount to unjustifiable discrimination on the grounds of marital status, violating Article 14 combined with Article 8." That report was before this court. The bill was eventually enacted in its original form so that unmarried couples are now eligible to be considered as adoptive parents.

(vii) Counsel drew attention to the report of Dr Ursula Kilkelly in her document "The Adoption (Northern Ireland) Order 1987: Compatibility with the Convention on the Rights of the Child and the European Convention on Human Rights" which had been commissioned by the Crown as part of the wide-ranging examination of the Adoption (Northern Ireland) Order 1987. At p. 22 of that report she said:

> "What is clear, however, is that the use of blanket exclusions may be problematic with regard to the requirement of proportionality under the ECtHR and a case by case analysis of the suitability of individual applicants governed by what is in the best interests of the child may in fact be the most appropriate approach …. According to the ECtHR, discrimination on the grounds of marital status is particularly difficult to justify. Thus the current provisions of the 1987 Order, which exclude unmarried couples from adoption, would appear prima facie to be incompatible with the Convention in so far as they constitute arbitrary discrimination on the grounds of marital status. This has been remedied in section 50 of the Children and Adoption Act 2002 and a similar provision should be incorporated into the provision of the Northern Ireland Order to ensure ECtHR compatibility."

(viii) Much attention in this case was centred on the case of Frette (supra). Mr O'Hara submitted that the four to three majority in that case which had determined that France had been entitled to refuse to consider a male homosexual as an adoptive father, was deeply flawed and in any event the majority in their judgment relied significantly on the margin of appreciation allowed to Member States particularly in the absence of any clear consensus across Europe on the issue. He drew my attention to the fact that the margin of appreciation is replaced by the discretionary area of judgment in domestic law. He submitted that an exceptional justification would have to be advanced to justify the continuation of the approach found in articles 14 and 15 of the 1987 Order when the law in Great Britain had been changed to allow adoption by unmarried couples. In Frette's case Mr O'Hara highlighted the fact that of the seven judges, a majority concluded that articles 8 and 14 of the Convention were engaged albeit ultimately it was concluded that France was not in breach in that the justification given by the French Government

appeared objective and reasonable. The difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention.

(ix) Counsel drew my attention to the fact that in Northern Ireland an unmarried gay person can adopt, but an unmarried couple cannot. He reminded me of Re M (Adoption: Joint Residence Order: Same Sex Couple) [2004] NI. Fam. 3241 where I had concluded that the 1987 Order was drawn sufficiently widely to permit one member of a lesbian co-habiting couple to adopt and the other to obtain a residence order. It was Mr O'Hara's submission that the present legislation prevents the best interests of the child being pursued because, as in the instant case, a man who has been cast in the role of the father of the child for the last eight years is unable to become the adoptive father in circumstances where the mother is the adoptive mother. Whilst he could obtain parental responsibility through a residence order, this would fail to recognise the true importance of what adoption is. It was his submission that the consequences of adoption for P were not simply legal. It is well recognised he argued that adoption confers an extra psychological and important sense of belonging. He claimed that there is a real benefit to the parent/child relationship in knowing that each is legally bound to the other in a relationship free from interference by outsiders (see Re H (Adoption: Non-party) [1996] 1 FLR 717 at 726.)

(x) Mr O'Hara accepted that there is a discretion vested in the Government of a Member State, but he argued that there requires to be a very powerful argument to justify a distinction between Great Britain and Northern Ireland in this instance. The legislation in Northern Ireland is under review but if articles 8 and 14 are engaged he submitted that this review is irrelevant. He dismissed the suggestion by the Government that the absence of a shortage of adoptive couples in Northern Ireland should somehow justify a distinction between Northern Ireland and Great Britain. It was his submission that Northern Ireland is part of a democratic society and as such it cannot ignore a human right even though the majority may not be attuned to it.

(xi) I adjourned the giving of judgment in this case for some time to enable parties to consider a decision of the European Court of Human Rights in PM v UK 18 BHRC 668 ("PM"). Accordingly all of the parties made further written submissions to the Court. In PM, the subject matter of the applicant's complaint was the differential treatment between married fathers and unmarried fathers in the matter of claiming tax relief for maintenance payments. The applicant was an unmarried father who made maintenance payments for his daughter under a deed of separation. Being unmarried, he could not claim tax relief for such payments, in contrast with a married father. The court considered that there was no material distinction between a separated unmarried father and a separated married father in this context and concluded that there had been a violation of article 14 of the European Court

of Human Rights in conjunction with article 1 of the First Protocol. Mr O'Hara submitted that the court had rejected the justification for the tax regime as somehow promoting the institution of marriage. He argued that the same justification was being advanced in this case notwithstanding the fact that the legislation in Great Britain now permits adoption by unmarried couples. He drew the conclusion therefore that there is no tenable justification for the continuation in Northern Ireland of an absolute bar on adoption by unmarried couples.

Submissions on behalf of the Official Solicitor

[10] Mr Lavery QC, with Mr McGuigan, instructed by the Official Solicitor, advanced the following arguments:

(i) The courts should consider the respective advantages and disadvantages of adoption for the child. Advantages of adoption include security, enhancement of social status, inheritance advantages and the fact that the parent of an adoptive child would have greater security in the event of a relationship break-up than if not adopted. The only disadvantage of adoption for a child, it was submitted, is the break of family ties to the natural parent.

(ii) Mr Lavery posed the question as to whether the existence of article 14 of the 1987 Order was an arbitrary action by the State which failed to protect the family from the disadvantages of its current family position.

(iii) Counsel questioned whether allowing unmarried couples to adopt children would run against the interests of the community. It was urged that the court ought to take account of such matters as a social acceptance of the status of unmarried couples and the decreasing gap between their status and that of married couples.

(iv) In the context of the margin of appreciation (see the Frette case) he challenged the degree of the margin of appreciation that the State ought to be afforded in defending a law which was made in a time of different social norms.

(v) It was submitted that it would be difficult to argue that the proposed adoption in this instance, given the background circumstances, would be against the interests of the child as an individual leaving aside any adverse impact that a change in law permitting adoption in these circumstances might have on society generally. On the assumption that the proposed adoption would be in the interests of the child, counsel asserted that the child's rights and obligations under art. 8 of the Convention would therefore be adversely affected by a refusal to permit adoption.

(vi) Relying on X, Y and Z v UK [1997] 24 EHRR 143, counsel submitted that the State has positive obligations to ensure an effective respect for family or private life. Mr Lavery argued that there was a plausible argument that the ability to have the de facto father recognised as a legal father was something which would facilitate the child's integration into the family and that there is an obligation on the State to provide legal standards that render possible, as from the moment of birth, the child's integration in its family (Mirckx v Belgium [1980] 2 EHRR 330.) Whilst the child is enjoying all the practical benefits of family life counsel argued that where something is manifestly in the interests of the child eg promoting the integration of the child in the family and enhancing the child's position in that family, it is relatively easy to see an argument implying a duty on the part of the State under article 8 to remove any obstacle which would prevent this particular interest being achieved. On the other hand the Official Solicitor recognised that this has to be balanced against other social interests such as the cultural and religious ethos of Northern Ireland in the ambit of the margin of appreciation. It was counsel's submission, however, was that if there is a significant advantage to the child then the thrust of the law ought to be to allow that child to have the advantage unless there were cogent reasons to the contrary. Given the extension and recognition of rights outside marriage, it was submitted that it would be difficult to argue that the extension of the law would have any undermining effect on the fabric of society. Attention was drawn to article 8(2) of the Convention which in terms lays down a number of justifications for interference in the exercise of the right for private family life and it was submitted that the only relevant materials in this matter were the protection of health and morals or the protection of the rights and freedoms of others. Mr Lavery submitted in the course of his skeleton argument that it would be difficult to say that the prevention of adoption in this case was necessary for any of these purposes particularly in view of the fact that in the rest of the United Kingdom such adoptions are permitted.

(vii) Mr Lavery questioned as to whether within the State itself the precise definition of a citizen's rights can depend upon what part of the country they live in. In this context counsel again drew my attention to the views expressed by the Joint Committee on Human Rights on the Adoption and Children Bill as amended by the House of Lords on Report HL Paper 177 in the course of the passing of the English legislation as to the compatibility of the impugned provisions with the Convention. In particular in this context Mr Lavery raised the question as to whether the differences between Northern Ireland and the rest of the United Kingdom are such that in one part of the United Kingdom provisions which would constitute an infringement of an individual's human rights are adopted whereas in another part they are not. Does this raise a question of rationality which must be a feature in the consideration of justification?

(viii) Dealing with the PM case, Mr Lavery submitted that clearly there was a distinction on the facts between the two cases. Nonetheless the detriment in the present case to the child not having an adopted father could be viewed considerably more significant than the financial detriment offered in the PM case where the court found a breach of article 14 of the Convention. Mr Lavery went on to submit that the PM case supports a proposition that the existence of marital status is never a conclusive justification for discrimination.

Crown Submissions

[11] The factual matrix of the Crown case is found in two affidavits of Brenda Conlon who is a Principal Grade 7 in the Child Policy Directorate of the Department of Health and Social Services and Public Safety. It was the Crown case that the impugned articles of the 1987 Order were not incompatible with the rights of X and Y or the Convention. The case made was that set out at paragraphs 3-10 of her affidavit of 13 October 2004 ("the first affidavit") and paragraphs 3 and 4 of the affidavit of 16 June 2005 ("the second affidavit"). In essence, the first affidavit deposed to the fact that it is the Government's view that the public's attitude to the rights of children, society's interest in facilitating the raising of children in a stable family context, the recognition of civil partnerships and issues that arise in relation to homosexual couples are all evolving over the decades as is the jurisprudence of the ECHR. The primary purpose of the 1987 Order was to bring legislation in Northern Ireland into line with that then applicable in Great Britain. It is the Government approach that legislation that is appropriate in Great Britain is not always appropriate in Northern Ireland and the problems that face society in Northern Ireland are not always precisely the same as those that affect Great Britain. Equally social attitudes and social norms in Northern Ireland do not always match those in Great Britain. It is the Government view that in the area of matters transferred to the Northern Ireland administration by Parliament under the Northern Ireland Act 1998, it is necessary that decisions are made on issues such as the instant one to meet society's needs in a manner then acceptable to Northern Ireland society as a whole. A similar position operates in Scotland. In particular attention is drawn to the fact that at the time the Adoption and Children Act 2002 was being dealt with in England and Wales, there was a chronic shortage of prospective adopters there whilst there is no such shortage in Northern Ireland. The affidavit pointed out the discussion at length in both Houses of Parliament during the passage of the Bill. The relevant department in Northern Ireland has commenced the process of carrying out a review of adoption legislation in Northern Ireland and it is hoped that an adoption strategy consultation paper will soon be produced. This will lead to widespread consultation of any interested parties or individuals. Following consideration of the results of the exercise, it is expected the legislation to implement any changes in law will be enacted by the spring of 2007. The

second affidavit, inter alia, indicated that the Department, as a public authority, had commissioned Dr Ursula Kilkelly to undertake a wide-ranging examination of the 1987 Order in light of the Convention on the rights of the child and the European Convention on Human Rights. That report was referred to during the course of this hearing. The views expressed in that report are still being considered by the Department and have neither been accepted nor rejected. The Department also organised a four day seminar as part of the consultative process on the adoption legislation. It was attended by representatives of bodies closely connected with the adoption system in Northern Ireland such as Social Services, adoption panels, adoption societies, Children's Law Centre, the Northern Ireland judiciary, solicitors and barristers. The consultation report arising therefrom was exhibited before the court.

(2) In this context Mr McCloskey relied on the Frette case and argued that whatever the criticisms of this case by the Joint Committee on Human Rights, I am obliged under article 21 of the Human Rights Act 1998 to take into account Frette's case as a judgment of the European Court of Human Rights as it stands. In Regina (Alconbury Developments) v Secretary of State [2002] 2 AER 929 at paragraph 26 Lord Slynn said:

> "Although the 1998 Act does not provide that a national court is bound by these decisions it is obliged to take account of them so far as they are relevant. In the absence some special circumstance it seems to me that the court should follow any clear and constant jurisprudence of the European Court of Human Rights."

(3) It has been consistently recognised that no one has the right to adopt under the terms of the Convention. Mr McCloskey argued that Article 8 of the Convention is concerned with the substance and reality of family life rather than any legal formalities or technicalities pertaining thereto. It was his submission that the facts in this case clearly illustrate that both X and Y enjoy family life and that the 1987 Order in no way thwarts or impedes normal development of family life in this context.

(4) Counsel submitted that a clear and consistent theme of Strasbourg and domestic jurisprudence is that the essential object of article 8 of the Convention is to protect the individual against arbitrary action by public authorities. In this case there is a fully integrated family unit that does not require the ingredient of specific legal formality in order to achieve integration or to become properly established. There is therefore no arbitrary action by the 1987 Act to impede their enjoyment of that family life.

(5) Again in the context of article 8, Mr McCloskey submitted that article 8 is not an absolute right and in certain circumstances it does not protect the right to establish and enjoy family life.

(6) In so far as the applicants relied on the Frette case as authority for the proposition that articles 8 and 14 of the Convention are similarly triggered in this case, Mr McCloskey submitted that Frette's case dealt only with the private life dimension of article 8 and not family life. It was his argument that in deciding how closely connected this application is to that right which is protected by article 8, the conclusion should be that there is no nexus and that the present application did not fall within the ambit of article 8. In other words he disputed that the inability of unmarried members of an adult partnership in Northern Ireland who chose not to marry, was sufficiently within the ambit of what article 8 protected so as to engage article 14. In substance his argument was that this was a fully integrated family unit where the parties had chosen not to marry, and in Convention terms, enjoyed their article 8 rights to the full already.

(7) Mr McCloskey went on to submit that if the "ambit" test was successfully overcome by the applicants, the approach thereafter should be that set out in a structured way in Wandsworth London BC v Michalak [2002] 4 AER 1136 as refined by the House of Lords in Regina (S) v Chief Constable of South Yorkshire Police [2004] UKHL 39 ("S v Chief Constable of South Yorkshire") as follows:

> "(i) Do the facts fall within the ambit of one or more of the Convention rights.
>
> (ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison.
>
> (iii) If so, was the difference in treatment on one or more of the prescribed grounds under Article 14?
>
> (iv) Were those others in an analogous situation?
>
> (v) Was the difference in treatment objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim."

This approach was cited with approval by Lord Bingham in A & Ors v Secretary of State for the Home Department [2004] UKHL 56. ("A and Ors")

(8) Adopting the above structured approach, Mr McCloskey submitted that Y, either on his own or in tandem with the child's natural mother, could not bring himself within the words "other status" in article 14 of the Convention. In Mr McCloskey's submission, "status" in article 14 must be interpreted as "a personal characteristic by which persons are distinguishable." In this context Mr McCloskey argued that Frette's Case is authority only for an engagement of a right to private life and is not relevant to the issue of family life. Ultimately he submitted the court made a decision based on his sexual orientation and it was this aspect of private life which triggered Article 8 and thereafter Article 14. In particular he drew my attention to para. 32 of the judgment which read:

> "However, French domestic law … authorises all single persons – whether men or women – to apply for adoption provided that they are granted the prior authorisation required to adopt children in State care or foreign children, and the applicant maintained that the French authority's decision to reject his application had implicitly being based on a sexual orientation alone. If this is true, the inescapable conclusion is that there was a difference in treatment based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention."

In terms it is argued that the ambit test is one of nexus and one has to ask how closely associated is the applicant's case to what is protected by Article 8.

In this case he argued it was a status by choice but did not have the personal characteristics which would attract the protection of article 14. In terms therefore it was his argument that a chosen disqualifying status which can be shorn at will does not come within the personal characteristics envisaged by article 14. In S v Chief Constable of South Yorkshire at para. 48, Lord Steyn said:

> "The list of grounds in Article 14 is not exhaustive, and necessarily includes each of the specifically prescribed grounds as well as 'other status'. The ECtHR has interpreted 'other status' as meaning a personal characteristic: Kjeldsen, Buskmidsen and Pedersen v Denmark [1976] 1 EHRR 711, para. 56. I do not understand the Lord Chief Justice to have expressed a different view in para. 47 of this judgment. On the other hand, the proscribed grounds in article 14 cannot be unlimited,

> otherwise the wording of article 14 referring to 'other status' beyond the well established proscribed grounds, including things such as sex, race or colour would be unnecessary. It would then preclude discrimination of any ground. That is plainly not the meaning of article 14."

(9) Mr McCloskey further argued that the comparator test was not satisfied in that there were significant differences between on the one hand a married prospective adoptive couple and on the other hand an unmarried prospective adoptive couple.

(10) Finally, it was the Crown case that even if the applicants surmounted the hurdles already outlined, the requirements of a legitimate aim and a reasonable relationship of proportionality to such aim were satisfied. Mr McCloskey submitted that the margin of appreciation (or discretionary area of judgment) arose with particular force in circumstances where:

(a) The measure under consideration was something duly enacted by democratically elected legislatures,

(b) It was of longstanding nature,

(c) The topic of which the legislative measure was concerned was one giving rise to contentious social, philosophical and moral arguments and judgments. He submitted that it was precisely in those circumstances that the court should more readily hold that the impugned measure had a legitimate aim and was proportionate.

Conclusions

[12] My conclusions in this matters are as follows:

(1) The applicants do not seek, and the Convention does not guarantee, the right to adopt as such. The authority for this proposition is accurately and conveniently summarised in Frette's case at paragraph 32 where the court said:

> "The court notes that the Convention does not guarantee the right to adopt as such ….. Moreover, the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family."

(2) The notion of family life clearly goes beyond the merely formal and covers other de facto family ties. It includes a relationship between

unmarried adults even if not formally or legally endorsed or recognised, provided such relationships are sufficiently enduring. Key factors are the stability of the relationship, the intention of the parties and, though by no means determinative, cohabitation. (See Kroon v Netherlands [1995] 19 EHRR 263 at para 30). Moreover in K & T v Finland [2003] 36 EHRR 18, notwithstanding the absence of a formal relationship between the parents of the children concerned and indeed between the parents and the children, the court found that, within the compass of Article 8, "family life" existed. At paragraph 150 the court observed:

> "The court would point out, in accordance with its previous case law … that the existence or non-existence of `family life' is essentially a question of fact depending upon the real existence in practice of close personal ties. Both the applicants had lived together with M until he was voluntarily placed in a children's home and later taken into public care. ….. Prior to the birth of J, the applicants and M had formed a family with a clear intention of continuing their life together. The same intention existed as regards the new born baby J, for whom T actually cared during sometime soon after her birth and before he became her custodian in law."

Accordingly I am satisfied that notwithstanding the fact that Y is not P's father, both he and X have enjoyed family life with P during the course of the previous 7/8 years. The absence of a marriage based relationship or natural father/natural daughter connection creates no impediment to that position. (See also Keegan v Ireland (1994) 18 EHRR 342, Camp and Bourime v Netherlands (2002) 34 EHRR 59, Elsholz v Germany (2002) 34 EHRR 58 and Singh v Early Clearance Office of New Delhi (2004) EWCA Civ. 1075.)

(3) Whilst I am satisfied that the Adoption Order (articles 14 and 15) does not prevent either of the applicants having a family life and that there is no breach of article 8 of the Convention in this case, nonetheless I am also satisfied that Mr O'Hara is correct in submitting that article 14, whilst restricted to a prohibition of discrimination in relation only to the substantive rights and freedoms set out elsewhere in the Convention, does not presuppose a breach of any of the substantive provisions of the Convention. (See paragraph [8] of this judgment).

(4) Convention rights do include positive duties. Whilst this does not extend to a duty to make positive provision, Article 14 is triggered even if there is no breach of a substantive right provided that a right is engaged. This means that where there is no duty on the State to make provision in the

first place, eg for adoption, but the State chooses to do so, as it clearly does under the 1987 Order, it must do so without discrimination. In Ghaidin v Godin-Mendoza [2004] 2 AC 557 Baroness Hale said at para. 135:

> "Everyone has the right to respect for their home. This does not mean that the State – or anyone else – has to supply everyone with a home. Nor does it mean that the State has to grant everyone a secure right to live in their home. But if it does grant that right to some, it must not withhold it from others in the same or analogous situation. It must grant that right equally, unless the difference in treatment can be objectively justified."

(5) Equally its application to those other provisions does not arise unless the facts at issue fall within the ambit of one or more the provisions of the Convention. The question therefore I have to consider at this stage is whether or not the facts fall within the ambit of one or more of the Convention rights, the relevant right in this instance being art. 8. Is the inability of an unmarried member of an adult partnership in Northern Ireland to adopt sufficiently within the ambit of what article 8 protects to engage article 14? It is my view that article 8 protects much more than privacy simpliciter. I consider the authors of "Human Rights Law and Practice" Lester and Pannick, second edition, have captured the real substance of the right at p. 261 para. 4.8.2 when the authors state:

> "Like other international human rights guarantees, it demands respect for a broad range of loosely allied personal interests: physical or bodily integrity; personal identity and lifestyle, including sexuality and sexual orientation; reputation; family life; the home and home environment; and correspondence, embracing all forms of communication. The closest to a unifying theme for such diverse subjects is the liberal presumption that individuals should have an area of autonomous development, interaction and liberty, 'a private sphere' with or without interaction with others and free from State intervention and free from excessive, unsolicited intervention by other uninvited individuals. Viewed in this way, the notion of privacy is something of a continuum starting from a inviolable course of personal autonomy and radiating out (yet becoming more subject to qualifications or justified interference) into personal and social relationships."

Whilst Frette's Case may be authority on a strict construction solely for the private life dimension of Article 8 in the context of adoption and sexual orientation, I am satisfied that, given that the State has provided for adoption even though it is not obliged to do so by the Convention, the right of unmarried couples to avail of that right in a joint approach is within the ambit of article 8 given the wide substance of the right which article 8 protects. As Ackerman J, said in Bernstein and Others v Bester and Others [1996] (2) SA 751:

> "A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority."

I consider the spirit of article 8 of the Convention has such a wide embrace. I regard the right in these circumstances of this couple to jointly apply for adoption to have a sufficient nexus to bring it within the terms of the protection afforded by the Convention.

[13] I pause to observe that I reject Mr McCloskey's submission that the applicants' case fails on this issue under essentially the same grounds as those outlined in Re McDonnell's Application for Judicial Review and Re Lilly's Application for Judicial Review [2004] NI 349. This was a case of a wholly different genre dealing with security of tenure where tenants failed to evince any evidence of disruption or potential disruption of their current home or family life by virtue of their inability to purchase their properties under a housing order. This is distinguishable different from the right of an unmarried man, as part of an unmarried couple, to exercise a right to be considered for adoption in circumstances where the State had chosen to provide for adoption notwithstanding that the State was not obliged to do so by the Convention.

[14] Having come to the conclusion that the facts do fall within the ambit of an Article 8 right, I am satisfied that the appropriate approach that I should now adopt is that set out in S v Chief Constable of South Yorkshire Police and A and Ors referred to in pp. 12 and 13 of this judgment. Accordingly the next matter that I must consider is whether or not there is a difference in treatment in respect of the right under article 8 between the complainants and others put forward for comparison. An instructive case on this issue is PM to which I have earlier referred. I reiterate that in that case the applicant, an unmarried father who was contributing financially to his daughter, claimed discrimination as an unmarried father because he had not qualified for tax deductions in respect of maintenance payments paid to the mother of his daughter. At para. 26 the court said:

> "26. For the purposes of art.14 a difference in treatment between persons in analogous or relevantly similar positions is discriminatory if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be realised. Moreover the contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. (See Camp v Netherlands [2000] ECtHR 28369/95 at para. 37)."

[15] The Government defended the case on the basis that the couple had made a free choice not to marry, that the marriage relationship was at the core of the applicable tax legislation and that there was objective and reasonable justification to the different treatment. Before I reach the stage of considering whether there is objective and reasonable justification for different treatment, I have to be satisfied that there was a difference in treatment in respect of the complainants and others put forward for comparison. The fact of the matter is that whilst Y is not the child's natural father, he is in all other respects the father in that he has treated P as his daughter to the extent that I am satisfied there is an established family life. Whilst this couple can individually, although not jointly, adopt a child, they are treated differently from a married couple as a result of their status. In my opinion that is an appropriate comparator and requires objective and reasonable justification. By virtue of the family life that this man has enjoyed, I believe that he has treated this child as a member of the family and as such would be under an obligation to maintain and to pay maintenance should there be a separation. This is demonstrably different from a situation where the applicants seek to compare themselves to a couple living in a subsisting marriage for the purposes of differing taxation eg Lindsay v United Kingdom (App. No. 11089/84) [1986] 49 DR 181 upon which Mr McCloskey relied and which was distinguished in PM.

[16] The next issue I have to determine is whether or not the difference in treatment was on one or more of the prescribed grounds under Article 14 of the Convention. In this case the suggestion is that the discrimination was on the grounds of "other status". Mr O'Hara had argued that in Northern Ireland an unmarried gay person can adopt, individual members of an unmarried couple can adopt but this unmarried man could not adopt if his partner was not to lose her rights. At best he could obtain a residence order if he was not to put a pre-condition on the natural mother extinguishing her rights.

[17] So far as the status issue is concerned, I am not persuaded that there is any material distinction in the context of this case between an unmarried man who has clearly established family life with a young child and a married father who enjoys similar family life. I do not believe that the marital status of the latter is a sufficiently relevant distinguishing factor and in the circumstances of this case I believe that there has been prima facie a difference in treatment between persons who are in an analogous or relatively similar position. In PM v United Kingdom the court concluded that there was no material distinction between a separated unmarried father and a separated married father and whilst the factual situations are clearly distinct from the present case, nonetheless I find the general approach of the court in that case to be sufficient to persuade me that Y, who is in fact a de facto father in this case, is sufficiently analogous to the position of a married father. The applicants in this case differ from a married couple only as regards the issue of marital status and in my view therefore can claim in the circumstances of adoption to be in a relatively similar position. I emphasise, however, that I make that finding in a context where I have been satisfied that this couple have firmly established beyond plausible dispute that they have established a family life with this child and have acted in the role of mother and father.

[18] The final test that I have to apply in this matter, is to decide whether the difference in treatment is objectively justifiable in the sense that it had a legitimate aim and bore a reasonable relationship of proportionality to that aim. In considering this aspect of the case, I have adopted the following approach:

(i) Although the Human Rights Act does give the judiciary an express mandate to determine whether legislation and executive decision making is human rights compatible, it does not make judges into legislators. The court must separate the spheres of decision making for elected representatives and for judges. Dealing with the discretionary area of judgment concept, Lord Hope of Craighead said in R v DPP., ex p. Kebilene [2002] A.C. 326 at p. 380 ("Kebilene"):

> "This doctrine is an integral part of the supervisory jurisdiction which is exercised over State conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all States but may vary in its application according to local needs and conditions. This technique is not available to the national courts when they are considering Convention issues arising within their own countries. But in the hands of the national courts also the Convention should be seen as an

> expression of fundamental principles rather than as a set of mere rules. The question which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.
>
> In this area difficult choices may have to be made by the Executive or the legislator between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention."

Although this is similar to the "margin of appreciation" accorded by the ECtHR to domestic decision making, the courts now refer to the "discretionary area of judgment" or "latitude" which should be given to elected or official decision makers.

(ii) The courts defer to legislative and Executive discretion particularly where the Convention permits the State to justify limiting the right. In R (On the Application of Pro Life Alliance) v British Broadcasting Corporation [2004] 1 AC 185 at p. 240 para. 75, ("R (Pro Life) v BBC") Lord Hoffmann said:

> "My Lords, although the word 'deference' is now very popular in describing the relationship between the judicial and the other branches of Government, I do not think that overtones of servility, or perhaps a gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of Government has in any particular instance the decision making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.
>
> 76. This means that the courts themselves often have to decide the limits of their own decision making power. That is inevitable. But it does not mean that their allocation of decision making power to the other branches of Government is a matter of courtesy or deference. The principles upon which decision making powers are allocated are principles

> of law. The courts are the independent branch of Government and the legislator and the Executive are, directly and indirectly respectively, the elected branches of Government. Independence makes the courts more suited to deciding some questions of fact and being elected makes the legislator or Executive more suited to deciding others. The allocation of these decision making responsibilities is based upon recognised principles. The principle that the independence of the courts is necessary for a proper decision of disputed legal rights or claims of violation of human rights is a legal principle. It is reflected in Article 6 of the Convention. On the other hand, the principle of majority approval is necessary for a proper decision on policy or allocation of resources is also a legal principle. Likewise, when a court decides that a decision is within the proper competence of the legislator or Executive, it is not showing deference. It is deciding the law."

(iii) I find an unbroken line of authority to the effect that the more purely political the issue is, the less likely it is appropriate for a judicial resolution. In A v Secretary of State for the Home Department [2005] 2 AC 68 at para. 38 Lord Bingham of Cornhill said:

> "Those conducting the business of democratic Government have to make legislative choices which, notably in some fields, are very much of a matter for them, particularly when, as is often the case, the interests of one individual or group have to be balanced against those of another individual or group or the interests of the community as a whole. The European Court has recognised this on many occasions."

(iv) Where issues involve questions of contentious social or moral policy the necessity for the balancing exercise becomes all the greater. In Kebilene's case Lord Hope of Craighead said at p. 381:

> "It will be easier for such (a discretionary) area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It would be easier for it to be recognised where the issues involve questions of

> social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection."

[19] Re A and Others was a case concerning nine persons detained under the Anti-terrorism Crime and Security Act [2001] and its compatibility with Articles 5 and 14 of the Convention. Nonetheless a number of general statements were made relevant to my consideration of this aspect of the case. Speaking of the wide margin of discretion which should be accorded to the Executive and to Parliament today, Lord Hope of Craighead said at para. 107 et seq:

> "107… but the width of the margin depends on the context. Here the context is set by the nature of the right to liberty which the Convention guarantees to everyone, and by the responsibility that rests on the court to give effect to the guarantee to minimise the risk of arbitrariness and to ensure the rule of law….
>
> 108… put another way, the margin of the discretionary judgment that the courts will accord to the Executive and to Parliament where this right is an issue is narrower than will be appropriate in other contexts. We are not dealing here with matters of social and economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to Government and to the legislator."

[20] I am satisfied that Mr McCloskey properly summarised the position when he relied on what Lord Walker had said in R (Pro Life) v BBC at para. 136 as follows:

> "Finally (as to the authorities bearing on this part of the case) I would refer to the dissenting judgment of Laws LJ in International Transport Roth GMBB v Secretary of State for the Home Department [2003] QB 728, 765 – 767 … . The whole passage is of great interest but I will highlight four principles which Laws LJ put forward ….
>
> (i) 'Greater deference is to be paid to an act of Parliament than to a decision of the Executive or subordinate measure …'

(ii) 'There is more scope for deference where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified' ….

(iii) 'Greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts' …

(iv) 'Greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts'."

[21] The final authority to which I shall refer in this context is Bellinger v Bellinger [2003] 2 AC 467 which concerned the validity of a marriage where the wife was a transsexual woman who had been borne a man. The court said this was a decision "pre-emptily for Parliament". Lord Nicholls of Birkenhead said at para. 39:

> "(The case) raises issues whose solutions calls for intensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balance. The issue are altogether ill-suited for determination by courts and court procedure."

[22] I observe at this stage that I have derived great assistance in distilling these principles from an article by Ms Sandra Fredman, Professor of Law at the University of Oxford found in (2006) 122 LQR 81 where the author concludes:

> In a modern state with a positive responsibility for the provision of equality and liberty, policy is increasingly becoming the mechanism for the delivery of human rights rather than being ranged against it. Courts must therefore develop a mechanism for evaluating policy as part of a human rights adjudication which strengthens rather than detracts from democracy."

That interesting conclusion has not been sufficient to tempt me into the debate with which the author clearly wishes to trigger but I venture to suggest that the last drop of academic ink has not yet been split on this issue.

[23] Applying the principles that I have derived from the authorities mentioned above, I have come to the conclusion that there is much merit in the assertion by Ms Conlon from the Department of Health and Social Service and Public Safety in her affidavits that issues arising out of the framing of adoption legislation relevant to the point at issue in this case, must lie within the remit of those conducting the business of democratic Government and who have been elected to make legislative choices on our behalf. The line to be drawn between judicial activism and political resolution is often delicate and sometimes controversial but I consider that social issues such as whether unmarried couples should be permitted to adopt require the input of social attitudes and social norms in Northern Ireland and a recognition that distinctions in this area may be drawn with the rest of the United Kingdom. A reading of the debates in Parliament concerning the Adoption and Children Act 2002 clearly reveals that the chronic shortage of prospective adopters in England and Wales was a potent factor. I have been informed, without challenge, that this shortage does not exist in Northern Ireland. This is but one illustration of the differences in our society which feed that society's needs. A decision on this matter will have ramifications for same sex partnerships as well as unmarried different sex couples in subsequent adoption applications. Socio-economic conditions, religion and tradition are all factors which feed into the social morals of Northern Ireland and will contribute to the Parliamentary process in determining legislative outcomes. Already the Department has commenced the process of carrying out a review of adoption legislation in Northern Ireland with the hope that an adoption strategy followed by legislation will be enacted by the spring of 2007. Law is a dynamic process. It has to be in tune with the ever changing needs and values of a society failing which individuals suffer and social fabric breaks down. It is this dimension of law which makes it a catalyst of social change. Nonetheless proper appreciation of the role of the courts must be accompanied by a corresponding recognition of its limits. Basic assumptions are changing but the courts should be slow to compete with Parliament on issues that are self evidently reflective of social attitudes and norms particularly at a time when the Government is looking at the matter as part of a coherent and comprehensive review of adoption legislation. Government has clearly embarked on a wide ranging consultative process on the adoption legislation and I consider that it is an inappropriate task for the courts to upsurp that role whilst the voice of the people of Northern Ireland is still being heard. I believe it would involve a striking constitutional asymmetry if at the same time as the legislature is contemplating change, the judicial process was to impose itself on that process. Doubtless the interpretation of the Convention must move with the grain of our times in accordance with contemporary notions of social justice, but nevertheless the courts cannot embark on an independent and unfettered appraisal of what they think is required by public policy on every issue. I therefore depart from the views expressed by the Joint Committee on Human Rights and Dr Kilkelly in so far

as those reports are invoked as a reason to suggest this court must declare the impugned provisions to be incompatible with the Convention. I recognise that there are limits to this proposition. Dudgeon v United Kingdom [1981] 4 EHRR 149 ("Dudgeon's case") is an early example of where, in the field of homosexuality, the ECtHR held that notwithstanding the margin of appreciation left to the national authorities, it was for the court to make the final evaluation as to whether the reasons it found to be relevant were sufficient in the circumstances to justify the prohibition and in particular whether the interference complained of was proportionate to the social need claimed for it. I consider the Dudgeon's case is clearly distinguishable from the present case in circumstances where there is self evidently, in my view, more room for plausible dispute and thus a need for wide discussion about what is the best approach for children within the confines of Northern Ireland society. This is not a question of intolerance or broad mindedness but rather a genuine social concern as to where the best interests of children may lie in this sphere of adoption and in a field where I believe different views may be not unreasonably held in the context of child welfare and Northern Ireland society as a whole. The fact of the matter is that in 1987 Parliament made a determination in this area of social policy and it is for Parliament to decide if a different point of view should now hold sway. If, in light of current social mores, this is now a flawed and unduly intrusive piece of legislation it is for Parliament to alter it. I am therefore persuaded that the difference in treatment between the applicants and a married adoptive couple are objectively justifiable in the sense that it has a legitimate aim, namely the best interests of children, and that this difference bears a reasonable relationship of proportionality to that aim. In this case the interests of these two individual applicants must be balanced against the interests of the community as a whole. It is for this society through Parliament to determine the setting in which the advantages of adoption can best be achieved. I do not consider it is the court's task to substitute its own view for that of the legislature in this instance. Accordingly I find no incompatibility between the impugned articles of the 1987 Order and the Convention.

[24] I therefore dismiss the applicants' case.