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COURT DELIVERS SAME SEX MARRIAGE JUDGMENT

Summary of Judgment

The Court of Appeal[1] today delivered its judgment in an appeal against the prohibition of same sex marriage in Northern Ireland. It said there was no need for the court to intervene and make a declaration that the legislation which existed at the time the case was brought given the change to the legislation in 2020 allowing for same sex marriage and opposite-sex civil partnerships. The appellants had entered into civil partnerships in December 2005: Grainne Close with Shannon Sickles and Christopher Flanagan-Kane with Henry Flanagan-Kane. Both couples wished to enter into a civil marriage but asserted they were prohibited from doing so by Article 6(6)(e) of the Marriage (Northern Ireland) Order 2003 ("the 2003 Order").

Statutory Background

The 2003 Order was made by the UK Parliament at a time when the Northern Ireland Assembly was suspended. Article 6(6)(e) provided that there was a legal impediment to a marriage if both the parties are of the same sex.

By November 2015 the NI Assembly had voted against the introduction of same sex marriage on four occasions. The vote, however, on this date was in favour. A petition of concern was lodged and the motion to introduce same sex marriage did not receive the necessary cross-community support.

Same sex marriage was, however, enabled by the UK Parliament in 2020. Section 8 of the Northern Ireland (Executive Formation etc) Act 2019 ("the 2019 Act") required the Secretary of State to make regulations by 13 January 2020 providing that two persons who are not 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. 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 UK 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.

Trial Judge's Conclusion

At first instance, the trial judge held that the European Court of Human Rights ("ECtHR") case law established that the ECHR did not impose an obligation on a State to provide access to same sex marriage. He noted a trend towards the recognition of same sex marriage but said there was no sign whatever of the ECtHR moving in that direction. On the basis of the case law before him, the trial judge felt driven to conclude that the ECHR rights of the appellants had not been violated. He said it

[1] The panel was the Lord Chief Justice, Lord Justice Stephens and Lord Justice Treacy. The Lord Chief Justice delivered the judgment of the court.

was not the role of a judge to decide on social policy: that was for the NI Executive and the NI Assembly. The trial judge concluded that the statutory provisions in Northern Ireland did not violate any rights as those rights did not exist in any legal sense.

Grounds before Court of Appeal

The appellants were permitted to amend their Order 53 Statement before the Court of Appeal. The sole declaration being sought was: "A declaration pursuant to section 4 of the Human Rights Act 1998 ("the HRA") that Article 6(6)(e) of the 2003 Order is compatible with Article 14 taken with Articles 8 and 12 of the ECHR insofar as it prevents individuals of the same sex entering civil marriage."

The Court considered the relevant ECtHR and domestic case law. It made the following conclusions:

- The case law of the ECtHR makes it clear that Article 12 does not establish a right to same sex marriage;
- The case law establishes that same sex couples in loving relationships have rights under Article 8 of the ECHR in respect of private and family life. The Court noted that Article 8 cannot, however, supply what Article 12 does not supply and cannot, therefore, provide a means of establishing a right to same sex marriage;
- 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 ECHR applies;
- States enjoy a margin of appreciation in ECHR law on the application of discrimination caught by Article 14.

The Court concluded that the questions in this appeal were 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.

Consideration

A claim under Article 14 ECHR generally raises four questions:

- Do the circumstances "fall within the ambit" of one or more of the ECHR rights?
- Has there been a difference of treatment between two persons who are in an analogous situation?
- Is that difference of treatment on the ground of one of the characteristics listed or "other status"?
- Is there an objective justification for that difference in treatment?

The Court said it was common case that the circumstances in this appeal fell within the ambit of Articles 8 and 12 and apparent that access to marriage and civil partnership in Northern Ireland was based on sexual orientation. It commented that 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 had been accurately described as incorporating a separate but equal status. The Court noted it as 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 but accepted that the status in each case is different:

> "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 [of Finance and Personnel] 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."

The Court then considered the test for justification. It noted the trial judge had recognised there had been a clear trend towards providing legal rights and recognition for same sex couples who wish to form long lasting relationships. It commented, however, that there was still some ambivalence about the entitlement to such rights which had not been resolved until a decision of the ECtHR in 2010[2]:

> "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."

The Court said it was clear from the NI Assembly debates that the principal objection to the introduction of same sex marriage was to maintain and uphold that cultural tradition. While there was an overriding religious aspect of some for their view the argument broadly centred on whether the rights of same sex couples should be provided for separately. 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.

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%. 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. The statutory purpose of the petition of concern mechanism was to ensure protection for the traditions of both unionist and nationalist communities. The Court noted that there was less enthusiasm for same sex marriage in the unionist community but considered, 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.

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[2] *Shalk and Kopf v Austria* (2010) 53 EHRR 20

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."

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. Since 2013 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 for not taking action in the absence of an NI Assembly was based primarily on adherence to the devolution understandings. The Court was satisfied that by the time of the delivery of the first instance judgment in this case in August 2017 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

The Court concluded that, in light of the legislative developments, there was no purpose to be served by making a declaration under section 4 of the HRA.

NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Judiciary NI website (https://judiciaryni.uk).

ENDS

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