

Judicial Communications Office

15 April 2020

COURT DELIVERS SECOND SAME SEX MARRIAGE JUDGMENT

Summary of Judgment

The Court of Appeal¹ today delivered judgment in an appeal brought by two men who were married in England but upon their return to Northern Ireland had to be treated as civil partners. The Court ruled they had been discriminated against but said the recent changes to legislation meant there was no purpose to be served by it making an order declaring the legislation at the time to be incompatible with the European Convention on Human Rights (“ECHR”).

Statutory Background

Marriage is a matter in respect of which the Northern Ireland Assembly has competence. The Marriage (Northern Ireland) Order 2003 (“the 2003 Order”), however, was made by the Westminster Parliament during a period of suspension of the Assembly. Article 6(6)(e) of the 2003 Order provides there is a legal impediment to a marriage if both parties are of the same sex.

In December 2014, after returning to Northern Ireland after his marriage in London, the appellant issued a petition pursuant to Article 31 of the Matrimonial and Family Proceedings (NI) Order 1989 (“the 1989 Order”) seeking a declaration that his marriage is a valid and subsisting marriage under the law of Northern Ireland. Article 34 of the 1989 Order provides that if the truth of the proposition to be declared is proved the court must make that declaration and any such declaration is binding on the Crown and all other persons. Schedule 2, Part 1, paragraph 2(1) of the Marriage (Same-Sex Couples) Act 2013 (“the 2013 Act”), however, provides that the appellant’s marriage under the law of England and Wales is to be treated in Northern Ireland as a civil partnership. The appellant sought a declaration that the relevant provision of the 2013 Act is incompatible with Articles 8, 9 or 12 of the ECHR either alone or read in conjunction with Article 14 ECHR.

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. The Marriage (Same-Sex Couples) and the Civil Partnership (Opposite-sex Couples) were passed on foot of the legislation. The appellant’s marriage has therefore now been recognised in accordance with that provision.

The First Instance Decision

¹ The panel was the Lord Chief Justice, Lord Justice Stephens and Sir Donnell Deeny. The Lord Chief Justice delivered the judgment of the court.

Judicial Communications Office

The Department of Finance and Personnel (“the Department”) contended that Article 31 of the 1989 Order did not give jurisdiction to the court to declare valid a marriage entered into outside Northern Ireland. It also submitted that Article 31 did not afford jurisdiction to declare a civil partnership in Northern Ireland to be a marriage. Thirdly, it was submitted that Article 13 of the Matrimonial Causes (Northern Ireland) Order 1978 rendered void a marriage in which the parties were not respectively male and female. Accordingly, the Department contended that the reference to “marriage” in Article 31 must be read as referring to an opposite sex marriage. The trial judge rejected those submissions and the Court of Appeal held that he ruled correctly on this issue. It said it was satisfied that the appellant was entitled to pursue a claim for a declaration in accordance with Article 31 of the 1989 Order and that he would be a person adversely affected for the purpose of challenging the compatibility of the relevant statutory provision with the ECHR.

The trial judge also concluded that the appellant’s ECHR rights had not been violated as a result of his same-sex marriage in England being treated as a civil partnership in Northern Ireland. The appellant, however, submitted that this was not a case about whether or not the prohibition on same-sex marriage was contrary to the ECHR but rather was a case about whether the same-sex marriage celebrated in England should be recognised in this jurisdiction. It was submitted that the impugned legislation took away the appellant’s marriage. The Court said that while it understood the sentiment behind the presentation, the position was that the appellant and his husband went through a ceremony of marriage in England which was recognised as such in that jurisdiction but in Northern Ireland the ceremony which the appellant and his husband went through is treated as a civil partnership. The Court said the appellant knew that when he took part of the ceremony and there was therefore no issue about him having had a marriage taken away from him either in this jurisdiction or in England and Wales.

Consideration

The Court of Appeal considered the issue of whether the prohibition on same sex marriage in Northern Ireland was in breach of ECHR rights in *Re Close and others*² where it concluded that the prohibition had become unlawful by the summer of 2017. In the period after this, the prohibition was in breach of the rights of same-sex couples under Article 14 ECHR and the failure to recognise the appellant’s marriage must give rise to the same unjustified discrimination as compared to heterosexual couples whose marriages were recognised in similar circumstances. The issue in this case was whether there was any obligation to recognise the appellant’s marriage in this jurisdiction during the period when the prohibition on same sex marriage was not in breach of ECHR rights. The Court said it did not accept that section 3 of the Human Rights Act 1998 can be utilised to achieve that aim and considered the appellant’s case is an incompatibility case.

The Court considered this was an Article 14 ECHR discrimination case and the test to be applied was therefore:

- Do the circumstances “fall within the ambit” of one or more of the Convention 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”?

² *In re Close and others* [2020] NICA 20

Judicial Communications Office

- Is there an objective justification for that difference in treatment?

The principal authority touching on that matter is *Wilkinson v Kitzinger (No.2)* 2007 FCR 1983. In that case the court accepted that the reality of the underlying position was that the different treatment was based on sexual orientation. The question was whether it could withstand scrutiny and that dependent on whether it had a legitimate aim and whether the means chosen to achieve that aim were appropriate and not disproportionate in their adverse impact.

The Court of Appeal accepted that the maintenance of the traditional concept of marriage was a legitimate aim and provided justification for the prohibition on the recognition of same sex marriage for the period until the summer of 2017. Applying the tests set out above, the Court said it did not accept that those same sex couples who were married in England and Wales are treated differently from the appellant and his husband as both had had their marriage recognised in England and Wales and both are treated as civil partners in Northern Ireland:

“The true comparator is between those same sex couples who married in England and Wales and those heterosexual couples who did likewise. The heterosexual marriage was treated as a marriage in Northern Ireland. There was a difference of treatment which required justification. We considered the question of justification in some depth in *Close* and are satisfied that exactly the same issues arise in this case. We see no basis, therefore, upon which it could have been argued that the failure to recognise a same sex marriage celebrated in England and Wales could have given rise to unlawful discrimination during the period up to the summer of 2017 during which period the prohibition on same sex marriage was justified in this jurisdiction.”

Conclusion

The Court of Appeal concluded that the legislative changes introduced by the 2019 Act mean that there is no purpose to be served by any Order in this case.

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

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice’s Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF
Telephone: 028 9072 5921

Judicial Communications Office

E-mail: Alison.Houston@courtsni.gov.uk