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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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2014 No. 121568

IN THE MATTER OF AN APPLICATION BY GRAINNE CLOSE, SHANNON SICKLES, CHRISTOPHER FLANAGAN KANE AND HENRY FLANAGAN KANE FOR JUDICIAL REVIEW

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O'HARA J

Introduction

[1] The applicants in this judicial review are two same sex couples who entered into civil partnerships in 2005. Their challenge is to Article 6 of the Marriage (NI) Order 2003 ("the 2003 Order") which prohibits marriage "if both parties are of the same sex". They both want to be married couples rather than civil partners but cannot be due to that provision.

[2] Mr McMillen QC appeared for the applicants with Ms L McMahon. Mr McGleenan QC appeared with Mr McAteer on behalf of the relevant Government Department, the Department of Finance and Personnel. The Attorney General for Northern Ireland, Mr Larkin QC intervened in these proceedings in his own right. I am indebted to all counsel for their extensive written and oral submissions which have been of considerable assistance in formulating this judgment.

[3] As the case for the applicants makes clear, their ambition to be married has been frustrated by the refusal of the Northern Ireland Assembly to pass legislation to permit same sex marriage. In its initial form the judicial review challenged the use of the Petition of Concern in the Assembly. This is a mechanism which can be and has been used to frustrate various proposals, even if they achieve a majority of those voting. However that part of the case was not pursued.

[4] The result of that development is that the issue before me is whether Article 6 of the 2003 Order unlawfully discriminates against the applicants on the basis of sexual orientation contrary to the Human Rights Act and specifically Article 8 (right

to respect for private and family life), Article 12 (the right to marry) and Article 14 (prohibition of discrimination) of the European Convention on Human Rights ("the Convention").

[5] Before turning to the law I must recognise the compelling evidence put before me about the effect on the gay and lesbian community of being treated less favourably than others so repeatedly and for so long. That evidence shows the psychiatric damage caused by isolation, insult and disapproval. It shows how lives are altered for the worse in the most damaging of ways. This evidence and the Westminster government's case for same sex marriage which resulted in the Marriage (Same Sex Couples) Act 2013 make out a strong case for same sex marriage. Not only is it important for the gay and lesbian community; on the evidence it is also important to promote an open and tolerant society. That explains why this issue has attracted support far beyond the gay and lesbian community.

[6] The personal experiences of the applicants are described in moving terms in the affidavits lodged on their behalf. Their distress and feeling of exclusion has only increased in recent years as same sex marriage has been introduced through legislation in England, Wales and Scotland, as a result of a referendum in the Republic of Ireland and as a result of decisions taken by legislatures and courts in a growing number of countries.

The effect of the Human Rights Act and the European Convention on Human Rights

[7] Fundamental to the case made for the applicants is the contention that the effect of the Convention, as incorporated into the law of the United Kingdom by the Human Rights Act, is that the denial of same sex marriage in Northern Ireland is unlawful. Since the Strasbourg Court has considered this issue in recent years and since judgments of that court must be taken into account in this one it is relevant to consider what they say. It will then be necessary to consider what the effect of those judgments is on the case for the applicants.

[8] As was accepted on behalf of the applicants, the Strasbourg Court has not imposed on States an obligation to introduce same sex marriage under any provision of the Convention. It does require some legal recognition of same sex relationships but that recognition already exists here through civil partnerships. The difficulty facing the applicants therefore is to establish that the Convention, properly interpreted and applied in this case, assists them.

[9] The Strasbourg Court considered same sex marriage in the context of Article 12 in *Schalk and Kopf* [2011] 53 EHRR 20. It held that a provision of the Austrian Civil Code which provided that marriage had to be between people of the opposite sex was not contrary to Article 12. The court further held that changes in attitudes and social policy in recent times did not lead to a conclusion that a "living instrument" interpretation of the Convention was justified or tenable so as to lead to

a conclusion that Article 12 now embraced the concept of same sex marriage. Further the court noted that there is no European consensus on same sex marriage.

[10] The court (in fact the Grand Chamber) considered same sex marriage again in the context of Article 12 in *Hamalainen* [2014] and again concluded that the Article could not be construed as imposing an obligation on member states to grant access to marriage to same sex couples.

[11] If further emphasis were needed, it was provided by a later decision in *Oliari v Italy* [2015] which again rejected an Article 12 complaint about the failure to legislate for same sex marriage as being manifestly ill-founded, both on its own and even when read in conjunction with Article 14.

[12] The court has also rejected the proposition that any different result is reached under Article 8. It has done so in *Schalk and Kopf* and again in *Hamalainen*.

[13] As Mr McMillen was driven to accept, all of the relevant case law from the Strasbourg Court is against his case. His submission however was that that case law is wrong. Mr McGleenan and the Attorney General submitted that the case must inevitably fail under the Ullah principle because I cannot take an independent view of that case law.

[14] It is of course correct that there have been important landmark developments independent of the Convention and the decisions of the Strasbourg Court. I have already referred to the Irish referendum as being one example. So also are judgments given in courts in the United States, South Africa and elsewhere. There is therefore a growing list of countries where same sex marriage has been legislated for or become part of the law because it is regarded as the right thing to do, pure and simple.

[15] If there is a trend, it is undoubtedly towards recognition of same sex marriage in more and more countries. Unfortunately for the applicants there is no sign whatever of the Strasbourg Court moving in that direction. It has had three opportunities to consider the issue during this decade and has turned its face firmly against it.

[16] On the basis of the case law which is summarised above I am driven to conclude that the Convention rights of the applicants have not been violated. It is not the role of a judge to decide on social policy. That is for the Executive and the Assembly under our constitution. In certain limited circumstances the courts can intervene but this is not one of them. Put simply, the Strasbourg Court does not recognise a "right" to same sex marriage. That being the case, the current statutory provisions in Northern Ireland do not violate any rights. Those rights do not exist in any legal sense.

[17] If equality in marriage is to be achieved for gay and lesbian couples such as these applicants, it will have to be achieved through the Assembly. I hope that when

the Assembly is next asked to consider the issue, those who have the responsibility of voting will read the evidence in this case and in *Re X* in order to understand more completely the issue before them.

[18] In the circumstances the application for judicial review is dismissed.