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2014/124435

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY DIVISION

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X

Petitioner

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O'HARA J

Introduction

[1] The applicant is a gay man who lives and works in Northern Ireland. He married his husband in London in September 2014, a same sex marriage recognised in law by the Marriage (Same Sex Couples) Act 2013 ("the 2013 Act"). That Act applies to England and Wales. It does not extend to Northern Ireland save that in Schedule 2 it is provided that a same sex marriage is treated for the purposes of the law of Northern Ireland as a civil partnership in accordance with the Civil Partnership Act 2004.

[2] The result of this is that X and his partner are married but the law of Northern Ireland where they live does not recognise their marriage. In these proceedings X seeks a declaration that his marriage in London is a valid and subsisting marriage under the law of Northern Ireland pursuant to Article 31 of the Matrimonial and Family Proceedings (NI) Order 1989 ("the 1989 Order"). His fundamental contention is that the failure to recognise his marriage as a valid and subsisting marriage when domiciled in Northern Ireland contravenes his rights under the European Convention on Human Rights ("the Convention"). In the event that the relevant provision of Schedule 2 of the 2013 Act cannot be read and given effect to in a way which is compatible with his rights, the petitioner seeks a declaration that that statutory provision is incompatible with the Convention.

[3] In effect X wishes his same sex marriage to be recognised and given effect to as a matter of law in Northern Ireland. The law on marriage is a matter which is a transferred matter under the Northern Ireland Act 1998. This means that it lies within the competence of the Northern Ireland Executive and the Northern Ireland Assembly. To the frustration of supporters of same sex marriage the Assembly has not yet passed into law any measure to recognise and introduce same sex marriage. Their frustration is increased by the fact that the Assembly has voted by a majority in favour of same sex marriage but by reason of special voting arrangements which reflect the troubled past of this State that majority has not been sufficient to give the vote effect in law.

[4] In these proceedings X was represented by Ms Quinlivan QC with Mr McQuitty. The relevant Northern Ireland Government department, the Department of Finance and Personnel, was represented by Mr McGleenan QC with Mr McAteer. Mr Scoffield QC with Mr Egan represented the Government Equalities Office which is part of the Department for Education in Westminster and which was responsible for delivering the Government's policy on extending marriage to same sex couples in England and Wales through the 2013 Act. It was also involved in obtaining the necessary legislative consent from the Northern Ireland Assembly in respect of the provisions of Schedule 2. The Attorney General for Northern Ireland, Mr Larkin QC, also 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.

Background

A. The 2013 Act

[5] By bringing forward the Bill which became the 2013 Act and by supporting its passage through the United Kingdom Parliament, the Government demonstrated its commitment to the principle and benefits of marriage for same sex couples in England and Wales. It did so in very strong terms which are relied on by X as indicating why the unavailability of same sex marriage in Northern Ireland breaches his rights. For instance in the Ministerial Foreword to the Government's response during the consultation process in December 2012 the Minister said:

> "Since 1836 marriage has been a civil institution as well as a religious one: the State recognises equal rights in all aspects of civil life and cannot justify preventing people from marrying unless there are extremely good reasons for doing so – being gay or lesbian is simply not one of them.

> For me, extending marriage to same sex couples is all about how society treats its citizens – we are all equal. It will strengthen, not weaken, this vital institution and help ensure that it remains an essential building block of society. But I also know there are concerns.
>
> While some religious organisations have made it clear they would like to marry all couples, others have been absolutely clear that their faith would prohibit it. So this consultation response sets out how we will ensure unequivocally that no religious organisation will be forced to marry same-sex couples, while also ensuring that organisations who wish to conduct these marriages can also opt-in as they can for civil partnerships."

[6] Notwithstanding this stance, the Act did not extend either to Scotland or Northern Ireland because the responsibility for legislating for marriage had been devolved or transferred to the legislatures in those separate jurisdictions. As was acknowledged in the submission of the Government Equalities Office, the Westminster Parliament could ultimately impose its view on Northern Ireland (or Scotland) but that is a step which would be out of keeping with the internal constitutional arrangements within the United Kingdom.

[7] There was one issue which the Government Equalities Office addressed relating to Northern Ireland during the passage of the legislation. The Civil Partnership Act 2004, which applies throughout the United Kingdom, provided that overseas marriages of same sex couples were to be treated within the United Kingdom (including Northern Ireland) as civil partnerships. The 2013 Act provided that same sex marriages entered into overseas could be recognised as marriages in England and Wales. That left to be addressed how same sex marriage in England and Wales would be recognised in Northern Ireland. It would have been incongruous if they were not recognised at all.

[8] Accordingly Schedule 2 to the 2013 Act provides that same sex marriages entered into in England and Wales are recognised in Northern Ireland as civil partnerships. In accordance with established Convention, this provision was the subject of exchanges between the United Kingdom Government and Northern Ireland Executive. Those exchanges led to a legislative consent motion being tabled in the Northern Ireland Assembly in June 2013 and being approved. The United Kingdom Government did not seek any other or extended legislative consent motion because it was not intending to introduce legislation for same sex marriage in Northern Ireland. It recognised that any such legislation was a matter for the Northern Ireland Assembly, a fact made clear during the passage of the Bill in Parliament.

B. The 1989 Order

[9] Article 31 of the 1989 Order provides that a petitioner can apply for a declaration that his/her marriage is a valid and subsisting marriage. It does so in the following terms:

> "**31.**—(1) Subject to the provisions of this Article, any person may apply to the court for one or more of the following declarations in relation to a marriage specified in the application, that is to say—
>
> (a) a declaration that the marriage was at its inception a valid marriage;
>
> (b) a declaration that the marriage subsisted on a date specified in the application."

[10] It is under this provision that X has launched his claim. In effect he seeks a declaration that his marriage which is recognised by virtue of the 2013 Act in England and Wales should similarly be recognised under the law of Northern Ireland notwithstanding the provisions of Schedule 2 and the clear intentions of the Westminster Parliament not to legislate for same sex marriage in Northern Ireland.

[11] It is relevant to note in this context that Article 13 of the Matrimonial Causes (NI) Order 1978 renders void a marriage in which the parties are not respectively male and female. However Article 17 of the same Order provides that Article 13 does not preclude a determination as to the validity of a marriage which would otherwise fall to be determined in accordance with the rules of private international law by reference to the law of a country other than Northern Ireland.

Preliminary issue as to jurisdiction

[12] Both Mr McGleenan and the Attorney General submitted that X's case must fail because Article 31 of the 1989 Order does not give jurisdiction to the court to declare valid a marriage entered into outside Northern Ireland. It was further submitted that Article 31 does not afford jurisdiction to declare a civil partnership in Northern Ireland to be a marriage. Thirdly it was submitted that the reference in Article 31 to "marriage" must be read as referring to an opposite sex marriage consistent with Article 13 of the 1978 Order and Article 6(6) of the Marriage (NI) Order 2003 which provides that there is a legal impediment to marriage if both parties are of the same sex.

[13] This submission was resisted by Ms Quinlivan, in part on the basis of the decision in *Wilkinson v Kitzinger* [2007] 1 FCR 183. That case involved an application

by a woman who had entered into a same sex marriage in Canada but had then returned to live in the United Kingdom. She sought to have her same sex marriage recognised as valid in English law at a time when English law did not provide for that. As such her application was similar in nature to the petition before this court.

[14] The court's jurisdiction to hear the Wilkinson case does not appear to have been challenged. The declaration was sought under Section 55 of the Family Law Act 1986 which is the equivalent of Article 31. Each of these statutory provisions gives the court jurisdiction to entertain the application on grounds which include domicile and habitual residence. This seems to me to be significant. Jurisdiction is explicitly based on those grounds and not on the country in which the marriage ceremony was performed. There is a logic to that which is that from time to time a person's status and rights may have to be determined by reference to their marital status. In such cases it makes sense that the court in their country of domicile should have the jurisdiction to consider and declare whether any relevant marriage which is said to have been entered into was valid and whether it continues to subsist.

[15] Accordingly I accept that Article 31 does give jurisdiction to hear the petition presented by X. However it is appropriate to note the outcome of the case. The petitioner failed to have her same sex marriage recognised as being valid in the English law. Furthermore she failed to obtain a declaration that the provisions of English law which prevented her marriage from being recognised were incompatible with her rights under Articles 8, 12 and 14 of the Convention.

[16] These issues were considered and addressed by the President of the Family Division in advance of the more recent decisions of the Strasbourg Court which will be referred to below. In my judgment those later decisions add weight to the strength of this authority against X.

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

[17] Fundamental to the petitioner's case 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 it is relevant to consider what they say. It will then be necessary to consider what the effect of those judgments is on X's case.

[18] As was accepted on behalf of X, 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

X therefore is to establish that the Convention, properly interpreted and applied in this case, assists him.

[19] The Strasbourg Court considered same sex marriage in the context of Article 12 (the right to marry) 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 and 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, a point emphasised on behalf of X, that notwithstanding social changes there is no European consensus on same sex marriage.

[20] 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.

[21] 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.

[22] The court has also rejected the proposition that any different result is reached under Article 8 (right to respect for private and family life). It has done so in *Schalk and Kopf* and again in *Hamalainen*.

[23] Although the applicability of Article 9 (freedom of thought, conscience and religion) was also raised for X, I do not accept on the evidence that there is any substantive case to be considered. If the case cannot be advanced under Articles 8, 12 and 14, I do not understand how Article 9 assists X.

[24] As I have already stated it was accepted on behalf of X that the findings of the European Court do not impose on member states a positive obligation to introduce same sex marriage. That concession was properly made but as Ms Quinlivan argued that is not necessarily the end of the case. She advanced an extensive submission which included the following contentions:

(a) The Human Rights Act requires judges to take account of the judgments of the European Court, not to be bound by them.

(b) The judgments referred to above all have to be considered against a backdrop that as the court has stated repeatedly there is no European consensus on same sex marriage with the result that a margin of

appreciation is allowed to member states who will not go as far as others do.

(c) Notwithstanding the absence of consensus, the court requires as a minimum some legal recognition of same sex relationships. This does not go as far as same sex marriage but indicates that there is discernible direction of movement.

(d) Within a member state the extent of any margin of appreciation is more restricted than it is at European level and in this case no attempt has been made to justify on tenable grounds the policy decision not to legislate for same sex marriage in Northern Ireland.

(e) The fact that the Scottish Parliament has now legislated for same sex marriage makes the impasse in Northern Ireland even harder to sustain and justify.

(f) There is a clearly identifiable international trend towards the recognition of same sex marriage. This is shown by the 2013 Act, by the result of the referendum in the Republic of Ireland, by judicial decisions in the United States, South Africa and elsewhere and by the range of countries which have moved to legislate for it in recent years. While it might not be possible to argue that there is yet a consensus, such a consensus is not the distant prospect that it appeared only a few years ago.

[25] In addition it was argued that the strength of the United Kingdom Government's case for same sex marriage and the potency of the arguments it advanced undermine any tenable resistance to its extension to Northern Ireland. Included in this contention is a proposition that far from weakening or undermining the institution of marriage, its extension to same sex couples will strengthen the institution and bring greater stability and strength to their relationships as it does to heterosexual relationships.

[26] It is unnecessary for me to set out at any length the powerful reasoning of the Westminster Government which is detailed in the papers exhibited in this case. They were in effect adopted on behalf of X to contend that to deny recognition to him and his husband of their marriage in Northern Ireland is simply unlawful and unjustifiable.

[27] The response of the different respondents was that the 2013 Act was based on a policy choice, not a legal obligation. Accordingly they submitted that the fact that one policy has been implemented into law in England and Wales and then Scotland while another policy has been adopted here is entirely legitimate and consistent with the Convention.

[28] Of course their submissions on the human rights issue went further than that. They contended that:

(a) The case law of the European Court, including very recent case law, is entirely against X.

(b) There is not and never has been a right under Convention law to recognition of same sex marriage. Accordingly in the present case there is no obligation to justify any policy because there has been no violation of a right to begin with.

(c) The fact that there are strongly held social and religious views on this issue which are reflected in local exchanges, debates and votes means that this is an issue where the margin of appreciation or discretionary judgment within a member state or part of a member state is tangible and the court should decline to intervene.

(d) The House of Lords and the Supreme Court have repeatedly made the point that national courts should not without strong reason dilute or weaken the effect of the Strasbourg case law. In addition they have ruled that while Member States can legislate to give rights more generous than those guaranteed by the Convention, they should not interpret (or misinterpret) the Convention to do so because the Convention must bear the same meaning for all states who are party to it.

Discussion

[29] The social policy arguments in favour of same sex marriage were set out in very strong terms during the consultation process which led up to the 2013 Act and during the Parliamentary debates. They are also described in X's affidavit in which he explains the inconsistency and confusion which he endures because his marriage is not recognised in the part of the United Kingdom in which he lives. There is a difference in substance between being a civil partner and being a partner in a marriage. The two are simply not the same. It is not at all difficult to understand how gay men and lesbians who have suffered discrimination, rejection and exclusion feel so strongly about the maintenance in Northern Ireland of the barrier to same sex marriage.

[30] However the judgment which I have to reach is not based on social policy but on the law. In the skeleton argument presented for X the issues which I have to consider were set out as follows at paragraph [16]:

(i) Whether the statutory deeming of the petitioner's marriage as a civil partnership by the 2013 Act violates the petitioner's rights under the European Convention (Articles 8, 9, 12 and 14).

(ii) If so whether the 2013 Act and any subordinate legislation (i.e. the Matrimonial Causes Order 1978) can be read compatibly with the petitioner's Convention rights.

(iii) If not, whether the court should make a declaration of incompatibility under Section 4 HRA 1998 in respect of the 2013 Act (and any other relevant provision).

[31] I have set out above in summary terms what the case law of the Strasbourg Court says. On the basis of that case law I cannot possibly conclude that X's Convention rights have been violated. My conclusion on this is supported by the following:

(a) While the Northern Ireland Human Rights Commission supports an equal level of human rights protection across the United Kingdom, its Chief Commissioner wrote on 11 June 2012 that:

> "The restriction of marriage to opposite sex couples does not violate the international standards and this is clear from both the international treaties and the jurisprudence of the European Court of Human Rights and the United Nations Human Rights Committee."

In my view the Chief Commissioner was correct to make that statement.

(b) The extensive papers from the consultation process do not at any point suggest that legislation is required to make English law compliant with the Convention.

(c) It is not open to me to give an interpretation of the Convention which is quite different from that of the Strasbourg Court. This follows from the "Ullah" principle that save in special circumstances I must follow clear and constant jurisprudence of the Strasbourg Court.

(d) The doctrine of the margin of appreciation is replaced in domestic courts by the doctrine of a discretionary area of judgment. In other words while the courts are obliged to intervene in some circumstances, they should be careful about how and when they do so and respect the separation of powers.

(e) It is in fact doubtful that the area of discretionary judgment arises in this case because the Strasbourg Court has held that same sex marriage is not even a Convention right. This means that while it is open to Government and Parliament to provide for it, they are not obliged to do so and whether they do so is a matter for them, not the courts.

(f) In its judgment in *Re P* [2008] UKHL 38, the House of Lords declared that an unmarried couple could be considered as adoptive parents for a child despite a specific statutory provision that only married couples could be so considered. That judgment was heavily influenced by the conclusion that the Strasbourg Court which had previously taken a contrary view would no longer do so. There is simply no reason in this case to believe that the Strasbourg Court will take a different view in the foreseeable future in light of its clear repeated and recent rulings.

[32] For all these reasons I conclude that X's rights have not been violated by virtue of the fact that the same sex marriage which he entered into in London in 2014 is recognised in Northern Ireland only as a civil partnership. It was submitted by the respondents that this recognition is actually a benefit for X because save for Schedule 2 his marriage would not be recognised in any legal sense in this jurisdiction. In a limited sense that is correct but it cannot be of much consolation for X who wants the full and unequivocal recognition of his marriage status in Northern Ireland as he would have if he lived in Scotland.

[33] I finish only with the suggestion that when this issue is raised again in the Northern Ireland Assembly, as it inevitably will be, those who carry the responsibility of voting will pause to read the papers from the consultation process.

[34] For the reasons set out above X's petition is dismissed.