IN THE HIGH COURT OF JUSTICE Case F005D04600

FAMILY DIVISION

B E T W E E N

SUSAN WILKINSON	***Petitioner***
and	
CELIA KITZINGER	***First Respondent***
HER MAJESTY'S ATTORNEY GENERAL	***Second Respondent***
and	
THE LORD CHANCELLOR	***Intervener***

SKELETON ARGUMENT OF THE INTERVENER

NOTE ON PAGE REFERENCES:
Page numbers are as follows: B1 – page 1 of bundle B; D(1)1 – page 1 of bundle D(1), etc.

This skeleton argument has been prepared before indices for Bundles A (skeleton arguments) and D(1) (authorities) have been finalised. A fully referenced copy will be substituted as soon as these are available.

1. INTRODUCTION

1. This is the response of the Lord Chancellor (intervening) to the Petitioner's application for:

    a. A declaration that the marriage entered into between the Petitioner and First Respondent under the law of British Columbia on 26 August 2003 was valid as a marriage as a matter of English law at its inception; or

    b. alternatively, a declaration of incompatibility under section 4 of the Human Rights Act 1998 ("the HRA") in respect of

section 11(c) Matrimonial Causes Act 1973 ("the MCA") and sections 1(1)(b) and 212-218 Civil Partnership Act 2004 ("the CPA"); and

c. an order that the Petitioner and the Intervener bear their own respective costs[1].

As a matter of English law, a valid marriage is a relationship between one man and one woman: section 11(c) of the Matrimonial Causes Act 1973 ("the MCA"). This codifies the deeply embedded common law position[2], and is consistent with the extent of the right to marry protected by Article 12 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention"/"the ECHR") as reflected in the consistent case-law of the European Court of Human Rights ("ECtHR")[3].

2. With effect from 5 December 2005, two consenting adults of the same sex, and of appropriate capacity[4] are able to form a civil partnership which is afforded an equivalent degree of legal recognition and equal legal protection by the CPA and the orders and regulations made thereunder. And under sections 212-218 CPA, where two persons of the same sex have entered into a marriage recognised as such by the law of a State which makes provision for such marriage, that marriage

[1] In his judgment of 12 April 2006 on the application for a Protective Costs Order, [2006] EWHC 835 (Fam), the President of the Family Division held that the conditions for the making of a PCO were not made out, and ordered that costs should be determined at the conclusion of the hearing in the normal way, although any *inter partes* claim for costs would be limited to £25,000 – judgment paragraph 59, B40.

[2] Hyde -v- Hyde and Woodmansee, (1866) 1LR P & D 130.

[3] This skeleton argument is drafted by reference to the law of England and Wales, since the Petitioner and First Respondent are domiciled in England. The MCA applies only to England and Wales: there are different provisions in force in Scotland and Northern Ireland, which are not the subject of this litigation. The relevant sections of the CPA extend to the whole of the United Kingdom. (Note that other parts of the CPA have varying territorial extent, see section 262 CPA.) The Petitioner and First Respondent erroneously describe their domicile as "Britain" (paragraph 3 of their statements at B2 and B107). The distinction may matter (though it does not on the facts of this case) because there is no UK wide law of marriage: the MCA applies to England and Wales only.

[4] I.e. not married or in a civil partnership with another, not within prescribed degrees of consanguity, etc.

is treated as a civil partnership under the law of the United Kingdom[5] provided that:

a. neither of the parties is already a civil partner or lawfully married (see section 212(1)(b)(ii) CPA),
b. under the law of the State in question they had the capacity to enter into such a relationship and met the requirements necessary to ensure its formal validity (see section 215(1) CPA), and
c. where either of the parties is domiciled in England and Wales, neither is under 16 years of age and they are not within the prescribed degrees of consanguity (see section 217(1) and (2) CPA).

3. As is common ground, s11(c) of the MCA thus imposes no practical or financial disadvantage on a same-sex couple whose relationship is recognised as a civil partnership, in comparison with an opposite-sex couple who are married.

4. The CPA is, nonetheless, the subject of strong political views on many sides. Unless, however, there is some incompatibility between the law as it stands and the rights scheduled to the HRA, any political controversy as to whether, to what extent, and by what means legislation should protect particular forms of relationship is not an arena apt for judicial intervention.

5. The issue before this Court is one of law. The Petitioner and the First Respondent are two women, who pursuant to a ceremony ("the Canadian marriage") on 26 August 2003 in Vancouver are married as a matter of the law of British Columbia. The Canadian marriage is by virtue of ss 212-218 CPA recognised as a civil partnership in English law, with all the same incidents as a civil partnership formed between two women in England and Wales. But the relationship cannot be recognised as a marriage in English law, because s11(c) MCA provides that a marriage shall be void if the parties are not respectively male and female.

[5] See footnote 2.

6. The Petitioner, supported by the First Respondent, asks the Court either to read and give effect to s11(c) MCA and/or ss1(1)(b) and 212-218 CPA in such a way as to recognise same-sex marriages lawfully effected in other jurisdictions as marriages (either universally, or where the parties choose to do so). This, she contends, is necessary to ensure compatibility with the rights of the Petitioner and Respondent under the Convention, by reason of s3 of the HRA[6].

7. Alternatively[7], the Petitioner seeks a declaration under s4(2) HRA that these provisions are incompatible with her, and the First Respondent's, Convention rights, under Articles 12, 8 and/or 14 ECHR[8].

8. Alternatively[9], she asks either that the common law be developed so as to recognise the Canadian marriage as a marriage in English law. She asks the court to suspend the requirement of private international law that the legal capacity to marry be judged according to the law of the parties' domicile if – as she postulates here – application of the ordinary private international law doctrine would violate the Convention rights of the parties to the foreign marriage.

2. SUMMARY OF THE CROWN'S POSITION

9. The Crown opposes this application. All the forms of relief sought are misconceived. They are all erroneously predicated on the false premises:

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[6] Amended Petition paragraphs 28-29, B6.

[7] Amended Petition, paragraph 30, B7.

[8] The Crown is entitled to notice of an application that the Court make a declaration of incompatibility under s5(1) of the HRA and Rule 10.26 of the Family Proceedings Rules 1991 (SI 1991/1247) (FPR), and by section 5(2) of the HRA, and Rule 10.26(5) of the FPR, a Minister of the Crown is then entitled to be joined to the proceedings[8]. The Lord Chancellor is the Minister of the Crown who will make representations in this case on behalf of the Crown: the Attorney-General has elected not to take part. Thus, whilst there is a statutory basis for intervention by either the Attorney-General or another Minister of the Crown (and whilst clearly the Crown will need to be represented in a contested application for a declaration of incompatibility), it makes no difference to the Petitioner which Minister participates, provided only one does so.

[9] Amended Petition, paragraph 31 B8.

a. That an opposite-sex overseas marriage would necessarily be recognised as a matter of public international law;
b. That s11(c) MCA and s1(1)(b) and ss212-218 CPA are not compatible with the Convention rights of the Petitioner and Respondent.

10. Firstly, *any* overseas marriage between parties with English domicile who lack capacity to marry in England and Wales, whether the parties are same-sex or opposite-sex, is not recognised in English law[10]. Secondly, having regard to the case-law of the ECtHR", the statutory provisions are entirely compatible with the Convention. In summary:

    a. Article 12 of the ECHR does not apply to recognition of same-sex relationships at all, but only to the right of a man and a woman to marry, as recognised in the domestic laws of the respective member states of the Council of Europe.
    b. There is no positive obligation upon a state under Article 8 to create a structure of legal recognition for a particular form of relationship which is afforded a particular legal title.
    c. Thus, whether or not a state creates some form of legal framework around a relationship is outside the ambit of Article 8.
    d. Alternatively, any limitations upon rights protected by Article 8(1) resultant upon the recognition of the status of marriage are consequences of the effect of Article 12, and so justified under Article 8(2).
    e. Since the matter falls outside the scope of Article 12 ECHR, and the positive requirements of Article 8(1), Article 14 ECHR (which applies only to discrimination which may arise within the ambit of another Convention provision) does not apply either.
    f. In any event:
        i. Married and unmarried couples are not analogously situated for comparison of their treatment under Article 8 ECHR. The correct comparators are other couples who have married overseas, and who lack of capacity to marry in English law.

[10] The private international law position as to recognition of marriage is set out in an Appendix to this document.

ii. Civil partners are subject to no less favourable treatment than married couples. Since the practical, property, and other legal, benefits of marriage have been afforded to same-sex couples whose relationships are recognised as civil partnerships under the CPA, the orders and regulations made thereunder, and the Finance Act 2005, there is no legal disadvantage, and no discrimination under Articles 8 and 14 of the ECHR.

g. Further, and in any event, the ECtHR and national courts will be very slow to trespass on areas of social, political and religious controversy where a wide variety of national and cultural traditions are in play, and very different political and legal choices have been made by the members of the Council of Europe. This is just such an area.

h. The decision to provide parallel, and equal, legal and financial protection to same-sex partners, through the CPA, to that provided to opposite-sex partners who elect to marry, and the decision to permit only same-sex partners to enter a civil partnership, were legitimate political choices, well within the state's very broad margin of appreciation in this area.

i. Since the legislation complies with the Convention rights, s3 of the HRA is not in play. A natural and ordinary reading of s11(c) MCA is compatible with the Convention rights. In any event, s11(c) MCA and the relevant sections of the CPA could not, by application of s3 of the HRA, be read so as to be compatible with the meaning of Articles 12, 8 and 14 of the ECHR for which the Petitioner contends, since this would involve departure from a plain and fundamental feature of the interlocking legislative scheme which the Marriage Act 1949, the MCA, and the CPA together create for opposite-sex and same-sex relationships respectively.

j. There is no reason for a declaration of incompatibility because, as explained above, Articles 12 and 8 and/or 14 of the ECHR do not require the recognition of same-sex marriages.

k. For the same reason, there is no rationale for seeking to develop (or, rather, entirely change) the common law position as to marriage. In any event, this would be constitu-

tionally improper, since the definition of marriage is a matter on which the legislature has spoken, and the common law power of judges to interpret private international law ought not to be exercised so undermine the deeply entrenched statutory concept of marriage.

3.THE SCOPE OF ARTICLE 12

11. The wording of Article 12 provides:

> "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of that right".

12. This language makes it clear that it protects the right to form a legally binding association between a man and a woman.

13. That understanding is reinforced by the case-law of the ECtHR. That Court has consistently held that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite sex. This appears mainly from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. See *Rees -v- United Kingdom* (1986) 9 EHRR 56 at paragraph 29, and 49. In *Cossey -v- UK* (1990) 13 EHRR 622 at 642, paragraph 46, the ECtHR said that there was no evidence in contracting states of any "general abandonment of the traditional concept of marriage".

14. In *Sheffield and Horsham -v- UK* (1998) 27 EHRR 163, the Court stated (paragraph 66):

> "the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. *However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite*

biological sex cannot be said to have an effect of this kind". [emphasis added]

The reference to "biological sex" can no longer stand in the light of the judgment of the Court in *Goodwin -v- UK* (2002) 35 EHRR 447 at 479. However even the *Goodwin* case is founded on the essential proposition that the fundamental right to marry secured by Article 12 is applicable only to one man and one woman (see paragraphs 98 and 100)[11].

15. That Article 12 relates only to marriage between a man and a woman has also recently been made clear in *B and L -v- United Kingdom* (App. 36536/02, 5 October 2005, paragraph 34) and *F -v- Switzerland* (1987) 10 EHRR 411, at paragraph 32.

    The same approach is taken by the European Court of Justice: see *Grant -v- South-West Trains* [1998] ECR I-621 ECJ at paragraphs 34-35, which referred to *Rees* and *Cossey,* and concluded that as a matter of EC law there was no requirement to protect stable relationships outside marriage between two persons of the same sex.

16. The very clear message from the ECtHR is that "marriage", as a Convention concept, relates only to the historical status of opposite-sex unions. Its sole consideration is traditional marriage between a man and a woman, and any disadvantages of this for those unable to marry are not matters within the ambit of Article 12.

17. It would be surprising if it were otherwise, given the lack of unanimity amongst member states of the Council of Europe on this subject. The majority have no form of legal recognition of same-sex relationships at all. Only three (Belgium, the Netherlands and Spain) have a legal institution of same-sex marriage, and – as explained below – the Court is slow to impose a "human rights bottom line" in culturally sensitive social policy areas where there is a wide variety of national practices.

[11] The breach of Art 12 found in the *Goodwin* case was because the Court held that gender can be determined by criteria other than simply *biological* factors (paragraphs 100 and 103). The case was concerned with legal recognition of a reassigned gender, and the right to marry was held to follow from that recognition. The right is to marry a person of opposite gender to the transsexual person's reassigned gender.

18. The "living instrument" doctrine cannot be used to bring within the scope of the Convention issues which are simply outside its contemplation: *Johnston & others -v- Ireland* (1986) 9 EHRR 203, paragraphs 52-54. in any event, it cannot be said that there is a Europe-wide consensus on the subject such that the Convention too should be treated as having evolved and expanded its scope to encompass other forms of social recognition.

19. There is, therefore, a clear and consistent line of Strasbourg case-law on the scope of Article 12. Section 2 HRA requires UK courts and tribunals determining a question arising in connection with a Convention right to take this into account and in the absence of any special circumstances, to follow it. The purpose of s2 is to ensure that the same Convention rights are enforced under the HRA by courts within the United Kingdom as would be enforced by the ECtHR in Strasbourg. It is not intended to provide Convention rights with a domestically autonomous meaning: *N -v- Secretary of State for the Home Department* [2005] UKHL 31, [2005] 2 AC 296 per Lord Hope at paragraph 25, and per Lord Bingham in *R(Ullah) -v- Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323 at paragraph 20:

> "… the Convention is an international instrument, the correct intepretation of which can be authoritatively expounded only by the Strasbourg court. … *It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of the interpretation of the Convention by national courts*, since the meaning of the Convention should be uniform throughout the states party to it. The duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less".[12]

[12] The policy behind this is clearly explained, in the context of an allegation of discrimination on grounds of sexual orientation within the ambit of the article 8 protection of respect for

4.THE SCOPE OF ARTICLE 8 AND RECOGNITION OF RELATIONSHIPS

20. Article 8 provides:

> "(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".

21. It is the most protean and potentially far-reaching article of the Convention. It requires member states to afford *respect* to private life, family life, home and correspondence, and prevents public authorities from *interference* with the right. Broadly construed, Article 8 would cover any matter touching on the personal life of any person in a Council of Europe country, and *any* legislation concerning personal relationships (whether between friends, family members, colleagues, partners, business associates) would be within the "ambit" of Article 8 for discrimination law purposes.

22. But the House of Lords has recently recognised, in the important case of *Secretary of State for Work & Pensions -v- M* [2006] UKHL 11, (2006) 2 WLR 637, that such an approach is unrealistic. As Lord Bingham said, to interpret any matter having any connection with any of the areas for which respect must be accorded as falling within the scope of Article 8, however tenuous the link, would be:

> "a recipe for artificiality and legalistic ingenuity of an unacceptable kind" (paragraph 4).

Lord Walker, in a careful review of the Article 8 case-law (at paragraphs 62-81), observed that the Strasbourg court had shown itself to be "well aware of the dangers of any unrestrained or unprincipled extension of Article 8" (paragraph 63) Rejecting an argument that any alleged act of discrimination was within the ambit of

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private and family life, in *Department for Work & Pensions v M* [2006] UKHL 11 (2006) 2 WLR 637, per Lord Nicholls at paragraphs 24-30.

Article 8, Lord Walker (with whom the majority of the House agreed) observed (paragraphs 82-83) that:

> " …. If that were right virtually every act of discrimination on grounds of personal status (gender, sexual orientation, race, religion and so on) would amount to a breach of article 14, since these are all important elements in an individual's private life. There would be little or no need for the wider prohibition in article 1 of the Twelfth Protocol on discrimination in the enjoyment of any legal right.[13]
>
> … in my opinion, that is not the effect of the Strasbourg case law which I have attempted to summarise. The ECHR has taken a more nuanced approach, reflecting the unique feature of article 8 to which I have already drawn attention: that it is concerned with the failure to accord *respect.* To criminalise any manifestation of an individual's sexual orientation plainly fails to respect his private life, even if in practice the criminal law is not enforced (*Dudgeon; Norris);* so does intrusive interrogation and humiliating discharge from the armed forces (*Smith & Grady; Lustig-Prean and Beckett).* Banning a former KGB officer from all public sector posts, and from a wide range of responsible private sector posts, is so draconian as to threaten his leading a normal personal life (*Sidabras and Dziautas). Less serious interference would not merely have been a breach of article 8; it would not have fallen within the ambit of the article at all".* [emphasis added].

23. The focus of the Petition is on an alleged interference with the State with the Petitioner's right to respect for private life, or family life, by failing to legislate for same-sex marriage. Properly analysed, however, the issue of whether and how to extend statutory recognition is not within the ambit of Article 8 at all.

24. The claim that there has been discrimination in the sphere of the Petitioner's family life cannot stand, in the light of the House of Lords' decision in *DWP -v- M.* There is no dispute that a same-sex couple are as capable as a heterosexual couple of constituting a "family", as a matter of English law[14]; but the HRA only prevents discrimination within the sphere of Convention rights scheduled to it: s1 and sch 1 HRA. The concept of "family life" in the Convention is an autonomous one, with a universal meaning across the Council of Europe, and that concept does not embrace same-sex partners (*DWP -v- M* per Lord

[13] A free-standing anti-discrimination guarantee which the United Kingdom has not signed, which is not binding upon it in international law, and which is not scheduled to the HRA.
[14] See *DWP -v- M* at paragraph 23.

Nicholls at paragraphs 24-30). Recognition or non-recognition of a same-sex relationship cannot, therefore, be said to fall within the scope of "respect for family life". Section 2 HRA, and the case-law in relation to it (at paragraph 19 above) prevents Article 8 from being interpreted to have a wider domestic meaning.

25. Equally, a measure impugned by reference to the "private life" limb of Article 8 must be particularly focussed on an aspect of a person's private life to constitute a "modality" of the exercise of the guarantee of the right to respect for it. It cannot be said that any measure which impinges upon a person's private life in any way is within the ambit of the private life heading of Article 8, because if that were so, every case of discrimination based on sexual orientation would be within the ambit of Article 8 (per Lord Nicholls at paragraphs 31-33), and would – contrary to the scheme of the Convention – give Article 14 an "independent existence".

26. The recognition (or otherwise) of a marriage is focused exclusively on the legal recognition given to a particular form of the family. By declining to legislate for recognition of the partnership between the Petitioner and First Respondent as a marriage, it cannot be said that the State has impinged in any way upon the Petitioner's private life, or acted within the sphere of the duty to afford respect to it.

27. Thus, the failure to recognise a particular kind of relationship by according it a particular title cannot be said even to fall within the ambit of Article 8. The primary proscription of Article 8 is measures by which the State *interferes* with respect to the private sphere (for example, by criminalising consensual sexual conduct between two adults).

28. This analysis is borne out by the Strasbourg case-law on the scope of Article 8. Whilst in some exceptional circumstances, Article 8 has been interpreted so as to impose some positive obligations, where positive steps by the state are required adequately to afford respect to an interest protected by the Convention.

29. But the ECtHr is properly cautious about how far it will impose social and political choices upon member states by development of the doctrine of positive obligations.

30. For example, in *Botta* -v- *Italy* (1998) 26 EHRR 241 ECtHR at paragraph 35, it was held that there could be no positive obligation upon a state to take steps to ensure physical access to a public beach for the disabled applicant as an aspect of "respect" for his private life under Article 8.

31. Again, the "living instrument" doctrine cannot be used to bring within the scope of the Convention, which relates to inalienable fundamental rights, controversial issues which are matters of political, social and economic evaluation. Expansion of public policy in such fields is outside the scope of the Convention. In Estevez v Spain (ECtHR 10 May 2001), a homosexual man claimed that the state's failure to pay him a social security allowance payable only to "surviving spouses", after the death of his partner, violated Article 14 ECHR in conjunction with Article 8. The ECtHR rejected this claim as being manifestly ill-founded. As regards respect for family life, the Court held (in paragraph 4) that:

> "… despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation … Accordingly the applicant's relationship with his late partner does not fall within Article 8 insofar as that provision protects the right to respect for family life."

The Court also held that, whether or not the complaint might be within the scope of Article 8 in relation to private life (which the Court did not decide), the claim under that head too was manifestly ill-founded because the Spanish legislation had a legitimate aim, "the protection of the family based on marriage", and the difference in treatment was within the State's margin of appreciation.

32. In particular, the ECtHR will not require member states to establish particular forms of social and legal institution to recognise particular relationships, especially in areas of social controversy.

33. In *Johnston -v- Ireland* (1986) 9 EHRR 203 at paragraphs 65-68, the Court stated in terms that Article 8 did not impose a positive obligation to establish for non-married couples a status analogous to that of married couples or establish a special regime for a particular categories of unmarried couples.

34. Even if the introduction of a mechanism for protecting same-sex relationships were within the ambit of Article 8, however, the decision to do so through the creation of a different, but parallel institution, would fall within Article 8(2). The protection of the family in the traditional, marital, sense, is in principle capable of being weighty justification for a difference in treatment. See *Karner –v- Austria* (2003) 38 EHRR 528 paragraph 40.

35. The government had twin goals in introducing the CPA:

    a. To afford equivalent legal protection to same-sex partnerships as opposite-partners can obtain through marriage;
    b. To uphold the institution of marriage as the best basis for family life between opposite-sex couples.

36. As *Estevez* illustrates, protection of the institution of marriage is a legitimate social policy aim, and to legislate in a particular way so as to give effect to it is an entirely proportionate thing to do, well within the State's margin of appreciation. It would, as Lord Bingham observed in the *M* case, be anachronistic to castigate as a *failure* to give respect to private and family life a measure such as the CPA which affords same-sex partners a level of legal protection which is equivalent to that afforded by marriage, considerably more than was available before the CPA came into force, less than a year ago, and very considerably more than the protection afforded to such relationships across the majority of European countries.

37. In some circumstances, as in the *Estevez* case, the absence of the institutional protection of marriage may have some knock-on effects of limiting some of the other rights protected by Article 8 (though this is not an issue which would appear to have practical consequences for those protected by a civil partnership). However, where a measure is the consequence of Article 12 protection or a legitimate limitation upon

the exercise of the Article 12 right, it will be regarded as justified for the purposes of Article 8(2): see (among many examples) *Dickson -v- UK* (ECtHR, 18 April 2006) at paragraph 41, and *Johnston -v- Ireland* (*supra*).

38. Accordingly, the recognition of foreign same-sex marriages as civil partnerships raises no issues under Article 8 (in particularly bearing in mind the intended "practical" rather than "theoretical" effect of the protection intended to be afforded by the Convention)[15].

5. ARTICLE 14

39. The Petitioner also argues that the treatment of her Canadian marriage to an English civil partnership is discrimination against her and the First Respondent, contrary to Article 14 read with Article 12 and/or Article 8 ECHR. This submission has no substance.

40. Article 14 ECHR provides:

> "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".

41. That means that any discrimination based, not on differences of situation, but differences of "status", within the ambit of other Convention provisions, attracts the protection of Article 14, and hence must be objectively justified and proportionate if it is to be regarded as lawful. The list of protected statuses is not finite, and sexual orientation is regarded as a "status" for the purposes of Article 14: e.g. *Salgueiro da Silva Mouta -v- Portugal* (2001) 31 EHRR 47 ECtHR 47 paragraph 28.

42. However, a claim cannot come within the scope of Article 14 if the facts of the case do not fall within the ambit of one or more of the other Convention rights. It is important, given the broad-ranging character of Article 8, to address the "ambit" question properly. It

[15] Marckx -v- Belgium,(1979) 2 EHRR 330.

should not be given an artificially extended interpretation, such that any social policy measure which has any link with a person's personal life is brought within the Convention's protection of "respect" for private and family life. For example, in *Botta -v- Italy* (1998) 26 EHRR 241 ECtHR, the absence of positive steps to redress the disadvantage suffered by a disabled person was not a breach of the positive obligation to "respect" his private life under Article 8. Consequently, the matter fell outside the ambit of Article 8, and Article 14 was inapplicable (paragraph 39). Likewise, the Child Support regime before the introduction of the CPA, which had the effect of discriminating against those who lived in same-sex relationships, was held to be outside the ambit of Article 8 as it applied to private or family life (*DWP -v- M*, above).

43. For the reasons set out in Part 3 above the extent to which and the means by which the law affords protection to same-sex relationships do not fall within the ambit of Article 12 or 8 at all. For understandable reasons, given that the Petitioner accepts that there is no financial disadvantage in being civil partners, there is no allegation of discrimination in relation to property under Article 1 Protocol 1.

44. This is a case, like *Botta,* where, having established that the State has no positive obligation to take steps to redress a particular form of perceived social disadvantage under Article 8, no issue of discrimination under Article 14 can arise either, by reference to the disadvantaged status.

45. Alternatively, and in any event

a. Article 14 only protects those who are in "analogous" or "relevantly situated" situations, and those who can enter a civil partnership are not analogously situated to those who can enter a marriage.

b. In point of fact, there is no less favourable treatment of those in a civil partnership from those in a marriage;

c. Even if there were some perceived disadvantage such as to amount to *prima facie* discrimination, different treatment is not contrary to Article

14 if there is an objective justification for it, particularly in areas of changing social mores.

d. Further, this is an area in which there is no common agreement across Europe, and accordingly one in which the State will be afforded a particularly wide margin of discretion (see Part 5, above).

Analogous situation

46. Article 14 is intended to prevent like cases being treated unalike, or unlike cases being treated alike. The burden of proving that two cases are analogously situated, and so require non-discriminatory treatment, falls upon the party seeking to establish this. See *Fredin -v- Sweden* (1991) 13 EDHRR 784 at paragraph 60, and *Carson -v- DWP* [2005] UKHL 37, [2006] 1 AC 173.

47. However, the Petitioner and Second Respondent are not analogously situated to their chosen comparators, for two main reasons.

48. Firstly, the institution of marriage is afforded a particular status within the framework of the European Convention on Human Rights. Challenges to provisions, for example financial benefits, which discriminate on grounds of marital status, have been held to be justified by reference to the "special protection" afforded to the traditional concept of marriage. Thus, a person who is regarded as married by the law of a Convention state is not in an analogous situation to one who is not. See, for example, *Shackell -v- UK* (45851/99), *Gomez -v- Spain* (37784/97), *Zapata -v- Spain* (34615/97), *Estevez -v- Spain* (56501/00). Thus, comparisons between those who are married and those who are not married have been held to be outside the scope of Article 14 because the comparators are not "analogously situated" for the purposes of Article 14. Alternatively, the distinctions between the two groups have been held to be justified on that basis.

49. Secondly, in paragraph 13 of her Statement, the Second Respondent seeks to compare the position of the Petitioner and herself to that of an opposite-sex couple who married in British Columbia whose marriage is recognised in England. The correct comparators are an opposite-sex couple who, like the Petitioner and Second Respondent, lack capacity to marry one another as a matter of the law of their place

of domicile in English law. Their marriage would not be recognised in England as a marriage either. The distinction is between the recognition of marriages where the parties have capacity to marry and non-recognition of those where the parties lack such capacity as a matter of the law of their domicile. The differential treatment is not on grounds of sexual orientation, but on the ground that they lack capacity as defined by the law of the place of their domicile.

50. Thus, since the Petitioner and First Respondent are not analogously situated to a couple whose marriage as recognised as a marriage as a matter of English law, no question of discrimination under Article 14 arises.

No less favourable treatment

51. Even supposing that the matter is within the protection of Article 14, there are fundamental factual objections to the Petitioner's allegation of discrimination. Discrimination arises in a case of *less favourable* treatment. The Petitioner acknowledged, in evidence before the court on the Protective Costs Application that by virtue of the CPA, "all financial benefits and responsibilities associated with marriage were conferred on us" (paragraph 38 of her second witness statement)[16]. There is, accordingly, no difference of treatment at all as to the respect or legal recognition which is accorded to her partnership as opposed to that of a married couple. The treatment is identical. Only the parallel legal mechanism by which that equality is achieved is different.

52. Since the financial benefits and responsibilities, and indeed legal recognition of a civil partnership are for all practical purposes (e.g. consent to medical treatment) identical to those of marriage, the name and mechanisms by which these rights and responsibilities are conferred are largely semantic. They are of little if any *practical* importance in the United Kingdom.

53. The Petitioner and First Respondent suggest that the difference between civil partnership and marriage may not have any practical significance in the UK, but does matter if they travel abroad to

[16] This statement contains sensitive private financial and other information, and is not before the court as it is unnecessary to refer to it further in a public hearing.

countries in which same-sex relationships are not recognised. It is difficult to see how this Petition could have any effect on this issue. Whether a same-sex relationship (civil partnership or overseas same-sex marriage) is recognised abroad, as a marriage or at all, is not a matter within the jurisdiction of the English courts. Whether or not an overseas same-sex marriage is treated as a civil partnership in the UK makes no difference whatever to the way in which it may be treated under the law of any other country. And a country which does not recognise same-sex relationships as marriages is unlikely to do so because of any foreign "married" status, whether conferred by the registrar in British Columbia, the courts of England and Wales or otherwise. To the extent that it may make a difference to how a third country may view their relationship, the Petitioner and First Respondent could presumably invite foreign recognition of the Canadian marriage as such: but that would be a matter for the courts of the country in which recognition was sought, not the courts of England and Wales.

54. As to English law, the Petitioner argues that there is less favourable treatment in the mere difference of the name of the institution, and the means by which, the State has chosen to fill the gap in legal recognition and protection formerly suffered by same-sex partners.

55. But the Petitioner's perception – even if it were correct – that civil partnerships are "not symbolically" the same as marriage is also a matter outside the control of the law. Most media coverage of the introduction of the CPA described civil partnerships as "gay marriages" (a point made by the evidence lodged in support of the Petition – e.g. B127), and there is no evidence that large numbers of same-sex couples are troubled by the semantic distinction between civil partnership and marriage. Stonewall has welcomed the legislation, and published a guide called "Getting Hitched".

56. The "social" and religious concepts of marriage are separate from the legal institution, and outside the control of the law. For example, unmarried opposite-sex couples are often colloquially referred to as "common law" husband and wife. A couple may be married for the purposes of their faith, but not in the sight of the law (as in the case of actually polygamous couples whose religions recognise polygamy). As

noted above, the media coverage of the CPA, and coverage of high-profile civil partnership ceremonies since then, has generally been in terms of marriage, and nothing stops the Petitioner and First Respondent regarding their relationship as a marriage, or introducing one another in social situations as wives, by reference to their Canadian marriage. Thus, the parallel but equal institutions cause no harm to the Petitioner and First Respondent.

57. Insofar as legislative intention is relevant to this issue, the intention expressed by the government in introducing the legislation was not to create a second class institution, but to fill a gap in the law, redress a perceived inequality of treatment and to buttress the institution of marriage:

Baroness Scotland, introducing the second reading of the Civil Partnership Bill in the House of Lords, said that the Bill, "shaped by consultation with stakeholders and the public at large",

> "offers a secular solution to the disadvantages which same-sex couples face in the way they are treated by our laws. … This Bill does not undermine or weaken the importance of marriage and we do not propose to open civil partnership to opposite-sex couples. Civil partnership is aimed at same-sex couples who cannot marry. However, it is important for us to be clear that we continue to support marriage and recognise that it is the surest foundation for opposite-sex couples raising children …"
> (*Hansard*, HL, 22 April 2004 Col 388).

Jacqui Smith, Deputy Minister for Women and Equality, introducing the second reading of the Civil Partnership Bill in the House of Commons, described it as:

> "a historic step on what has been a long journey to respect and dignity for lesbians and gay men in Britain … In creating a new legal relationship for same-sex couples, this Bill is a sign of the Government's commitment to social justice and equality … The Bill sends a clear message about the importance of stable and committed same sex relationships."
> (*Hansard*, HC, 12 October 2004 Col 174).

In answer to a question as to whether she would "come clean" and announce that the Government supported gay marriage, Ms Smith replied:

> "… civil partnerships under the Bill mirror in many ways the requirements, rights and responsibilities that run alongside civil marriage. I recognise that hon. Members on both sides of the House understand and feel very strongly about specific religious connotations of marriage. The Government are taking a secular approach to resolve the specific problems of same-sex couples. As others have said, that is the appropriate and modern way for the 21st Century".
>
> (*Hansard*, HC, 12 October 2004 Col 177).

Justification

58. For all these reasons, there is no discrimination within the scope of Article 14 at all. But, even if there were, it is objectively justified, by the Government's twin objectives:
    a. Of filling the legal gap in protection and recognition for same-sex couples; and
    b. To uphold the special status of marriage as the best means of supporting family life for opposite-sex couples.

59. The legislature's choices as to how to change legal frameworks in response to social change will be accorded a high degree of deference, particularly in circumstances where judgment is required as to how far and how fast social attitudes have in fact changed: see *Van Raalte -v- Netherlands* (1997) EHRR 503 at 39, and *R(Hooper) -v- DWP* [2005] UKHL 29; [2005] 1 WLR 1681. Thus, the provision of equal financial and legal recognition through an alternative form of legal and social union for same-sex couples, is a proportionate response having regard to the special status accorded to the institution of marriage under the Convention[17].

60. This is particularly so in a field such as this, in which there is no common approach across the Council of Europe member states.

[17] See, for example, *Shackell -v- UK* (45851/99), *Saucedo Gomez -v- Spain* (37784/97), *Quintana Zapata -v- Spain* (34615/97) *Mata Estevez -v- Spain (56501/00).*

6. AN AREA OF SOCIAL, POLITICAL AND RELIGIOUS CONTROVERSY

61. There are certain principles which overarch the questions of interpretation of the Convention discussed above. They concern the approach which the ECtHR takes in relation to areas of social, political and religious controversy, in which there is no consensus across Europe. The EctHR has consistently declared itself to be very slow to trespass on areas of social, political and religious controversy where a wide variety of national and cultural traditions are in play, and very different political and legal choices have been made by the members of the Council of Europe: see (of many examples) *Frette -v- France* [2003] 2 FLR 9*, F -v- Switzerland* (1987) 10 EHRR 411, paragraph 33; *Estevez -v- Spain (above).*

62. Whether and how to create new social institutions to give recognition to particular forms of relationships is a paradigm example of the circumstances in which the ECtHR will afford a very broad margin of appreciation. It will hesitate to impose a positive obligation to afford a particular type of recognition to a particular relationship: see *Johnston -v- Ireland* (above) at paragraph 35. The concept of marriage as a relationship between two people of the opposite sex is very deeply embedded in Article 12 (*B & L -v- UK* (cited above)). The law of almost all the 46 member states of the Council of Europe share this approach. It is an area where there is some social change in some member states, but no universally agreed norm. Those states which afford some legal recognition to same-sex relationships are in the clear minority. Only three members of the Council of Europe (Belgium, the Netherlands and Spain) recognise marriage between same-sex partners. Only a further ten states, including the UK, have legislated for an alternative form of legal registration for same-sex relationships such as civil partnership or registered partnership.

63. The discretionary area of judgment afforded by a national court to a national legislature is conceptually different, of course, from the international margin of appreciation. Yet it is a familiar principle, antedating the HRA, but continuing after its enactment, that the courts will exercise self-restraint in adjudicating in controversial areas, particularly those where the legislature has spoken. See *R v Secretary of State for the Home Department ex parte Daly* [2001] UKHL 26,

[2001] 2 AC 532 at paragraphs 27-29. Judges must be "loyal to the Convention rights, but loyal also to the legitimate claims of democratic power" (per Laws LJ in *R(Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at paragraph 33).

64. Debates both inside and outside Parliament at the time the Civil Partnership Bill was passed illustrated that whether, and if so the extent to which and means by which legal recognition should be afforded to same-sex relationships remains a subject of political controversy in this country, not just in other Council of Europe countries. Many individuals and groups, including Stonewall, welcomed it as introducing for the first time, positive measures to put the legal protection afforded to the relationships of same-sex couples on an equivalent footing with those of opposite sex couples. Others have argued that civil partnerships should have been made available to opposite-sex couples too, who wished to secure the legal and financial protection of marriage without taking on its "historical baggage". Others argued that the provisions in the CPA which mirror prohibited degrees of marriage should have been removed – for example, to enable a daughter to form a civil partnership with her mother or sister, to obtain the tax advantages inherent in that status. And, as the House of Lords has noted, in the common law no less than the Convention, the concept and institution of *marriage* as a relationship between two people of the opposite sex has a long history and is also very deeply embedded as such: Lord Bingham in *Bellinger -v- Bellinger* [2003] UKHL 21 [2003] 2 AC 467 paragraph 46.

65. In a field such as this, there is very little common ground between members of the Council of Europe; international law is at a transitional stage. It is also a field in which views differ as to the extent to which public opinion has moved in relation to the appropriateness, and the appropriate means of recognising same-sex relationships. A degree of political judgment is called for as to the appropriate solution, and – as Lord Bingham observed in *DWP -v- M* at paragraph 6 – notwithstanding bodies of opinion against any recognition for homosexual relationships "a democratic majority, by enacting the Civil Partnerships Act 2004, has established a new consensus …". The court should afford a very considerable degree of respect to the decision of the legislature as to the appropriate institutional framework, and be very

slow to hold that the new consensus in England and Wales, considerably ahead of much public opinion across Europe, violates the rights protected by the ECHR.

7. INAPPLICABILITY OF SECTION 3 HRA

66. Section 3(1) HRA provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with Convention rights."

This is a strong adjuration. But the duty to construe compatibly with the Convention only arises if, on ordinary construction, the statutory provisions identified by the Petitioner are not compatible with Convention rights: *Brown -v- Stott* [2003] 1 AC 681. The natural and ordinary and natural meanings of section 11(c) MCA and sections 1(1)(b) and 212-218 CPA are compatible with the Convention, as explained above. Accordingly, the interpretative obligation of s3 HRA is not in play. (See, by recent analogy, *J -v- C & E* [2006] EWCA Civ 551, 15 May 2006, at paragraph 37 per Wall LJ).

67. To the extent that s3 has any application, it is for the Petitioner to make out the case as to how the MCA and/or CPA could be read so as to be compatible with the Convention, and the Crown will respond to any particular suggestions made by the Petitioner when it sees how she puts her case.

68. However, it is difficult to see how s3 HRA could realistically be used to achieve the construction for which the Petitioner contends. The exercise under section 3 is one of interpretation, not legislation. Parliament has consciously, clearly and unambiguously legislated for parallel institutions to afford legal recognition and protection to same-sex partners and married couples. Thus, s11(c) MCA could not, by application of s3 HRA, be read so as to be compatible with the meaning of Articles 12, 8 and 14 of the ECHR for which the Petitioner contends, since this would involve departure from a plain and fundamental feature of the scheme set out by Parliament in the MCA and the CPA. Purported "compatible interpretation" of the MCA and

CPA would cross the boundary between interpretation and amendment: see *Re S (Implementation of Care Plan)* [2002] 2 AC 291 per Lord Nicholls at paragraph 40.

69. Secondly, s3 HRA is inapt to purport to "interpret" the CPA, because treating overseas same-sex marriages as marriages in England and Wales, rather than as civil partnerships, would have wide ramifications, raising policy issues ill-suited for determination by the courts or court procedures, and it would require the construction of wide-ranging new extra-statutory schemes. See *Re* S (above) and *Bellinger -v- Bellinger* [2003] UKHL 21, [2003] 2 AC 467. In particular, the Petitioner's suggestion that overseas civil partnerships or same-sex marriages be recognised as marriages in England and Wales, if the parties so chose, would require the creation of an "election" machinery which does not at present exist, and could not, by any stretch of the imagination, be regarded as a mere exercise in interpretation, however creative.

8. "DEVELOPMENT OF THE COMMON LAW"

70. The Petitioner also suggests that the result for which she contends may be achieved by development of the common law. She suggests that, as a matter of common law, the ordinary private international law rules whereby capacity to marry is judged by the law of domicile be disapplied. The rules as they stand are set out the Appendix to this skeleton argument.

71. The Petitioner's primary argument is that this purported "disapplication" should be automatic. However, this would have the effect of "imposing" an English marriage on those who may not choose to be regarded as married (for example, those who have entered a *pacte civile de solidarité* in France). Her secondary argument is that foreign marriages or partnerships should be recognised as such where the parties to them wish that this is so. This gives rise to problems in cases where one party to the overseas same-sex marriage or civil partnership may wish it to be regarded as such in the United Kingdom, but the other does not. It would also require the creation of an "election" machinery which does not at present exist. This is an

inappropriate exercise for judges to undertake: see *Bellinger v Bellinger* per Lord Hope at paragraph 69.

72. Aside from being unworkable, this solution would not be a proper use of the concept of the common law. The definition of marriage is a matter upon which the legislature has spoken, through the mechanism contained in the MCA and CPA. To that extent, the common law is extinguished. If the courts were to purport to "interpret" the common law so as to interpret as marriages relationships which the legislature regards as civil partnerships, it would go behind that public policy, the "new consensus" recognised by Lord Bingham in *DWP -v- M*.

9. **DECLARATION OF INCOMPATIBILITY**

73. If, contrary to the Crown's firm position, section 11(c) MCA or s1(1)(b) and ss212-218 CPA or any of them were to be incompatible with the Convention, the appropriate mechanism for the Court to reflect this view would be for it to make a declaration of the respects in which it considered those provisions to be incompatible with the Convention under s4(2) HRA. For the reasons set out above, that situation does not arise.

10. CONCLUSIONS

74. For these reasons, the Petition is misconceived and should be dismissed in its entirety. The Crown proposes to reserve its submissions on costs until after judgment, unless the Court otherwise directs.

HELEN MOUNTFIELD
Matrix Chambers

24 May 2006

APPENDIX – THE PRIVATE INTERNATIONAL LAW POSITION ON RECOGNITION OF AN OVERSEAS MARRIAGE

1. Marriage is a contract. It requires form, capacity and consent. Form is governed by the local law of the place of celebration (with minor, immaterial exceptions): *Berthiaume -v- Dastous* [1930] AC 79, and see Rule 67 of Dicey & Morris, *The Conflict of Laws* 13th edition (2000), Volume II, page 651 at paragraph17R-001.

2. Capacity to marry is generally governed by the law of each party's ante-nuptial domicile (the so-called "dual domicile test": *Padolecchia* -v- *Padolecchia* [1968] P314 at 338 and Rule 68 in Dicey & Morris *op. cit.* page 671 paragraph 17R-054. It is also supported by the statutory test applied in respect of overseas foreign polygamous marriages: s11(d) MCA. Occasionally, the courts will judge the matter of capacity by reference to intended matrimonial home (*Lawrence* -v- *Lawrence* (1985) FLR 1097 CA per Purchase LJ at 1105D-1106C) or by reference to the jurisdiction with which the marriage is adjudged to have had its most substantial connection: see *Vervaeke -v- Smith* [1983] AC 145 HL per Lord Simon of Glaisdale at 166D.

3. Capacity to marry in English law requires not only that the parties be a man and a woman, but also that both parties be over the age of 16; that they are not within prohibited degrees of consanguinity; that they are mentally capable of consenting, and that neither of them is in a subsisting marriage or civil partnership.

4. In a case where a person of English domicile purports to "marry" in another jurisdiction, but the parties would lack capacity to marry in English law, then the marriage is not recognised in England: see *Mette* -v- *Mette*, (1859) 1 Sw & Tr 416, *Brooks* -v- *Brooks*(1861*)* 9 HL Cas 193*,* and *Pugh* -v- *Pugh* [1951] P 482.

5. Since the parties in the present case lacked capacity to marry each other by reference to the law of the state of domicile, matrimonial home and close connection, the marriage would not be recognised by the courts by reference to public international law.

6. Even if the parties had capacity to marry (e.g. if they had both been domiciled in British Columbia at the time of their marriage there), English courts will not recognise an overseas marriage if there are public policy reasons not to do so: *Vervaeke* at 164C per Lord Simon of Glaisdale.

7. Marriage in English law is an institution deeply embedded in the religious and social culture of this country as a relationship of two persons of the opposite sex. To treat it as encompassing overseas same-sex relationships would involve a fundamental change to the traditional concept of marriage: per Lord Nicholls in *Bellinger -v- Bellinger* [2003] UKHL 21, [2003] 2 AC 467 at paragraphs 46-48. Further, the position that marriage is a relationship between parties of opposite sexes is expressly recognised in statute. Per Lord Hope, in *Bellinger,* at paragraph 69:

> "… it is quite impossible to hold that section 11(c) of the 1973 Act [the MCA] treats the sex of the parties to a marriage ceremony as irrelevant, as it makes express provision to the contrary. In any event, *problems of great complexity would be involved if recognition were to be given to same-sex marriages*. *They must be left to Parliament."*

8. Parliament has chosen to recognise same-sex partnerships, including those formally recognised abroad, through the mechanism of the CPA. That would have been unnecessary if the policy of Parliament had been to allow same-sex marriage. Indeed, it specifically rejected calls to provide for this, adopting instead a parallel institution. Recognition of overseas same-sex marriages as marriages in the UK would have been inconsistent with provision of a parallel institution for same-sex couples who formalised their relationship in the UK.

9. In these circumstances, an English judge faced with the issue of whether to recognise an overseas same-sex marriage in which (unlike this one) the parties did not lack capacity, would be obliged decline to exercise the court's discretion in favour of recognition, because to recognise would run contrary to English public policy as expressly, and recently, demonstrated by parliament. In terms of English law and policy, a same-sex relationship can never be a marriage, because the term "marriage" as presently understood and applied, connotes and requires two persons of opposite sex. To recognise a relationship lacking this essential characteristic would alter the definition of marriage in English law. In English law, a same-sex partnership is not capable of being formalised as a marriage, but only as a civil partnership, a relationship of the type and with rights specifically provided for by the parallel CPA.

10. In any event, there is no such discretion here, because the parties are and were at all material times domiciled in England (Petitioner's statement, paragraph 3 B2; Second Respondent's statement, paragraph 3, B107).

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IN THE HIGH COURT OF JUSTICE
FAMILY DIVISION

B E T W E E N

SUSAN WILKINSON	***Petitioner***
and	
CELIA KITZINGER	***First Respondent***
HM ATTORNEY GENERAL	***Second Respondent***
THE LORD CHANCELLOR	***Intervener***

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