IN THE HIGH COURT

FAMILY DIVISION

PRINCIPAL REGISTRY

HEARING DATES: currently listed for 6-9 June 2006

BETWEEN:

SUSAN WILKINSON

Petitioner

-And-

CELIA KITZINGER

First Respondent

-And-

THE ATTORNEY GENERAL

Second Respondent

-And-

THE LORD CHANCELLOR

Intervener

PETITIONER'S SKELETON ARGUMENT

Time Estimate: 3 Days

Essential Reading:

1. **Amended Petition**
2. **Amended Answer**
3. **First (excluding SJW2) and Third Witness Statements of Petitioner, First Witness Statement of First Respondent**
4. **Skeleton Arguments of Petitioner and Intervener**

INTRODUCTION AND ISSUES

1. This Skeleton Argument addresses the Petitioner's application under Section 55(1) of the Family Law Act 1986 for a declaration as to the validity of her marriage to the First Respondent [B/1].

2. The "Background to Hearing" and "Statement of Issues" describe the context to this application and the issues for determination.

3. In short summary, and as is agreed between the parties, the Petitioner and the First Respondent who are both women and who are both domiciled in the U.K., lawfully married each other on 26 August 2003 in British Columbia, Canada [Background to Hearing; Petitioner's First Witness Statement C/1-9; Expert Report of Cynthia Petersen C/14-31]. That marriage is not recognised as such in the U.K.. Instead, because the marriage is between persons of the same sex, in accordance with the legal schemes described below, it is legally categorized as a "civil partnership".

4. The issues which require resolution in this application principally engage private international law and human rights law, as derived from the Human Rights Act 1998 and other European and international fundamental rights norms. In short summary, the issues to be resolved are,
    (1) Whether a prohibition on same sex marriage violates the Petitioner's Convention rights (Articles 8, 12 and 14);
    (2) Whether the rules of private international law by themselves and/or with the Human Rights Act 1998 are such that the Petitioner's Canadian marriage should be recognised as such in the U.K.;
    (3) Whether a statutory conversion of the Petitioner's marriage to a civil partnership violates the Petitioner's Convention rights (Articles 8, 12 and 14); and
        (a) If so, whether the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004 can be read compatibly with the Petitioner's Convention rights; and

(b) If not, whether the court should make a Declaration of Incompatibility in respect of Section 11(c) of the Matrimonial Causes Act 1973 and Sections 1(b) and Chapter 2 of Part 5 of the Civil Partnership Act 2004.

5. This application raises issues of considerable importance to the Petitioner and First Respondent and to the public interest more generally [Petitioner's First Witness Statement C/1-9; Petitioner's Third Witness Statement C/48-5; First Respondent's Witness Statement C/106].

THE LEGAL CONTEXT

"Marriage"

English Common law

6. Since 1866 the English courts have applied the common law definition of marriage as stated in **Hyde v Hyde and Woodmansee** (1866) LR 1 P&D 130, as follows:

"I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others." (at 133) (and see **Corbett v Corbett (otherwise Ashley)** [1971] P 83).

Statute: the Matrimonial Causes Act

7. The common law test of marriage is given statutory force by Section 11 of the Matrimonial Causes Act 1973 ("MCA"). Section 11(c) provides that a marriage will be void "if the parties are not respectively male and female" or (amongst other things) "at the time of the marriage either party was already lawfully married [or a civil partner]" (Section 11(b) MCA 1973).

Foreign Marriages

8. The MCA and the common law test above do not deal *w*ith the recognition of "foreign" marriages. The MCA recognises that a marriage might be lawful and

recognised in the English Courts notwithstanding that it does not meet the requirements of Section 11. Thus polygamous marriages entered into outside the U.K. are only void where one of the parties was domiciled in the U.K. at the time of the marriage (Section 11(d) and see Dicey and Morris, "The Conflict of Laws" (13th edn, 2000) Ch 17, rule 74). Furthermore, Section 14 of the MCA provides that "where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in Section 11… above shall (a) preclude the determination of that matter as aforesaid; or (b) require the application to the marriage of the grounds or bar there mentioned except so far as applicable in accordance with those rules." This means that in respect of foreign marriages the rules of private international law apply.

9. In addition, Section 14(3) now provides that "No marriage is to be treated as valid by virtue of subsection (1) if, at the time when it purports to have been celebrated, either party was already a civil partner."
However, at the date upon which the Petitioner's marriage was celebrated, neither she nor the First Respondent was already a civil partner.

10. Civil partnerships are addressed below.

Canada and Other Jurisdictions

11. Canada allows for same sex marriages [Expert Report of Cynthia Petersen C/14-31] and at the time the Petitioner and First Respondent married, same sex marriages were lawful in the Province in which they married [*ibid*.]. Other jurisdictions also permit same sex marriage, including certain European countries (Belgium, Netherlands, Spain).

Recognition of Foreign Marriages: Private International Law

12. Generally the formal validity of a marriage is governed by the *lex loci celebrationis*, the law of the place where the marriage was celebrated (there are exceptions to this principle but none are relevant to this case). A marriage will be lawful and recognised in the U.K. if it complies with the formal requirements of the local law applicable to the place where the marriage took place. The marriage of the Petitioner and the First Respondent did so [Expert Report of Cynthia Petersen C/14-31].

13. However, legal capacity to marry is also governed by the law of each party's ante nuptial domicile: **Padolecchia v Padolecchia (otherwise Lei)** [1968] 2 WLR 173 at 185 *("Each party must be capable of marrying by the law of his or her respective antenuptial domicile: see Dicey and Morris, 8th ed., p. 254, rule 31"*). As long as the parties to a marriage abroad had capacity to marry according to the laws of the jurisdiction in which they were married *and* in which they were domiciled the marriage is valid in English law as regards capacity.[1] Thus a different sex couple domiciled in the U.K. and married in Canada would unequivocally have their marriage recognised in the U.K..

14. There are exceptions to this rule, however, including on grounds of "public policy". The "public policy" exception has been used so as to decline to recognise an *incapacity* to marry if to do so would be contrary to public policy:

"Numerous examples may be suggested of the injustice which might be caused to our own subjects if a marriage were declared invalid, on the ground that it was forbidden by the law of the domicile of one of the parties. It is still the law in some of the United States that a marriage between a white person and a "person of colour" is void. In some States the amount of colour which will incapacitate is undetermined; in North Carolina all are prohibited who are descended from negro

[1] There is some authority holding that the proper test for determining legal capacity is by reference to the laws of the country in which the parties to the marriage intend to have their matrimonial home (**Radwan v Radwan** (No 2) [1973] Fam 35). However, this appears to be against the weight of authority and this would make no difference to the outcome in this case in any event.

ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person (Pearson on Marriage, sect. 308). Suppose a woman domiciled in North Carolina, with such an amount of colour in her blood as would arise from her great grandmother being a negress, should marry in this country, should we be bound to hold that such a marriage was void? Or suppose a priest or monk domiciled in a country where the marriage of such a person is prohibited were to come to this country and marry an English woman, could the Court be called on at the instance of the husband to declare that the marriage was null and to give a legal sanction to his repudiation of his wife? Mr. Dicey, in his excellent treatise on Domicile, p. 223, answers these questions in the negative, and places these two cases under this head: "A marriage celebrated in England is not invalid on account of any incapacity of either of the parties, which though enforced by the law of his or her domicile is of a kind to which our Courts refuse recognition." (**Sottomayer v De Barros (Queen's Proctor Intervening)** (1879) 5 PD 94, 104, per Sir James Hannen, President).

15. Further the English Courts have refused to recognise a *capacity* to marry given by the relevant foreign law if in the circumstances it would be unconscionable to do so (**Cheni (Otherwise Rodriguez) v Cheni** [1965] P 85 at 98, in the case of an incestuous marriage). However, the court's discretion to refuse to recognise a foreign capacity to marry on the grounds of public policy is "sparingly exercised" (**Cheni**, *supra* and in the case of divorce **Qureshi v Qureshi** [1972] Fam 173 at 201).

16. The Petitioner and First Respondent had capacity to marry according to the laws of the jurisdiction in which they were married [Expert Report of Cynthia Petersen C/14-31] but, on the face of it, lacked capacity in the jurisdiction in which they were then and are now domiciled because of the laws described above under the common law and MCA). It will be submitted below that that lack of capacity should be disregarded on public policy grounds because to defer to it would be

incompatible with the Convention rights. It will be submitted that such can be achieved by a Convention compliant application of private international law.

The Civil Partnership Act

17. The Civil Partnership Act 2004 ("CPA") came into force after the date on which this Petition was lodged.[2] However, subject to the arguments below, it affects the recognition of the Petitioner's marriage.

18. The CPA creates a structure for the establishment and formal recognition of "civil partnerships". These are defined by Section 1(1) of the Act as follows:
"A civil partnership is a relationship between two people of the same sex ("civil partners")—

(a) which is formed when they register as civil partners of each other,

……..

(b) which they are treated under Chapter 2 of Part 5 as having formed (at the time determined under that Chapter) by virtue of having registered an overseas relationship."

19. As can be seen from Section 1 a civil partnership is created by a civil registration process or by the automatic recognition of certain overseas same sex relationships, as civil partnerships. The CPA provides the bureaucratic mechanisms necessary for the purposes of the civil registration process. In addition, the CPA provides for the breakdown of a civil partnership in much the same way as marriage. Most of the material disadvantages caused by the prohibition on same sex partners marrying have been remedied in so far as those who enter a civil partnership are concerned. However, there are express distinctions between this process and marriage. In particular, a civil partnership may not be effected on religious premises or in a religious ceremony[3] and civil partnerships are exclusively for same sex couples.

[2] 5 December 2005: see, SI 2005/3175, Article 3, Schedule 2.
[3] Section 6(1) and 2(3), Civil Partnership Act 2004.

20. As seen, apart from permitting same sex couples to enter into a civil partnership, the CPA statutorily converts certain overseas relationships, including marriages, into civil partnerships. Section 215 (in Chapter 2 of Part 5, referred to in Section 1(b) above), provides that:

"(1) Two people are to be treated as having formed a civil partnership as a result of having registered an overseas relationship if, under the relevant law, they—

(a) had capacity to enter into the relationship, and

(b) met all requirements necessary to ensure the formal validity of the relationship.

(2) Subject to subsection (3), the time when they are to be treated as having formed the civil partnership is the time when the overseas relationship is registered (under the relevant law) as having been entered into.

(3) If the overseas relationship is registered (under the relevant law) as having been entered into before this Section comes into force, the time when they are to be treated as having formed a civil partnership is the time when this Section comes into force.[4]

……

(6) This Section is subject to Sections 216, 217 and 218."

21. Sections 216 and 217 require both persons to the overseas relationship to have been of the same sex at the date the relationship was registered (under the relevant law) and do not treat certain relationships as civil partnerships where a party to the marriage was under 16 and certain other circumstances which are not material.

22. Section 218 provides that "[t]wo people are not to be treated as having formed a civil partnership as a result of having entered into an overseas relationship if it would be manifestly contrary to public policy to recognise the capacity, under the relevant law, of one or both of them to enter into the relationship", reflecting the public policy area of discretion found in private international law.

[4] Subsections (4) and (5) concern dissolution which is not relevant here.

23. By reason of the provisions of the CPA, the Petitioner's marriage is treated as a civil partnership, without any choice by the Petitioner or First Respondent and contrary to their wishes. This statutory status is afforded them because they are a same sex couple. Because of this, subject to arguments on the Convention rights and private international law below, they cannot enter a new marriage with anyone, anywhere (Section 14(3) MCA above).

The Human Rights Act 1998

24. The Human Rights Act 1998 ("HRA") provides that the courts are public authorities for the purposes of Section 6 of the HRA (Section 6(3)(a)). By Section 6(1) "[I]t is unlawful for a public authority to act in a way which is incompatible with a Convention right".

25. Accordingly, this court must not act incompatibly with a Convention right as set out in Schedule 1 of the HRA, save where it cannot do otherwise as a result of primary legislation (or in limited circumstances otherwise, as set out in Section 6(2)). This means it must develop and apply the common law and any rules of private international law, compatibly with the Convention rights.

26. Section 2 of the HRA provides that a court determining a question which has arisen in connection with a Convention right "must take into account any" judgment, decision, declaration or advisory opinion of the European Court of Human Rights or the Commission.

27. Further, Section 3 of the HRA provides that:

"(1) 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 the Convention rights.

(2) This Section –

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility".

28. Section 4 provides for the making of declarations of incompatibility where a court finds a provision of primary legislation is incompatible with the Convention right and it is impossible to read it compatibly having regard to Section 3. Section 4(2) provides that

"If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility".

29. Sections 3 and 4 therefore form part of a piece in that the court's primary duty is to interpret legislation compatibly. It is only where it is not possible to read legislation compatibly that Section 4 becomes engaged.

30. As to the proper operation of Section 6, where legislation is engaged, this will depend upon the operation, first, of Section 3. This is because where it is alleged that in the application of legislation a public authority, including a court, is acting incompatibly with a Convention right, it will be necessary to determine whether the authority could have acted any differently having regard to Section 6(2). If it is possible to read the legislative measure compatibly, having regard to Section 3, then Section 6(2) will not apply. If, on the other hand, it is not possible to read the legislative measure compatibly having regard to Section 3, then a public authority giving effect to that legislation will not be in breach of Section 6(1) because Section 6(2) protects it but in the case of a court, a Declaration of Incompatibility under Section 4 should then be made.

31. Section 3 provides the primary remedy for addressing incompatibility; it is the prime remedial measure and the linchpin of the scheme of the HRA which aimed to

"bring rights home" (thus declarations of incompatibility via Section 4 HRA are to be measures of last resort, per Lord Steyn, in **Ghaidan v Godin-Mendoza** [2004] 2 AC 557, para. 46 and in **R v A (No.2)** [2002] 1 AC 45, para. 44).[5]

32. It is Parliament's intention that legislation must be read and given effect to in a way which is compatible with the Convention rights and the courts must give effect to that intention (**Ghaidan**, para. 26, per Lord Nicholls). Section 3 presents not merely a "strong adjuration" but a command to construe compatibly wherever possible (per Lord Millett, in **Ghaidan**, para. 59). It is not an "optional cannon of construction" (per Lord Nicholls in **Re S (Minors) (Care Order: Implementation of Care Plan)** [2002] 2 AC 291, para. 37).

33. According to their Lordships in **Ghaidan**, Section 3:

(a) Does not depend on any existing ambiguity, indeed the legislation may admit of *no* doubt but Section 3 may still require a different meaning (para. 29, per Lord Nicholls);

(b) Is apt to require a court to read in words which change the meaning of the enacted legislation so as to make it Convention–compliant. The intention of Parliament in enacting Section 3 was to an extent bound only by what is "possible" and may require the court to depart from the intention of the enacting Parliament (para. 30, per Lord Nicholls);

(c) Creates a very compelling and mandatory obligation and may require reading in words or reading them out. However, there is no necessity for an over emphasis on linguistic features (**Ghaidan**, paras. 38 – 52, per Lord Steyn; paras. 111 and 121, per Lord Rodger).

[5] Both in **Ghaidan** (para. 46) and **R v A (No.2)** (para. 44) Lord Steyn cited the then Lord Chancellor's observation during the passage of the Human Rights Bill through Parliament that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility", Hansard (HL Debates), 5 February 1998, col 840 (3rd reading). He also cited the then Home Secretary's statement in the House of Commons that "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention", Hansard (HC Debates), 16 February 1998, col 778 (2nd reading).

34. As such, Section 3 alters the constitutional role to be played by judges in delineating the boundaries of a rights-based democracy[6]; it represents the clear intention of Parliament to empower judges to qualify the effect of other statutory provisions, no matter when they were enacted, if this is necessary in order to achieve Convention-compatiblity, bounded only by what is "possible".

35. The proper approach to the use of Section 3 is as follows:

(a) The court must determine whether the legislation under scrutiny, in its ordinary and natural meaning, is incompatible with the Convention (per Lord Millett in **Ghaidan**, para. 60; per Lord Hope in **R v A (No.2)**, *supra*, para. 106). This exercise requires the court to identify clearly the particular statutory provisions which are (or might be) incompatible (per Lord Nicholls in **Re S**, *supra*, para. 41). Here, they are the provisions of the MCA and CPA described above.

(b) The determination of the question of incompatibility necessarily requires the court to decide whether the application of the particular statutory provisions to the Petitioner amounts to a violation of her Convention rights in the circumstances of the case before it. The Petitioner submits that that determination (the question of whether there has been a violation of her Convention rights) is to be resolved in her favour (see below).

(c) If there is a violation of Convention rights, the obligation to read and give effect, if possible, to the relevant legislative provisions so as to render them compatible clearly arises.

36. As stated, the only limitation placed upon the Section 3 obligation is the limit of "possibility" (per Lord Nicholls, in **Ghaidan**, para. 32). This sole limitation has been considered on several occasions by the House of Lords and, given the primacy of the obligation under Section 3, the House of Lords has been careful to restrict the circumstances in which its use can be avoided. A review of the jurisprudence demonstrates that convention-compatible interpretations are only impossible, in truth, in one circumstance which can be made manifest in a number of ways. That

[6] Jowell, J, "*Judicial Deference : servility, civility or institutional capacity*", [2003] PL 592 at 597.

circumstance is where a court would thereby transgress the constitutional boundary sought to be preserved by the scheme of the HRA; that is the boundary between permissible judicial interpretation (modification of meaning or rectification) and legislation. Such a constitutional transgression can occur where compatible constructions:

(a) Require the court to contradict a fundamental feature of the statutory provision in question (per Lord Nicholls in **Ghaidan**, para. 33 and in **Re S** [2002] 2 AC 291 at para. 40; per Lord Hoffman in **R (Wilkinson v Inland Revenue Commissioners** [2005] 1 WLR 1718 at para. 17, in which it was the very point of the relevant provisions of the ICTA 1988, the "grain", to create a tax-break for widows who were, at a particular juncture in the socio-economic history of this country, perceived to be in need of such relief by reason of their economic inactivity as part of the formal economic sector and thus reading the relevant provision as addressing widowers would contradict a fundamental feature); or

(b) Require the court to make decisions for which it is not equipped (per Lord Nicholls in **Ghaidan,** para. 33; per Lord Nicholls in **Re S**, para. 40) and which should therefore remain the constitutional province of another organ of the state (see, **Bellinger v Bellinger (Lord Chancellor Intervening)** [2003] 2 AC 467 in which the Court was concerned with making a decision of *perceived* mammoth moral, theological, medical and social proportions, namely liberating gender from biological determinism which other organs of government (the executive, the elected legislature or other public authorities for example) were better equipped to take).

37. These two circumstances can often overlap.

38. Where, unusually, it is not possible to construe any legislative measure compatibly, then, where the legislative measure is contained in primary legislation, as here, a Declaration of Incompatibility must be made pursuant to Section 4 HRA.

39. The court's first duty is therefore to read and give effect to the statutory provisions described above in a Convention-compliant way if possible. The Section 3 obligation can include, as stated above, the modification of its substance so long as the limits described above, and discussed in detail below, are respected.

40. The relevant Convention rights are those contained in Articles 8, 12 and 14 of Schedule 1 of the HRA.

Article 8

41. Article 8 of the Convention provides that:

"(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 body 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."

42. Article 8 encompasses the right to personal development and physical and moral security in the full sense enjoyed by others: (**Goodwin v UK** (2002) 35 EHRR 447, para. 90). In **Niemietz v Germany** (1992) 16 EHRR 97 the ECtHR said this:

"The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle. *Respect for private life must also comprise to a*

certain degree the right to establish and develop relationships with other human beings." (para. 29).

43. The right to develop relationships with other human beings inherent in the protection afforded by the concept "private life" must include the development of same sex relationships. There is nothing in the Strasbourg jurisprudence to suggest that this right is confined to the right to develop relationships between two people of different sexes. This is particularly so in light of two features of the Strasbourg jurisprudence detailed below.

44. First, Strasbourg jurisprudence has given an extremely wide scope to "private life" in this context, holding that even business or professional relationships can, in principle, fall within the meaning of "private life".[7] If such relationships are within the scope of "private life", it is submitted that it is unarguable that intimate homosexual relationships - which, like intimate heterosexual relationships, can and do exhibit qualities of financial and emotional interdependence, love, commitment and monogamy[8] - must equally fall within those relationships, the development and establishment of which is protected by Article 8(1).

45. Second, Strasbourg jurisprudence has recognised that sexual orientation is a most intimate part of a person's private life, and there must exist particularly weighty reasons to justify any interference with that right,[9] or discrimination on that ground[10] (see further below). The manifestation of an individual's homosexuality by entering into a homosexual relationship is an entirely natural expression of, and inseparably bound up with, his/her sexual orientation and private life. It would be an unattractive conclusion to hold that the Convention afforded heightened protection to an individual on the basis of his or her sexual orientation but then excluded from the wide scope of the right to develop and establish relationships, the very conjugal relationship which is the natural consequence of that orientation.

---

[7] **Niemietz v Germany**, *supra*.
[8] See **Fitzpatrick Sterling Housing Association Ltd** [2001] 1 AC 27, **Ghaidan**, *supra*.
[9] **Smith and Grady v UK** (2000) 29 EHRR 493, para. 89.
[10] **Karner v Austria** (2003) 38 EHRR 528.

46. This is not to say that all incidents of sexual orientation discrimination will necessarily violate Article 8 or indeed fall within its "ambit" (as to which see below): **M v Secretary of State for Work and Pensions** [2006] UKHL 11. There has to be a sufficiently close nexus between the "core values which the provision is intended to protect" and any action complained of (per Lord Bingham, para. 4). However, the failure to accord equal recognition to a most core aspect of one's private life – that is, one's marriage – it is submitted will plainly fall within Article 8.

47. In addition to respect for private life, Article 8 guarantees respect for family life. The question then arises whether a same sex couple constitutes a "family" for these purposes. According to the majority of their Lordships (apparently[11]) in **M**, a same sex relationship does constitute a "family" for the purposes of Article 8 (para. 5, per Lord Bingham; para. 87, per Lord Walker and para. 112, per Baroness Hale[12]). Such is consistent with the developing trend in the ECtHR case law. Importantly, the Petitioner's relationship factually and at all material times shared the same relevant characteristics as an opposite sex relationship, save for the gender of the individuals in question (see Petitioner's and First Respondent's witness statements C/1-9, 48-51 and 106-115) (**Karner v Austria** (2003) 38 EHRR 528).

48. Accordingly, it is submitted that in principle such a relationship can amount to "family life" so as to bring it within the "ambit" of Article 8.

49. As with "private life", not every act touching upon a person's family life, will engage Article 8 – "the further a situation is removed from one infringing those core values, the weaker the connection" (per Lord Bingham, para. 4). However, for the reasons given above in relation to "private life" and developed further below,

[11] Lord Bingham was less clear. He apparently accepted that a same sex relationship was capable of constituting "family life" for Article 8 because he concluded "I do not think the enhanced contribution required of Ms M. impairs in any material way her family life with her children and former husband, or her family life with her children and her current partner, or her private life" (para. 5) but did not make an express holding on the same.

12 See too the observations of Lord Nicholls in **Fitzpatrick v Stirling Housing Association Limited** [2001] 1 AC 27, 44.

the failure to accord equal recognition to a most core aspect of one's family life – marriage –will plainly fall within Article 8 (see, **Bellinger v Bellinger (Lord Chancellor intervening)** [2003] 2 AC 467).

Article 12

50. Article 12 of the Convention provides that:
"Men and women of marriageable age have the right to marry and found a family according to the national laws governing the exercise of this right."

51. Article 12, of course, protects a core and universal value – the right to choose one's life partner and to be free to engage in the important social institution of marriage with one's partner of choice. Marriage is universally recognised; it has a place in religious doctrine and celebration and is still the chosen status of most adults**:**
"The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but 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" (**Goodwin v UK** (2002) 35 EHRR 447, para. 99).

52. Though Article 12 protects the rights of "men" and "women" to marry, the traditional approach to marriage, rooted in biological determinism, has been reassessed in a human rights context so that it is now understood that,
"Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision." (**Goodwin**, para. 98).

53. Whilst the right to marry is subject to "the domestic legislation, the national law of each of the spouses or the law of the forum", such qualification does not authorise a state "completely to deprive a person or a category of persons of the right to marry" (**Van Oosterwijck v Belgium** (1981) 3 EHRR 557, Com Rep para. 56).

54. In addition, the Convention is a "living instrument" which must be interpreted in the light of changing attitudes. A clear illustration of this is seen in the case of **Goodwin** (para. 100) in which the ECtHR held that past assumptions as to "men and women" in Article 12 should be cast aside in the light of major social changes in the institution of marriage so allowing trans people to marry in their reassigned sex to a person of the same sex as their birth sex. In **Goodwin**,

"The applicant ….. lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed." (para. 101).

55. It was no answer in **Goodwin** (and no answer here) to say that the applicant could marry a person of her opposite birth sex. Such a suggestion (as is made by the Intervener in the instant case[13]) is fundamentally offensive and outwith the respect for human dignity that underpins the Convention rights. Laws which prohibit persons from marrying those with whom they enjoy adult and intimate love, subject only to very narrow public policy considerations (like close degrees of consanguinity), are utterly antithetical to human rights values and respect for human dignity.

Article 14

56. Article 14 contains the Convention's non-discrimination guarantee. It provides that,

"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."

57. Article 14 is not freestanding – it depends upon there being discrimination in the enjoyment of the rights and freedoms set forth in the Convention. The Petitioner

[13] Para 16, Intervener's Answer [B/15].

complains of discrimination in the enjoyment of the rights described above under Articles 8 and 12. Article 14 may apply even if there is no breach of a substantive Convention Article. Importantly therefore, even if the court is not satisfied (contrary to the Petitioner's submissions below) that there has been a violation of Article 8 or 12, it must consider whether there has been a violation of Article 14, read with those provisions.

58. As to the test for determining whether there has been a violation of Article 14 read in conjunction with the other Convention rights, regard should be had to the five questions that have been identified as arising in the context of an Article 14 inquiry ("the **Michalak** questions"):

    (a) Do the facts fall within the ambit of one or more of the Convention rights?

    (b) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?

    (c) Were those others in an analogous situation?

    (d) Was the difference in treatment objectively justifiable? i.e. did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

    (e) Was the difference in treatment based on one or more of the grounds proscribed – whether expressly or by inference – in Article 14? (**Ghaidan**, *supra* at paras. 133-134, per Baroness Hale and see Brooke LJ in **Wandsworth London Borough Council v Michalak** [2003] 1 WLR 617, 625, para. 20 and **R (Carson) v Secretary of State for Work and Pensions** [2002] 3 All E.R. 994, para. 52).

59. The questions identified provide a "useful tool of analysis" though a "rigidly formulaic" approach is to be avoided (**Ghaidan**, per Baroness Hale, 605, para. 134). Of course, the questions overlap and it will sometimes be appropriate to ask them in a different order and such observations arise equally in the field of discrimination law more widely (see, for example, the observations of Lord

Nicholls in **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 at 340-341, paras. 7-11).

60. In **R (Carson) v Secretary of State for Work and Pensions** [2005] 2 WLR 1369 their Lordships found that the **Michalak** formulation was not without its difficulty (per Lord Nicholls, 1373, paras. 2-3; per Lord Hoffman, 1380-1381, paras. 28-33; per Lord Rodger para. 43; per Lord Walker, 1387-1391, paras. 61-70; per Lord Carswell, 1397-1398, para. 97). In **Carson**, their Lordships preferred a less "technical" or "structured" approach (see, Lord Nicholls, 1373, para. 3 and Lord Walker, 1390 at para. 69). This approach is reflected in the observations of Lord Nicholls, as follows:

"Article 14 does not apply unless the alleged discrimination is in connection with a Convention right and on a ground stated in Article 14. If this prerequisite is satisfied, the essential question for the Court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious relevant difference between the Claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may be best directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

61. It is submitted that the **Michalak** framework is a useful guide to analysing the issues that arise in the instant case (see, for example, its use in **R and O'rs v A** [2005] 2 AC 68, 114-115 para. 50, per Lord Bingham). Whether the **Michalak** framework or the more fluid approach of Lord Nicholls is adopted, the result in the instant case will be the same. For ease of formulation of the argument below, the **Michalak** questions are used for addressing the issues that arise under Article 14.

62. As to the concept of "ambit", Article 14 is applicable where the facts and circumstances of a case have a "connection" with one of the substantive Convention rights (**Carson** supra, per Lord Nicholls, 1373, para. 3). The Strasbourg Court has used a number of different phrases to describe the nature and degree of the link required: where the subject matter of the disadvantage "constitutes one of the modalities of the exercise of the right guaranteed" (**Petrovic v Austria** (2001) 33 EHRR 14 at para. 28; **National Union of Belgian Police v Belgium** (1979-80) 1 EHRR 578, at para. 45); where the measure in question is "linked" to a guaranteed right (**Schmidt and Another v Sweden** (1976) 1 EHRR 632 at para. 39); where the facts in issue fall "within the ambit" of such a right (**Abdulaziz, Cabales and Balkandali v United Kingdom** (1985) 7 EHRR 471, at para. 71 and **Ghaidan**, supra per Lord Nicholls at 566, para. 10; Baroness Hale, 605 at para. 133). As is well-known then:

"[the ECtHR] has consistently held that Article 14…complements the other substantive provisions of the Convention... It has no independent existence since it has effect solely in relation to "the enjoyment of the rights of freedoms" safeguarded by those provisions. Although [1] the application of Article 14 does not presuppose a breach of [another Convention right] – and to this extent it is autonomous – there can be no room for its application unless [2] the facts at issue fall within the ambit of one or more of the [other Convention rights]" (**Haas v Netherlands** [2004] 1 FLR 673 at para. 1 P&D 130 41).

63. As seen, the "ambit" principle does require a connection between the facts alleged and one or other of the other Convention rights. The degree of connection required has been the subject of recent consideration by the House of Lords in **M**, *supra*, as follows:

"[T]he further a situation is removed from one infringing those core values [in the Convention Articles], the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no

sharp line of demarcation between the two. An exercise of judgment is called for….. I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind."(per Lord Bingham, para. 4).

64. There must be some sufficiently close connection with a substantive Convention right as to make the discrimination analysis meaningful in the Convention context. It is respectfully submitted, and as is developed below, that there can be no real doubt that the failure to recognise a lawful marriage and/or prohibition of marriage is very closely connected to the core values protected by Articles 8 and 12.

SUBMISSIONS

65. In summary, the Petitioner submits that:

(a) A prohibition on same sex marriage violates the Petitioner's Convention rights (Articles 8, 12 and 14);

(b) A statutory conversion of the Petitioner's married status and her marriage, to a civil partnership status and a civil partnership also violates the Petitioner's Convention rights (Articles 8, 12 and 14);

(c) The rules of private international law by themselves and/or with the HRA must be understood therefore and applied such as to secure the domestic recognition of the Petitioner's Canadian marriage, having regard to Section 6 of the HRA;

(d) The fact that a prohibition on same sex marriage and a statutory conversion of a valid same sex marriage into a civil partnership violates Convention rights means that the court is bound to strive to achieve a compatible construction of the MCA and CPA, having regard to Section 3 HRA, and a compatible construction is possible;

(e) If, notwithstanding the Petitioner's primary submission, the court holds that it is not possible to construe the MCA and the CPA compatibly, the court must make a Declaration of Incompatibility in respect of Section 11(c) of the MCA 1973 and Sections 1(b) and Chapter 2 of Part 5 of the CPA.

66. Each of these submissions is elaborated upon below.

Same Sex Marriage and Convention Rights

67. A bar on same sex marriage and/or the non-recognition of same sex partners as having capacity to marry and/or a statutory provision which deprives a person of their married status violate the Convention rights for the following reasons.

Article 8: Private Life

68. Discriminatory measures based on sexual orientation may fall within the "private life" guarantee in Article 8. In this context "private life" includes sexual orientation.[14] Sexual orientation is "a most intimate aspect of private life".[15] Recent Strasbourg jurisprudence has confirmed and emphasised that the concept of "private life" is not limited to some inner, personal sphere but is a wide and generous concept. According to the ECtHR in **Pretty v UK** (2002) 35 EHHR 1:

"[T]he concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person …. It can sometimes embrace aspects of an individual's physical and social identity ……. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 ….. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world……. Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees. …

The very essence of the Convention is respect for human dignity and human freedom. …" (para. 61 and 65)

[14] **Dudgeon v the United Kingdom** (1982) 4 EHRR 149, paras. 41); **Norris v Ireland (1991)** 13 EHRR 186.

[15] **Dudgeon**, *supra*. "sexual behaviour is undoubtedly an aspect of private life, indeed a most intimate and important aspect of private life" **Pearce v Governing Body of Mayfields School** [2001] ICR 198 at para. 15 per Hale LJ.

69. By treating same sex couples detrimentally, by failing to allow them to marry their partners of choice and by converting any lawful same sex marriage effected overseas into a civil partnership, the law manifests a lack of respect for a core and most intimate aspect of the Petitioner's private life; her sexual orientation.

70. Whilst, as mentioned above, not all intrusions on private life will violate Article 8, a legal bar to equal recognition of what for the majority of people will be their most significant adult relationship touches upon the core values which the provision is intended to protect (**M**, per Lord Bingham, para. 4). As was made clear in **Goodwin**, which concerned the failure to recognise the new genders of trans people (so depriving them of the right to marry in their new gender amongst other things),

"The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety" (para. 77).

71. Similarly, the discordance between the position in society assumed by a lesbian and the status imposed by, at least marriage, law – that she is heterosexual – cannot be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places a lesbian in an anomalous position, in which she may experience feelings of vulnerability, humiliation and anxiety, as the Petitioner's and First Respondent's witness statements make clear (see too **Bellinger v Bellinger (Lord Chancellor intervening)** [2003] 2 AC 467, below).

Article 8: Family Life

72. The failure to recognise, through marriage, the Petitioner's family life with the First Respondent is demonstrative of a lack of respect for it. This is self evidently so. It also affects a very important aspect of family, both socially and intimately. It

affects the way in which their relationship is judged and measured and therefore is closely connected to the core rights contained in Article 8.

Article 8: Justification

73. The Intervener asserts that any lack of respect for the rights guaranteed by Article 8 caused by the refusal to allow same sex marriage or to recognise the Petitioner's marriage is justified (Intervener's Answer, para. 10). The justification is said to be the "need to preserve the institution of marriage as traditionally understood between two persons of the opposite sex" (*ibid.*). It is not said from where this need derives or its purpose.

74. For justification, the Intervener must show that any interference 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 (Article 8(2), see above). This requires that the aim sought to be achieved by any interference is identified and that such falls within one of the clauses in Article 8(2) (interests of national security etc). Further, even if such an aim is identified, the interference must be "necessary in a democratic society" in the interests of one of those aims. For an interference to be "necessary in a democratic society" to achieve one of the aims listed, case law indicates that the following four elements must be satisfied

    (a) that there is a pressing social need for some restriction;
    (b) that the restriction corresponds to (i.e. has a rational connection with) that need;
    (c) that the restriction is a proportionate response to that need;
    (d) that the reasons advanced by the authorities are "relevant and sufficient".[16]

Such requires a substantive assessment by a court.[17]

[16] **Handyside v United Kingdom** (1976) 1 EHRR 737; **Barthold v Germany** (1985) 7 EHRR 383.

75. The Intervener does not identify the particular clause into which the objective he relies upon is said to fit (Intervener's Answer, para. 10). Plainly it cannot be said that the refusal to allow same sex marriage is necessary in the interests of national security or for public safety or for the economic well-being of the country or for the prevention of disorder or crime or for the protection of health. This leaves only the possibilities provided for by the need to protect morals or for the protection of the rights and freedoms of others. Neither seem apt. Simply asserting that there is a "need to preserve the institution of marriage as traditionally understood between two persons of the opposite sex" is circular – there must be an aim identified to justify the exclusion of same sex couples and none has been identified.

76. It is not suggested by the Intervener – and nor could it be – that there is anything morally improper about homosexual relationships: "The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to "everyone", including homosexuals, by article 8 since **Dudgeon v United Kingdom** (1981) 4 EHRR 149." (**Ghaidan**, per Baroness Hale, para. 143). Any specific features of marriage which it might be legitimate to seek to protect are equally present or absent in same sex relationships as in opposite-sex relationships.

77. Nor is there anything in allowing same sex couples to marry that imperils the rights and freedoms of others. Those others remain free to marry. Recognising same sex marriage will not diminish the validity or dignity of opposite-sex marriage.

78. The only discernible reasons for the refusal to recognise same sex marriage are pre-disposed biases and negative attitudes towards homosexuals, which cannot constitute a legitimate aim (**Smith & Grady v UK** (2000) 29 EHRR 493 para. 97;

---

[17] **R (on the application of Begum, by her litigation friend, Rahman) v Headteacher and Governors of Denbigh High School** [2006] UKHL 15, para. 30, per Lord Bingham.

SL v Austria (2003) 37 EHRR 39 para. 44) and which would thus not justify a violation of the Petitioner's Article 8 rights. However, the Intervener eschews any suggestion that views based upon prejudice are to be relied upon (that providing the only foundation for holding same sex relationships or lesbians as morally inferior) (Intervener's Answer, para. 11(c) [B/13]).

79. Even if an aim is eventually identified which is capable of falling within Article 8(2) (and we can think of none), there would seem to be no necessity to bar same sex couples from the right to marry. As has been observed by the ECtHR,

"Very weighty reasons have to be put forward before the court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention…Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification…..

…..

The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see **Estevez v Spain**…). It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.

The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to member states is narrow, as [is] the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must be also shown that it was necessary to exclude persons living in a homosexual relationship from [the protected measure] in order to achieve that aim. The court cannot see that the government has advanced any arguments that would allow of such a conclusion". (**Karner v Austria** (2003) 38 EHRR 528, paras. 37-41).

80. It is not suggested (and still less is there evidence) that excluding same sex couples from the right to marry is necessary to *protect* any traditional family life. Allowing

same sex marriage self evidently will not interfere with or obstruct heterosexual marriage. Accordingly there is no justification for the exclusion of same sex couples from the right to marry and such with the consequences that flow (under private international law, the MCA and the CPA) violates Article 8.

Article 12

81. Article 12 has obvious importance for this application. By prohibiting the Petitioner from marrying the First Respondent and in failing to recognise their lawful Canadian marriage the State has "completely" deprived them of the right to marry (**Van Oosterwijck v Belgium** (1981) 3 EHRR 557, Com rep para. 56).

82. In **Goodwin** the ECtHR recognised that a failure to allow a trans person to marry in her reassigned sex constituted a breach of Article 12 (paras. 103-4). In **Bellinger v Bellinger (Lord Chancellor intervening)** [2003] 2 AC 467, the House of Lords concluded that "male" and "female" in Section 11(c) of the MCA were to be given their ordinary meaning and referred to a person's biological gender as determined at birth, so that, for the purposes of marriage, sex was to be determined by reference to birth sex. English law therefore did not recognise a marriage between two people, married in the U.K., who were of the same gender at birth, even if one of them had undergone gender reassignment treatment. The House of Lords concluded that it was not possible to read the MCA compatibly with the Convention rights, in particular (and distinguishing that case from this) because of the lack of unequivocal criteria by which gender reassignment treatment should be assessed and the significant sensitivity around determining gender reassignment (paras. 39-43). In those circumstances, and since there was no provision for the recognition of gender reassignment for the purposes of marriage, Section 11(c) was a continuing obstacle to Mrs Bellinger entering into a valid marriage with a man and was therefore incompatible with her right to respect for her private and family life and with her right to marry pursuant to Articles 8 and 12 respectively, and a Declaration of Incompatibility under the HRA to that effect was made.

83. In consequence the Gender Recognition Act 2004 has been enacted allowing for formal recognition of a person's reassigned sex to be granted, including for marriage purposes. A "Gender Recognition Certificate" recognising a person's acquired gender will be granted where a person has or has had gender dysphoria; has lived in the acquired gender throughout the period of two years ending with the date on which the application is made; intends to continue to live in the acquired gender until death, and complies with necessary formalities (Sections 2 and 3). The Petitioner and First Respondent therefore could marry each other, or have their marriage recognised, if one had obtained a "Gender Recognition Certificate" recognising a change of gender to that of a male. In this case however, neither the Petitioner nor the First Respondent has gender dysphoria or wants to live as a man. However, given now that the biological link between gender and marriage has been severed there can be no justification for depriving them of the right to marry based only on the fact that they were born and remain of the same sex. Instead the law, as presently understood and applied, "completely deprive[s] [the Petitioner] [and] a category of persons of the right to marry" (**Van Oosterwijck v Belgium** (1981) 3 EHRR 557, Com rep para. 56). That is incompatible with Article 12.

Article 14

84. As to each of the steps required in an Article 14 inquiry:

(a) Do the facts fall within the ambit of one or more of the Convention rights?

85. The facts of this case plainly fall within a Convention right, namely Articles 8 and 12, for the reasons given above (and see, **Bellinger**, *supra*). Even if, which is denied, the court finds that the refusal to allow same sex couples to marry does not violate Articles 8 or 12, the facts in this case certainly fall within their ambit.

86. The refusal to recognise their relationship on equal terms with that of a different sex couple plainly intrudes upon a most intimate aspect of the private life and family life of the Petitioner and the First Respondent. This is not a tangential issue (as was the position in **M)** concerning an incidental consequence but is a core and

fundamental aspect of their private and family life (see **Goodwin, Bellinger**), as it would be for a couple one of whom was transgendered and just as it would be for a heterosexual couple. As to family life, as observed in **M** the cases "in which Article 14 has been considered in conjunction with the family life limb of Article 8 [ie were within its ambit] were all (whichever way they were ultimately decided) concerned with measures very closely connected with family life: **Petrovic** (parental leave); **Estevez** (social security benefit for surviving spouse); **Frette** (adoption). By contrast **Logan** (the CSA case) is an example of unsuccessful reliance on a much more remote link (financial resources to visit absent children)." (per Lord Nicholls, para. 84). All of these illustrations concern matters which are less closely connected to the core guarantees in Article 8 than those matters raised by the facts of this application. The complaints raised by this Petition are, then, plainly within the ambit of Article 8.

87. As to Article 12, the facts of this case self evidently fall within Article 12 (**Goodwin**; **Bellinger**).

88. It can be noted too that where, as here, the State has decided to legislate in a particular field, even if the Convention does not require it to do so, then if that legislation falls within the sphere of a Convention right, Article 14 will apply (**Petrovic v Austria** (2001) 33 EHRR 14). This means that the fact that the State has legislated to recognise same sex relationships through the CPA means Article 14 is engaged and, absent justification otherwise, Article 14 requires that their marriage must be afforded equal recognition as a marriage. This is so even if, and this is denied, Articles 8 and 12 by themselves do not guarantee the Petitioner the right to have her same sex marriage recognised in the same way as a different sex marriage, and the facts of her case do not, by themselves, fall within their ambit. Thus by analogy in **Stec and others v U.K.** (App. No. 65731/01 and 65900/01, 12 April 2006), the Grand Chamber of the ECtHR held as follows (in relation to certain social security benefits):

"Finally, since the applicants complain about inequalities in a welfare system, the Court underlines that [the Convention] does not include a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme. If, however, a State does decide to create a benefits or pension scheme, it must do so in a manner which is compatible with Article 14 of the Convention (see the admissibility decision in the present case, §§ 54-55, ECHR 2005-...)" (para. 53).

89. For all these reasons the facts fall within the ambit of one or more of the Convention rights.

Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?

90. It is not clear whether the Intervener accepts that there was a difference in treatment (Intervener's Answer, para. 18 [B/15]). There is plainly a difference in treatment between the Petitioner and a British woman domiciled in the UK who married a man in Canada, in that the Petitioner is deprived of the opportunity to marry her partner of choice in the U.K. and denied recognition of her lawful Canadian marriage. That is a difference in treatment.

91. If it is to be argued that there is no "difference" in treatment because the CPA affords comparable benefits to same sex couples as marriage does to different sex couples (by securing equivalent tax, property etc rights), then it is to be first observed that there are differences, as described above. However, more particularly for the purposes of this application and the concerns of the Petitioner and First Respondent, the "intangible benefits" of marriage are more important as their witness statements make clear and the intangible damage done to them is significant. The "separate but equal" doctrine has an ugly history and has historically been used to justify discrimination (see the "Jim Crow" laws in the U.S.; **Plessy v Ferguson** (1896)). As was observed by the U.S. Supreme Court

many years ago in **Brown v Board of Education** (1954) 347 U.S. 483 in relation to the segregation of black children in "equal" but separate schools,

"To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system." (para. 494).

92. The U.S. jurisprudence on segregation is of particular resonance because, of course, certain U.S. States had, along with other "Jim Crow" laws mandating and requiring racial segregation, anti miscegenation laws persisting until the late 1960s at least.[18] Such laws allowed every adult individual to marry – but only within their own race. The object of such laws was to protect the "white race". Remnants of discriminatory marriage laws are still seen in the U.K. in the bar on same sex couples marrying (so excluding a stigmatized group from infecting the institution of marriage) and in the prohibition on the monarch from entering into marriage with a Catholic (so excluding a stigmatized group from infecting the institution of the monarchy).[19] All such laws derive from the fact that those prohibited from marrying into the preferred group, black people, Catholics, gay people, have been historically discriminated against.

[18] **Naim v Naim** (1955) 87 SE 2d 749, **Loving v Commonwealth of Virginia** 388 U.S. 1, 87 S.Ct. 1817.
[19] Bill of Rights 1689 (1 Will. & Mar. Sess. 2c.2); 1701 Act of Settlement; Union with Scotland Act 1706; Union with England Act 1707.

93. The exclusion of an historically disadvantaged group from a privilege or opportunity, even if tangibly "equivalent" rights are secured, is inconsistent with a contemporary (i.e. post 1960s) understanding of equality.

94. In **Halpern v Canada (Attorney General)** 2002 CanLII 42749 (ON S.C.D.C.), Mr Justice LaForme stated:

"To repeat, it is my view that any "alternative status" that nonetheless provides for the same financial benefits as marriage in and of itself amounts to segregation. This case is about access to a deeply meaningful institution - it is about equal participation in the activity, expression, security, and integrity of marriage. Any "alternative" to marriage, in my opinion simply offers the insult of formal equivalency without the *Charter* promise of substantive equality. Again, an "alternative" I find will only provide a demonstration of society's tolerance - it will not amount to a recognized acceptance of equality." (para. 282)

95. Most recently, the South African Constitutional Court has ruled the bar on same sex marriage unconstitutional, holding that:

"A democratic, universalistic, caring and aspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case.

…….

Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting" (**Minister of Home Affairs and O'rs v Fourie and O'rs** (2005) Case CCT 60/04, para. 60, per Sachs J).

Were those others in an analogous situation?

96. It is denied by the Intervener that the Petitioner and her wife and other same sex couples are in an "analogous" position to different sex couples. Such is a logically absurd argument. The factual situation of the Petitioner and her wife is the same as any other married couple. What sets them apart is the very classification that Article 14 protects, namely that they are lesbian and therefore in a same sex relationship and their comparators are heterosexual and therefore in different sex relationships. At this stage of the legal inquiry one cannot use the very protected status relied upon as reason to argue that the applicant is not in an "analogous situation", particularly where that protected status constitutes a "suspect" class (ie one which requires serious reasons if distinctions drawn upon it are to be justified, as with sex, race and sexual orientation: **Karner**, see above). The answer to the Petitioner's claim cannot be in law, "you are different because you are gay and therefore you are not in an analogous situation to a straight person" any more than one could say of a complaint brought of race discrimination "you are different because you are black and therefore you are not in an analogous situation to a white person" (see, in the context of sex discrimination: **James v Eastleigh BC** [1990] 2 AC 751).

97. In all respects the Petitioner is factually in an analogous position to a British woman in a different sex marriage contracted in Canada. The difference lies in how the law treats her same sex marriage and thereby (since she is in a same sex

marriage due to it) her sexual orientation. That is a difference the State must justify.

Was the difference in treatment objectively justifiable? i.e. did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

98. As is described above, there is no justification for the distinction in treatment as between same sex and opposite sex couples.

99. As observed above, discrimination on grounds of sexual orientation is regarded as a "suspect class" in Strasbourg jurisprudence and accordingly any alleged justification should be subject to rigorous scrutiny and very weighty reasons are required to make it out. Justification will not be made out on utilitarian grounds (see **R (Carson) v Secretary of State for Work and Pensions** [2005] 2 WLR 1369**,** per Lord Hoffman, 1377, para. 17, Lord Walker, 1386, paras. 57-58).

100. No legitimate or even coherent aim has been identified for the difference in treatment complained of in this case. The Intervener says that it is not based on prejudice but no other rational basis for the distinction is identified. For the avoidance of doubt, in determining justification, regard must be had to the hallmarks of a democratic society, namely "pluralism, tolerance and broadmindedness".[20] As such ignorance, prejudice and intolerance should not be regarded as good justificatory reasons.

101. The oft repeated mantra that excluding same sex couples from the institution of marriage is justified in order to preserve the institution as "traditionally" understood (Intervener's Answer paras. 10 and 19(b) [B/12-13 and 16]) is vacuous, for the reasons already given above. As has been observed:

"…[W]hat could be the legitimate aim of singling out heterosexual couples for more favourable treatment than homosexual couples? It cannot be the protection of the traditional family. The traditional family is not protected by granting it a benefit

[20] **Handyside v United Kingdom** (1976) 1 EHRR 737 para. 49.

which is denied to people who cannot or will not become a traditional family. What is really meant by the "protection" of the traditional family is the *encouragement* of people to form traditional families and the *discouragement* of people from forming others. There are reasons why it might be legitimate to encourage people to marry and to discourage them from living together without marrying. These reasons might have justified the Act in stopping short at marriage. Once it went beyond marriage to unmarried relationships **[or as in this case to civil partnerships**[21]**]**, the aim would have to be encouraging one sort of unmarried relationship and discouraging another **[or one sort of recognised partnership versus another**[22]**]**… [I]t is difficult to see how heterosexuals will be encouraged to form and maintain such marriage-like relationships by the knowledge that the equivalent benefit is being denied to homosexuals. The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to "everyone", including homosexuals, by Article 8 since **Dudgeon v UK** (1981) 4 EHRR 149." (**Ghaidan**, per Baroness Hale, para. 143).

102. The same observations pertain to the circumstances arising in this case.

Was the difference in treatment based on one or more of the grounds proscribed – whether expressly or by inference – in Article 14?

103. Sexual orientation is a ground protected by Article 14 and the same is well known and not disputed (**Karner**, *supra*).

Conclusion

104. By reason of the submissions above, a failure to allow same sex couples, and the Petitioner and First Respondent in particular, to marry and/or a failure to recognise

[21] Emphasis added.
[22] Emphasis added.

their lawful same sex marriage as such is incompatible with their Convention rights.

REMEDY

Private International Law and Section 6 HRA

105. The rules of private international law are not contained in statute. This court is bound by its obligations under Section 6 to act compatibly with the Convention rights.

106. The Petitioner's marriage is not recognised here because the rules of private international law require that capacity must be tested at the place of domicile. There is no such statutory requirement and indeed the courts may disregard that requirement at common law if to apply it would be contrary to public policy (see above). Just as the restriction under Section 11 of the MCA that a marriage will be void if where "at the time of the marriage either party was already lawfully married" does not necessarily render void a marriage effected overseas, so Section 11(c) does not necessarily render void a same sex marriage effected overseas. Section 14 of the MCA makes it clear that the relevant provisions of the MCA are *subject* to private international law and such law is not contained in statute. Therefore such law should be developed and applied compatibly with Convention rights because of Section 6 HRA.

107. Accordingly, the Petitioner's marriage should be recognised because to regard her as lacking capacity is to act incompatibly with the Petitioner's Convention rights. The Petitioner relies on the arguments above. There is nothing in primary legislation which prohibits the court from acting compatibly with the Petitioner's Convention rights and from making the declaration sought under Section 55 of the Family Law Act 1986.

108. Such an approach would be harmonious with regional and international law and would promote legal coherence, for the following reasons. Numerous international and regional instruments require States to confer equal rights to lesbian and gay people (including the International Convention on the Elimination of all Forms of Discrimination Against Women23; the International Covenant on Civil and Political Rights24 and the International Covenant on Economic, Social and Cultural Rights25). Further, the EU Charter of Fundamental Rights of the European Union[26] confers non-discrimination rights including equality rights[27] and free movement rights which prohibit Member States from discriminating against same sex partners, including same sex spouses, in the exercise of free movement rights. Further Directive 2004/38/EC grants free movement rights to nationals of Member States and those extend to guaranteeing rights to "spouses". Such rights must be guaranteed in a non-discriminatory way and a marriage between people of the same sex effected in Spain, Belgium or the Netherlands would therefore have to be recognised in the U.K. as a matter of EU law (see "E.U. Network of Independent Experts on Fundamental Rights: Report on the Situation of Fundamental Rights", (2005)[28]).

109. Further, if either the Petitioner or the First Respondent was domiciled in Canada (or indeed, Belgium, Spain or the Netherlands) there would be no answer to their application – and the CPA would have to be disregarded – because the rules of private international law would require that their marriage be recognised, absent good public policy reasons and there are none.

---

23 Adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979. Entry into force 3 September 1981, in accordance with Article 27(1).

24 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force on 3 January 1976.

25 Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entered into force on 3 January 1976.

[26] [2000] OJ C364, 18.12.2000 p.1, now contained, as is material in the, Constitution for the European Union adopted in June 2004 Treaty Establishing a Constitution for Europe [2004] OJ C 310/1.

[27] Chapter III.

[28] Reference : CFR-CDF.rep.EU.en.2004, http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2004_en.pdf.

110. Recognising the Petitioner's marriage, in accordance with Convention law, gives proper effect to the HRA and fundamental rights and ensures consistency in the recognition of marriages between people of the same sex.

Section 3: The MCA and CPA

111. Further, it is submitted that Section 3 should be applied so as to secure a compatible construction of the MCA and CPA such as to accord recognition of the Petitioner's marriage as such. As has been mentioned above, this is the primary remedy where legislation is engaged and a court will only be excused from acting incompatibly with the Convention rights (as would be the case here if the Petitioner's marriage was not recognised) if notwithstanding the compelling injunction contained in Section 3, it could not act otherwise because of the impact of primary legislation.

112. There is nothing in the MCA or CPA which prevents the recognition of the Petitioner's marriage if regard is had to Section 3 of the HRA. The test for determining whether a compatible construction is possible is not, as mentioned, a linguistic exercise but requires a substantive consideration of the legislation concerned. Reading the CPA and MCA in a way which recognises marriages between people of the same sex (as would be required by private international law anyway if one party to the marriage were domiciled in Canada) would not require the court

    (a) To contradict a fundamental feature of the statutory provision in question; or

    (b) Require the court to make decisions for which it is not equipped.

113. As stated, the only limitation placed upon the Section 3 obligation is the limit of "possibility" (per Lord Nicholls, in **Ghaidan**, para. 32) and that boundary is not tested here. In **Bellinger**, the House of Lords found it impossible to construe the MCA so as to allow for the marriage of trans persons in their new sex because, inter alia, of the very real difficulty in determining when gender reassignment occurs and when it would be proper to recognise it. Such challenges do not arise in this case.

114. The CPA can be given a Convention compatible construction by giving effect to Section 1(1)(b) and Chapter 2 of Part 5 only where the parties to the marriage concerned chose to rely upon it. The MCA can be given a Convention compatible construction by disregarding Section 11(c), consistent with the general thrust of the MCA, where the marriage concerned was effected overseas and deferring to Convention compliant rules of private international law.

Section 4

115. Only if the court considers it impossible to read the MCA and CPA compatibly with Convention rights should the court make a Declaration of Incompatibility in respect of their provisions.

KARON MONAGHAN

RUTH KIRBY