Butterworths Human Rights Cases/Volume 35 /P v HM Attorney General for Gibraltar - (2013) 35 BHRC 136

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P v HM Attorney General for Gibraltar

2012 F no 60

SUPREME COURT, GIBRALTAR

DUDLEY CJ

10 APRIL 2013

Privacy - Private and family life - Adoption - Claimant being in committed and permanent same-sex relationship with T - T receiving fertility treatment and conceiving child using donated sperm and claimant's ovum - Statute precluding adoption by unmarried couples - Because of her sexual orientation, claimant unable to marry T and thereby meet statutory criteria so as to adopt child jointly with T - Whether claimant's constitutional right to family life being engaged - Whether claimant treated in discriminatory manner - Gibraltar Constitution Order 2006, ss 7 and 14.

The claimant, P, and her same-sex partner, T, were in a committed and permanent relationship. As neither a civil partnership nor marriage was possible in Gibraltar for same-sex couples, they travelled to Scotland (where there were no residency requirements) and, in November 2010, they entered into a civil partnership. Shortly thereafter they decided to start a family together. P donated her ova to T who, with the aid of a sperm donor, received IVF treatment in London and in February 2012 gave birth to a baby girl, A. P wished to apply for adoption of the child jointly with T in Gibraltar. However, the effect of s 5 (set out at para 5, below) of the Adoption Act was that only single persons (subject to certain conditions) and spouses were eligible to apply for adoption. Adoption by unmarried couples--whether opposite-sex or same-sex--was not permitted. Although s 5(2)(a) provided for a joint application to be made if one of the applicants was the mother or the father of the child the applicants had to be married. Thus, despite the genetic link between P and A, the fact that P and T had entered into a civil partnership in another jurisdiction and that P had acted as de facto parent of A, P was unable to apply for an adoption order jointly with T. P sought a declaration that s 5(2) of the Act violated the Gibraltar Constitution Order 2006 (the constitution) by excluding her from applying for an adoption order jointly with her partner. The substantive argument was framed in terms of s 7 (set out, so far as material, at para 6, below), which established the right to respect for family life, and s 14 (set out, so far as material, at para 6, below), which afforded protection from discrimination. No defence or evidence was served either denying the alleged violation of the constitution or seeking to justify it.

Held - The relationship between P and T fell within the notion of family life. If P and T were an opposite-sex couple there would be no doubt that A, although born out of wedlock, would form part of that family unit. The fact that P and T were a same-sex couple could make no difference and it therefore followed that A was part of the family unit and therefore P's s 7 right to family life was engaged. Any other outcome would create an artificial distinction between same-sex and opposite-sex couples and would be devoid of a rational basis. Moreover, it was not in dispute that discrimination under s 14 included

discrimination on the grounds of sexual orientation. Section 5 of the Act afforded different treatment to married and unmarried couples. P, because of her sexual orientation, was unable to marry T and thereby meet the statutory criteria so as to adopt A. Whether the argument was framed as being in the nature of direct discrimination, in that she was treated less favourably as an unmarried person than as a married person, or indirect discrimination, because P could not lawful-

ly marry her same-sex partner and they were therefore in a position which was radically different to that of a same-sex couple, was a distinction without a difference, the fundamental point being that P was being discriminated against because of her sexual orientation. It was one thing to say that, in general terms, married couples were more likely to be suitable adoptive parents than unmarried ones; it was altogether another to say that one could rationally assume that no unmarried couple could be suitable adoptive parents. Moreover, a person seeking to adopt could not be prevented from doing so merely on the ground of his or her homosexuality. The fact that P and T were in a same-sex relationship highlighted the irrationality of not allowing unmarried couples to adopt. The Act did not on terms provide that the adoption had to be in the best interest of the child but it was axiomatic that any judge making such an order would apply that principle. The fact that P and T had gone to another jurisdiction to have their relationship recognised and then together embarked on IVF treatment evidenced the stability of their relationship and were clearly relevant factors when determining whether a second-parent adoption by P was in A's best interest. Accordingly the Adoption Act discriminated against unmarried opposite-sex couples whose constitutional rights were thereby infringed and, once the right to adopt was extended to unmarried opposite-sex couples, there could be no difference in treatment between that group and same-sex couples. It followed that, to the extent that s 5 of the Adoption Act required joint applications by spouses, P's constitutional rights guaranteed by ss 7 and 14 of the constitution were violated (see paras 7-9, 16, 18-20 and 22, below); *R (on the application of Carson) v Secretary of State for Work and Pensions* (2005) 18 BHRC 677, *Rodriguez* v *Minister of Housing* (2009) 28 BHRC 189, *Re P (adoption: unmarried couple)* (2008) 24 BHRC 650, *EB v France* (2008) 23 BHRC 741 and *X v Austria* (2013) 35 BHRC 85 considered.

Cases cited

Cerisola v A-G [2008] UKPC 18, [2008] 5 LRC 111.

EB v France (2008) 23 BHRC 741, ECtHR.

Gas v France [2012] ECHR 25951/07, 15 March 2012, ECtHR.

Ghaidan v Mendoza [2004] UKHL 30, (2004) 16 BHRC 671.

R (on the application of Carson) v Secretary of State for Work and Pensions [2005] UKHL 37, (2005) 18 BHRC 677.

Re P (adoption: unmarried couple) [2008] UKHL 38, (2008) 24 BHRC 650.

Rodriguez v *Minister of Housing* [2009] UKPC 52, (2009) 28 BHRC 189.

Salgueiro da Silva Mouta v Portugal [1999] ECHR 33290/96, [2001] 1 FCR 653, ECtHR.

Schalk v *Austria* (2010) 29 BHRC 396, ECtHR.

X v Austria (2013) 35 BHRC 85, ECtHR.

Claim

P sought a declaration that s 5(2) of the Adoption Act violated the Gibraltar Constitution Order 2006 by excluding her from applying for an adoption order jointly with her same-sex partner. The defendant was the Attorney General for Gibraltar. The facts are set out in the judgment of the court.

J Restano for the claimant.

R Rhoda QC (HM Attorney General) with G Gear for the defendant.

10 APRIL 2013. The SUPREME COURT delivered the following judgment.

DUDLEY CJ.

1. This is a Pt 8 action in which the claimant seeks a declaration that--

> 's. 5(2) of the Adoption Act violates the Gibraltar Constitution Order, 2006 by excluding the Claimant from applying for an adoption order jointly with her partner.'

Pursuant to an order dated 10 April 2012 the claimant (P) was given anonymity. Although the defendant in the acknowledgment of service indicated that he intended to defend the proceedings no defence or evidence was served either denying the alleged violation of the Gibraltar Constitution Order 2006 (the constitution) or seeking to justify it. The factual background to the claim is not disputed and can be summarised briefly. I draw from Mr Restano's skeleton argument and P's witness statement.

2. P and her same-sex partner (T) are in a stable committed, loving, monogamous, permanent and interdependent relationship. As neither a civil partnership nor marriage is possible in Gibraltar for same-sex couples they travelled to Scotland (where there are no residency requirements) and on 12 November 2010 they entered into a civil partnership. Shortly thereafter they decided to start a family together and to that end in early 2011 they attended the London Women's Clinic in London. P donated her ova to T who with the aid of a sperm donor, received IVF treatment and on 3 February 2012 gave birth to a baby girl (A).

3. Despite the genetic link between P and A, the fact that P and T entered into a civil partnership in Scotland and that P has acted as de facto parent of A, P is unable to apply for adoption jointly with T. The only option open to P is to apply for adoption as a single applicant which would require T to sever her parental rights over A, not surprisingly it is not an option which is acceptable to either P or T.

THE STATUTORY FRAMEWORK

4. Section 5 of the Adoption Act provides:

> '(1) Subject to subsection (2), an adoption order shall not be made unless the applicant--
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> (a) is the mother or father of the minor; (b) is a relative of the minor and has attained the age of twenty-one years; or (c) has attained the age of twenty-five years.
>
> (2) An adoption order may be made in respect of a minor on the joint application of two spouses--
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> (a) if either of the applicants is the mother or father of the minor, (b) if the condition set out in paragraph (b) or paragraph (c) of subsection (1) is satisfied in the case of one of the applicants, and the other of them has attained the age of twenty-one years.
>
> (3) Except where an adoption order is made on the joint application of two spouses, no adoption order shall be made authorizing more than one person to adopt a minor.

(4) An adoption order shall not be made in respect of a minor who is a female in favour of a sole applicant who is a male, unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.

(5) An adoption order shall not he made in favour of an applicant who is not resident and domiciled in Gibraltar or, save with the consent of the Minister responsible for personal status, in respect of any minor who is not a British subject and so resident.

(6) An adoption order shall not be made in respect of a minor who has been married.'

The effect of s 5 is that only single persons (subject to certain conditions) and spouses are eligible to apply for adoption. Although s 5(2)(a) provides for a joint application to be made if one of the applicants is the mother or the father of the child the applicants have to be married.

5. The claim is advanced in terms of it engaging and breaching ss 1, 7 and 14 of the constitution. Section 1 sets out in more generic form the fundamental rights and freedoms protected by the constitution which are then particularised and made subject to limitations in the remaining sections of Ch 1 and although the case can be framed from the perspective of that provision it does not require separate consideration given that the substantive argument is framed in terms of s 7 which establishes the right to respect for inter alia *family life* and s 14 which affords protection from discrimination.

6. Section 7 of the constitution affords protection to the right to family life on the following terms:

'(1) Every person has the right to respect for his private and family life, his home and his correspondence ...

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision--

(a) in the interests of defence, the economic well-being of Gibraltar, public safety, public order, public morality, public health, town planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit ...

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

The material provisions of s 14 for the purposes of this case are these:

'(1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of or social origin, political or other opinions or affiliations, colour, language, sex, creed, property, birth or other status, or such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory, whereby persons of one such description are subjected to disabilities or restrictions to which

persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law so far as that law makes provision ...

> (c) for the application, in the case of persons of any such description a is referred to in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description ... or; (e) whereby persons of any such description as is mentioned in subsection (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is consistent with the provisions of the European Convention on Human Rights ...
>
> (6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5).
>
> (7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) may be subjected to any restriction on the rights and freedoms guaranteed by sections 7, 9, 10, 11, 12 and 13, being such a restriction as is authorised by section 7(3), 9(5), 10(2), 11(2), 12(2) or 13(3), as the case may be.'

Unlike art 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (the convention) (Rome, 4 November 1950; TS 71 (1953); Cmnd 8969) which complements the other substantive provisions of the convention but has no independent existence, it is now well established that s 14 of the constitution affords free standing substantive rights (*Cerisola v A-G* [2008] UKPC 18, [2008] 5 LRC 111 and *Rodriguez* v *Minister of Housing* [2009] UKPC 52, (2009) 28 BHRC 189). That is of little practical relevance in this case given that the limitations in s 7(3) extend to the rights guaranteed by both s 7 and s 14 and that while it may in any event appear self evident, for the reasons which follow s 7 is engaged.

FAMILY LIFE

7. In *Schalk* v *Austria* (2010) 29 BHRC 396 at para 91 the European Court of Human Rights reiterated its established case law in respect of different-sex couples in relation to 'family life':

> '... namely that the notion of family under this provision is not confined to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that "family" unit from the moment and by the very fact of his birth ...'

The court went on to take account of the rapid evolution of social attitudes and at para 94 said:

> 'In view of this evolution the court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of art 8. Consequently the relationship
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> of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.'

On the facts before me it is evident that the relationship between P and her partner T falls within the notion of 'family life'. If P and T were an opposite-sex couple there would be no doubt that A although born out of wedlock would form part of that family unit. The fact that P and T are a same-sex couple can make no difference and it therefore follows that A is part of the family unit and therefore P's s 7 right to family life is engaged. Any other outcome would create an artificial distinction between same-sex and opposite-sex couples and would be devoid of a rational basis. The fact that it is P's ova from which A was conceived may arguably on the facts strengthen her case, but it seems to me that in these cases primacy ought not to be given to biological or genetic links but rather whether there are social familial ties, and whether the relationship is one of parent-child.

8. For these reasons it is in my judgment evident that the s 7 right to family life is engaged. The issue from the perspective of that provision is whether the restriction imposed in P's family life by not being able to adopt A with T is saved by the s 7(3) limitations.

DISCRIMINATION

9. In s 14(3) discrimination is defined and includes *'such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory'*. Not in dispute that sexual orientation in one such ground (*Salgueiro da Silva Mouta v Portugal* [1999] ECHR 33290/96).

10. Albeit in the context of the convention a very useful analysis of the nature of discrimination is to be found in the House of Lords decision in *Ghaidan v Mendoza* [2004] UKHL 30, (2004) 16 BHRC 671 where in a case involving sexual orientation Lord Nicholls at [9] said:

> 'It goes without saying that art 14 is an important article of the convention. Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced. Of course all law, civil and criminal, has to draw distinctions. One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. Like cases should be treated alike, unlike cases should not be treated alike. The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another ... Unless some good reason can be shown, differences such as these do not justify differences in treatment. Unless good reason exists, differences in legal treatment based on grounds such as these are properly stigmatised as discriminatory.'

11. Mr Restano ably submits that P's inability to adopt A with her same-sex partner can be categorised as both direct and indirect discrimination. Direct

discrimination in that if she were a man she would be able to marry T and thereby adopt A. Indirect discrimination because she is unable to marry T due to her sexual orientation and that the fact that the Act applies to unmarried opposite-sex couples does not redeem the constitutional invalidity of the provisions as heterosexual couples have the option of getting married whilst same-sex couples do not.

THE EUROPEAN COURT OF HUMAN RIGHTS PERSPECTIVE

12. In the Chamber judgment of the European Court of Human Rights in *Gas v France* [2012] ECHR 25951/07 the court held that the refusal to allow a woman to adopt her same-sex partner's child was not discriminatory. The court relied on earlier decision to the effect that marriage confers a special status and that the applicant's position was not comparable to that of a married couple when it came to second-parent adoption. Noteworthy that the court determined that, as unmarried opposite-sex couples were likewise prohibited from adopting there was no evidence of difference of treatment based on the applicant's sexual orientation.

13. That approach was in large measure adopted in the very recent case of *X v Austria* (2013) 35 BHRC 85, a decision of the Grand Chamber of 19 February 2013, which was handed down after the hearing of this case but which Mr Restano properly brought to this court's attention. In *X v Austria* the Grand Chamber held that there had been a violation of art 14 taken in conjunction with art 8 (right to family life) on account of the difference in treatment of the applicants in comparison with unmarried different-sex couples in second-parent adoptions. But that there had been no violation when the applicant's situation was compared with that of a married couple. *Gas v France* [2012] ECHR 25951/07 was approved and distinguished on the basis that under French law second-parent adoption was not open to any unmarried couple be they heterosexual or same-sex. The Grand Chamber at para 140 reiterated on the following terms that discrimination on the grounds of sexual orientation requires very weighty reasons for its justification:

> 'In cases in which the margin of appreciation 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 the measure chosen to be suitable in principle for achie-

> vement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people, in this instance persons living in a homosexual relationship ...'

And at para 146 summarised the basis for its decision as follows:

> '... the existence of de facto family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the government in order to show that it would be detrimental to the child to be brought up by a same-sex couple ... and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples ... Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child, which is a key notion in the relevant international instruments ...'

That of course against the backdrop that the court had earlier reiterated the position that there is no obligation under art 8 of the convention to extend the right to second-parent adoption to unmarried couples. Essentially therefore in *X v Austria* the discrimination arose by virtue of the fact that Austrian law allowed second-parent adoption by unmarried opposite-sex couples.

14. The Adoption Act allows for adoption by either married couples or a sole applicant but does not allow for adoption by unmarried couples whether opposite-sex or same sex. Those provisions when viewed from the perspective of ECHR case law does not offend the convention. Although trite, I remind myself that by virtue of s 18(8) of the constitution in determining questions in connection with Ch 1 this court is enjoined to take account inter alia of judgments of the European Court of Human Rights. Moreover, s 14(4)(e) of the constitution essentially allows for laws to be discriminatory provided that they are consistent with the rights protected by the convention.

GIBRALTAR AND ENGLISH CASE LAW

15. That however is not the end of the matter. In *Rodriguez* v *Minister of Housing* (2009) 28 BHRC 189 a Privy Council decision binding on this court the Board held that Ms Rodriguez who had been denied a joint tenancy with her same-sex partner of a government tenancy had been indirectly discriminated because although unmarried opposite-sex couples were subject to the same policy and would also be denied joint tenancies Ms Rodriguez and her partner could not marry or have children in common. That this came about by virtue of their sexual orientation and therefore amounted to discrimination. The Board then went on to find that the discriminatory effect of the policy could not be justified because it was not rationally related to a legitimate aim. In the judgment delivered by Lady Hale the Board at [11] made it clear that:

> '... the Board is interpreting the constitution, not the convention, so that the reasons for restraint in the interpretation of the "convention rights" under the United Kingdom's Human Rights Act 1998 does not apply ...'

Essentially therefore the Board determined that the constitution can go further than the convention in the protection of fundamental rights.

16. In construing the constitution the Board adopted the approach laid down by Lord Nicholls who in *R (on the application of Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37 at [3], (2005) 18 BHRC 677 at [3] said:

> '... 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. Sometime 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 best be 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.'

Adopting that approach and applying *Rodriguez* v *Minister of Housing* (2009) 28 BHRC 189 in my judgment it is apparent that s 5(2) and (3) of the Act affords different treatment to married and unmarried couples and that P because of her sexual orientation is not able to marry T and thereby meet the statutory criteria so as to adopt A. Whether the argument is framed as being in the nature of direct discrimination in that she is treated less favourably as an unmarried person than

as a married person or indirect discrimination because P cannot lawfully marry her same-sex partner and they are therefore in a position which is radically different to that of a same-sex couple is a distinction without a difference the fundamental point being that P is being discriminated because of her sexual orientation.

JUSTIFICATION

17. The approach to be taken by the court in carrying out the justification analysis is succinctly set out at [25] of the Boards judgment in *Rodriguez* v *Minister of Housing* (2009) 28 BHRC 189*:*

> 'The benefit of a justification analysis is that it encourages structured thinking. A legitimate aim of the difference in treatment must first be identified. There must then be a rational connection between the aim and the difference in treatment. And the difference must be proportionate to the aim.'

Identification of the legitimate aim is referable to the enumerated interests in s 7(3)(a) of the constitution. The defendant has neither identified or advanced a case on justification. In contrast P relies upon the witness statement of Charles Trico, the secretary of the Equality Rights Group OGR, who summarises reputable scientific research to the effect that there is no significant difference between children brought up by same-sex and opposite-sex couples. Interesting as that material is and although it corresponds with my wholly unscientific opinion that children can be brought up equally well (or equally badly) by married couples, same-sex couples, opposite-sex couples or single parents it is not evidence which is before me in the nature of expert opinion evidence subjected to the usual form of scrutiny which is to be expected in a trial. Therefore, I place very limited reliance upon it. But in any event the burden of establishing justification lies with the defendant and there is no onus on P to counter an argument which is not advanced.

18. However, given the significance of the relief sought and its wider implications beyond this particular case it is right that justification be explored further. *Re P (adoption: unmarried couple)* [2008] UKHL 38, (2008) 24 BHRC 650 the House of Lords dealing with an appeal from the Court of Appeal in Northern Ireland touching upon declaratory relief sought by an unmarried couple that the Adoption (Northern Ireland) Order 1987 contravened arts 8 and 14 of the convention, held that being unmarried was a status within the meaning of art 14 and that the applicants convention rights were engaged by the legal bar on their being considered adoptive parents. Applying a similar limitation as our Adoption Act art 14 of the Adoption (Northern Ireland) Order 1987 provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple. Notwithstanding that provision the House declared that the applicants were entitled to apply to adopt the child. Lord Hoffman dealt with justification extensively and at [13] of his speech said:

> 'The state is entitled to take the view that marriage is a very important institution and that in general it is better for children to be brought up by parents who are married to each other than by those who are not. If, therefore, it was rational to adopt a "bright line rule" to determine what class of people should adopt children, there would be much to be said for art 14 [of the order] ...'

And later at [16]:

> 'The question therefore is whether in this case there is a rational basis for having any bright line rule. In my opinion, such a rule is quite irrational. In fact, it contradicts one of the fundamental principles stated in art 9 [of the order], that the court is obliged to consider whether adoption "by particular ... persons" will be in the best interest of the child. A bright line rule cannot be justified on the basis of the needs of administrative convenience or legal certainty, because the law requires the interests of each child to be examined on a case-by-case basis. Gillen J said that "the interests of these two individual applicants must be balanced against the interests of the community as a whole". In this formulation the interests of the particular child, which art 9 declares to be the most important consideration, have disappeared from sight, sacrificed to a vague and distant utilitarian calculation. That seems to me to

> be wrong. If, as may turn out to be the case, it would be in the interests of the welfare of this child to be adopted by this couple, I can see no basis for denying the child this advantage in "the interests of the community as a whole".'

And at [18]:

> 'It is one thing to say that, in general terms, married couples are more likely to be suitable adoptive parents than unmarried ones. It is altogether another to say that one may rationally assume that no unmarried couple can be suitable adoptive parents. Such an irrebuttable presumption defies everyday experience ... I would agree that the fact that a couple do not wish to undertake the obligations of marriage is a factor to be considered by the court in assessing the likely stability of their relationship and its impact upon the long term welfare of the child. Once again, however, I do not see how this can be rationally elevated to an irrebuttable presumption of unsuitability.'

That approach is equally applicable to the present case. Our Adoption Act does not on terms provide that the adoption must be in the best interest of the child but it seems to me axiomatic that any judge making such an order would apply that principle. In any event s 4 of the Children's Act requires the court when it determines any question with respect to the upbringing of a child to treat his welfare as the *first and paramount consideration.*

19. The fact that P and T are in a same-sex relationship cannot be a legitimate basis for distinguishing the present case from *Re P (adoption: unmarried couple)* (2008) 24 BHRC 650. In *EB v France* (2008) 23 BHRC 741 at 766-767 Judge Costa who dissented only on the application of the principles to the facts of the case succinctly re-stated the principle established by that case:

> '... the message sent by our court to the states parties is clear: a person seeking to adopt cannot be prevented from doing so merely on the ground of his or her homosexuality. This point of view might not be shared by all, for good or not so good reasons, but--rightly or wrongly--our court, whose duty under the convention is to interpret and ultimately apply it, considers that a person can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds.'

In a way the fact that P and T are in a same-sex relationship highlights the irrationality of not allowing unmarried couples to adopt It is of course not in the context of this action for me to make a determination as to the suitability or otherwise of P as an adoptive parent of A, but the fact that P and T have gone to

another jurisdiction to have their relationship recognised and then together embarked on IVF treatment evidences the stability of their relationship and are clearly relevant factors when determining whether a second-parent adoption by P is in A's best interest.

20. In a sense the apparent dichotomy between ECHR case law and the application of the principles in *Rodriguez* v *Minister of Housing* (2009) 28 BHRC 189 is resolved by *Re P (adoption: unmarried couple)* (2008) 24 BHRC 650. Applying *Re P* it is clear that the Adoption Act discriminates against unmarried opposite-sex couples whose constitutional rights are thereby infringed. Applying the principles of *X v Austria* (2013) 35 BHRC 85 it follows that once the right to adopt is extended to unmarried opposite-sex couples (as *Re P* does) there can be no difference in treatment between that group and same-sex couples.

21. A final issue on the construction of a limitation found in s 14 of the constitution arises. By virtue of s 14(4)(c) s 14(1) does not apply to any laws so far as that law makes provision--

> 'for the application, in the case of persons of any such description as is referred to in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is *the personal law applicable to persons of that description*.' (My emphasis.)

Personal law is about the application of distinct legal provisions among different communities within a territory, sanctioned and applied by the state. The provision which was also to be found in the Gibraltar Constitution Order 1969 and the constitutions of other overseas territories is a historic vestige no doubt included for very good reason to accommodate pre-colonial indigenous religious and cultural legal traditions whilst allowing for the application of English common law in the colonies. It is of no relevance in the present case, not least given that there are to my knowledge no *personal laws* which survive in this jurisdiction.

22. In my judgment for these reasons to the extent that s 5 of the Adoption Act requires joint applications by spouses, P's constitutional rights guaranteed by ss 7 and 14 of the constitution are violated and notwithstanding the offending provisions in the Adoption Act P may apply for an adoption order jointly with her same-sex partner.

23. Orders accordingly.