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2003 No 038372

HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND – FAMILY DIVISION

IN THE MATTER OF P (A CHILD)

GIRVAN LJ

Introduction

[1] The factual context within which the issues raised in this appeal arise can be simply stated. X, the natural mother of P ("the child") and her partner, Y, applied on 2 January 2003 to adopt the child who was born on 17 July 1997. The natural father of the child took no interest in his child and did not maintain her. The relationship between X and Y started before P's birth and has continued uninterrupted since then over a period of 8 years. They have cohabited for more than 7 years. According to paragraph 19 of the application proceedings were taken by Y in the Family Proceedings Court to obtain a parental responsibility order though there is no further information before this court on that issue. In his judgment Gillen J recorded that counsel on behalf of the applicants stated that X and Y did not have any religious or moral beliefs which required marriage or encouraged them in that direction and they did not believe that a civil wedding would in any way add to or strengthen their relationship. In paragraph 17 of this judgment he recorded that he was not persuaded that there was any material distinction in this case between Y as an unmarried man who had clearly established family life with a young child and a married father who enjoys a similar family life. He concluded that X and Y differed only as regards the issue of marital status. He was satisfied that the couple had firmly established beyond plausible dispute that they had established a family life with the child and had acted as the child's mother and father. The judge, however, heard no evidence from X

and Y as to the stability of their relationship nor was there any probing of the bare assertion by counsel that X and Y considered that their relationship was as good as a marriage. The reasons why an apparently committed couple wishing to adopt a child should decline to commit themselves to a marriage which is a statutory pre-requisite to adoption would clearly be relevant matters to be considered in the context of deciding whether the relationship is as soundly based as counsel asserted or whether it is truly analogous to that of a marriage if that were a matter to be decided on factual grounds.

[2] The essential question which fell for determination by the court at first instance was whether the unavailability to cohabiting but unmarried couples of a right to apply for the adoption of a child was incompatible with the Convention rights of the couple having regard to the fact that a married couple have such a right. Having a right to apply for adoption of a child does not of itself confer a right to adopt a particular child and if the court has jurisdiction to make an order it would have to satisfy itself that in the circumstances of the individual case such an order would be appropriate in the interests of the child. This would necessarily entail a careful consideration of the stability and permanence of the relationship of the cohabiting couple and would entail some consideration of the motivation behind the decision of the parties not to get married bearing in mind that marriage not merely confirms an intention to make permanent the relationship but also confers legal and other rights and a status on the parties distinct from those applying to a cohabiting couple.

[3] In the application before Gillen J and in this appeal the court was asked as a matter of principle to consider the question whether the restriction to a married couple of a right to apply for adoption under article 14 of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order") contravened article 8 of the Convention in conjunction with article 14. Mr O'Hara QC on behalf of X and Y argued that the court should declare the provisions of the 1987 Order incompatible with the Convention provisions and should declare that the applicants were eligible to be considered as adoptive parents regardless of the fact that they were not married. He argued that article 14 of the Order should be read in the light of the Human Rights Act 1998 and should be construed and interpreted in such a way as to treat a cohabiting man and woman as having the same rights as a married couple.

The Statutory Context

[4] Article 9 of the 1987 Order provides:

> "In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall regard the welfare of the child as the most important consideration and shall –

(a) have regard to all the circumstances, full consideration being given to:

(i) the need to be satisfied that adoption, or adoption by a particular person or persons, will be in the best interests of the child; and

(ii) the need to safeguard and promote the welfare of the child throughout his childhood; and

(iii) the importance of providing the child with a stable and harmonious home; and

(b) so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give consideration to them, having regard to his age and understanding."

[5] Article 14 of the 1987 Order as amended by Schedule 9 paragraph 141 of the Children (Northern Ireland) Order 1995 provides:

"(1) An adoption order shall not be made on the application of more than one person except in the circumstances specified in paragraphs (2) or (3).

(2) An adoption order may be made on the application of a married couple where both the husband and wife have attained the age of 21 years.

(3) An adoption order may be made on the application of a married couple where

(a) the husband or the wife

(i) is the father or mother of the child; and

(ii) has attained the age of 18 years; and

(b) his or her spouse has attained the age of 21 years.

> (4) An adoption order shall not be made on the application of a married couple unless at least one of them is domiciled in a part of the United Kingdom, or in any of the Channel Islands or in the Isle of Man."

[6] Article 15 provides that an adoption order may be made on the application of one person where he has attained the age of 21 years and is not married or is married and the court is satisfied his spouse cannot be found or the spouses have separated and are living apart and the separation is likely to be permanent or the spouse is by reason of ill health whether physical or mental incapable of making an application for an adoption order.

[7] By virtue of article 40(1) an adopted child is to be treated in law where he is adopted by a married couple as if he had been born a child of the marriage whether or not he was in fact born after the marriage was solemnised. In any other case the child falls to be treated as if he had been born to the adopter in wedlock and not a child of any actual marriage. An adopted child is to be treated in law as if he were not the child of any person other than the adopter or adopters.

The Convention Context

[8] Article 8(1) provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There should be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in 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."

[9] Article 14 provides:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds 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."

[10] Although it did not feature in the arguments article 12 has some peripheral relevance. It provides that men and women of marriageable age have the right to marry and to found a family according to the national laws governing the exercise of that right.

[11] It is clear from Convention case law that article 8 does not of itself confer on any person a right to adopt a child and there is no freestanding right to adopt guaranteed by the Convention. In Lazzaro (31924/96) the Commission declared inadmissible a claim by an unmarried woman who claimed a right to adopt a child. Italian law conferred a right to adopt only on married couples. The Commission pointed out that the right of a married couple to found a family did not in itself carry with it a right to adopt or integrate into the family anyone other than a blood related child.

[12] Recognising these propositions, Mr O'Hara argued that if the state has chosen to provide for adoption, although not obliged to do so by the Convention, it cannot discriminate on any impermissible grounds. These, counsel argued, included marital status. The 1987 Order clearly differentiates between married and unmarried couples. Unless good reason exists differences in legal treatment can be properly stigmatised as discriminatory. He argued that the question of adoption entitlement falls within the ambit of article 8 thus bringing into play article 14 of the Convention. Mr McCloskey QC on behalf of the Crown contended that the adoption law framework alleged was so far removed from the scope of what article 8 protects that it did not come within the ambit of article 8 and, thus, no question of a breach of article 14 could arise.

[13] As pointed out by Lord Nicholls in M v Secretary of State [2006] 4 All ER 929 at 936 the extended boundary identified in the Strasbourg jurisprudence is that for article 14 to be engaged the impugned conduct must be within the "ambit" of a substantive Convention right. The term "ambit" is imprecise and can be narrowly or widely interpreted (as is the case with comparable expressions such as "scope" and the need for an impugned measure to be "linked" to the exercise of a guaranteed right). Article 14 is engaged whenever the subject matter of the disadvantage comprises one of the ways in which a state gives effect to a Convention right ("one of the modalities of the exercise of a right guaranteed"). Thus, for example, while article 8 does not require a state to grant a parental leave allowance, if the state does choose to grant such allowances it thereby demonstrates its respect for family life. The allowance is intended to make provision for family life and, thus, the allowance comes within the scope of article 8 and article 14 (see Petrovic v Austria [1998] 4 BHRC 232 at 237). In M v Secretary of State the

House of Lords rejected as insufficient to engage article 14 a merely tenuous link with another provision of the Convention.

The Fretté Decision

[14] In Fretté v France the European Court of Human Rights had occasion to consider the question of article 8 and article 14 in an adoption context. In that case a French single homosexual man made an application for prior authorisation to adopt a child. The Paris Social Services Department rejected his application but the Paris Administrative Court set aside the decision, considering that there was nothing to suggest that the applicant would not be a suitable parent. The Conseil d'État on appeal rejected the lower courts decision and concluded that despite his qualities and aptitude for bringing up children the applicant was not a suitable person to adopt. Under French law a married couple who had been married for two years or more or were both over 28 and a single person over 28 could apply for adoption. The European Court by a majority concluded that the matter fell within the ambit of article 8. Judges Costa, Jungwiert and Traja in their partly concurring opinion did not consider that article 8 was breached. They did not in terms conclude that the matter was not within the ambit or scope of article 8 for the purpose of considering whether article 14 was breached. Three of judges comprising Judges Bratza, Fuhrman and Tulkens in very clear terms concluded that the application undoubtedly fell within the scope of the ambit of article 8. By legally entitling single persons to apply for adoption France went beyond the requirements of article 8. Having granted such a right and having established a system of application for authorisation to adopt it had a duty to implement the system in a non-discriminatory way. While Fretté is not an easy authority to read in view of the differing approaches adopted by the judges it appears tolerably clear that the majority view was that the matter did fall within the scope of article 8 and thus raised issues as to the applicability of article 14.

[15] In Fretté, French law conferred a right on any individual over the age of 28 years to apply for adoption. What was in issue was whether the application of the law in a manner discriminatory to single homosexual persons infringed article 14 rather article 8. Under the 1987 Order there is no general right for all couples to apply for adoption. There is a right for married couples to do so. The minority judgment (which on this point probably expresses the majority conclusion) states:

> "Whenever the legal system grants a right, in this case the right for everyone to apply for authorisation to adopt, it cannot grant it in a discriminatory manner without violating article 14 of the Convention."

Applying that dictum to the present case it could be argued that what is impermissible is discriminatory application of the right of married couples to adopt within the class of married couples (thus for example requiring justification of the exclusion of non-white married couples or couples of a particular religion). This would, however, appear to be too narrow an approach. Having conferred a right to apply for adoption in certain cases article 8 is in play for the purposes of article 14. It is thus necessary to proceed to consider whether article 14 has been breached.

[16] In Fretté the court in line with its consistent case law stated that a difference of treatment is discriminatory for the purposes of article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be realised. On the article 14 point in Fretté the court concluded that:

> "The contracting States enjoy a certain margin of appreciation in assessing whether and to what extend differences in otherwise similar situations justify different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background. In this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the contracting States … It is indisputable that there is no common ground on the question. Although most of the contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt it is not possible to find in the legal and social orders of the contracting States uniform principles on these issues and which opinions within the democratic State may reasonably differ widely. The court considers it quite natural that the national authorities whose duty it is in a democratic society ought to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case therefore touch on areas where there is little common ground among

> the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage a wide margin of appreciation must be left to the authorities of each State. …"

The Proper Approach to Article 14 Cases

[17] In R (Carson) v Secretary of State [2005] 4 All ER 545 the House of Lords subjected to close scrutiny the proper approach to cases raising the issue whether an individual's article 14 rights have been breached. As it made clear differential treatment per se does not amount to discrimination. Discrimination means failure to treat like cases alike. It arises only if the cases are not sufficiently different to justify the difference in treatment. The Strasbourg court often expresses this by saying that the two cases must be in an analogous situation. Lord Hoffman pointed out that whether the cases are sufficiently different is partly a matter of values and partly a question of rationality. Lord Walker drew parallels between the Convention case law and the American Supreme Court's approach in applying the Equal Protection Clause of the 14th Amendment of the United States Constitution. The American case law has developed a doctrine of "suspect grounds" of discrimination which the court will subject to particularly severe scrutiny. These are personal characteristics including sex, race and sexual orientation which an individual cannot change and discrimination in respect of which is recognised to be particularly demeaning for the victim. Lord Walker said that the Convention case law often refers to "very weighty reasons" being required to justify discrimination on particularly sensitive grounds which the Strasbourg case has identified as discrimination on the grounds of race, gender, illegitimacy, religion, nationality and sexual orientation. Lord Hoffman distinguished between discrimination which appears to offend our notions of the respect due to the individual and those which merely require some rational justification. Discrimination on the first category cannot be justified merely on utilitarian grounds (eg that it is rational to prefer to employ men rather than women because more women than men give up employment to look after children). Difference of treatment in the second category usually depend on considerations of the general public interest. While the courts as guardians of the right of the individual to equal respect will carefully examine the reasons offered for any discrimination on the first category, decisions about the general public interest underpinning differences and treatment in the second category are very much a matter for the democratically elected branches of government.

[18] The majority judgments in Carson make clear that, whereas in Lord Hoffman's first category there is a strict scrutiny test, in the second category of case the scrutiny is more relaxed. Lord Walker cited with approval the approach of the American Supreme Court in Massachusetts Board of Retirement v Murgia [1976] 427US 307:

> "The inquiry employs a relatively relaxed standard reflecting the court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary."

[19] What also emerges from the majority judgments is that where broad social issues and policies are in play proper respect is due to the democratically elected branches of government which must draw the lines considered appropriate. The court should be slow to categorise differential treatment fixed by the legislature on rational policy grounds as unlawfully discriminatory. The House in Carson moved away from the type of rigid step by step analysis in cases involving an alleged breach of article 14 suggested by the Court of Appeal in Wandsworth London BC v Michalak [2002] 4 All ER 1136. It also concluded that the term "burden of proof" should not divert attention away from the need to make a broad evaluation of competing private and public interests.

Discussion

[20] Bearing these points in mind it is now possible to consider the question whether the withholding of adoption rights from unmarried cohabitant couples infringes the Convention rights of unmarried couples such as X and Y or indeed the rights of the child (although the child is not a party to the present application). The statutory provisions reflect clearly a policy choice which the legislature made to restrict to married couples the right to apply for adoption.

[21] One of the features of modern social arrangements is the increasing number of couples who live together in cohabitational relationships. Baroness Hale of Richmond in Stack v Dowden [2007] UKHL 17 at paragraphs 44 and 45 said as follows:

> "[44] Inter vivos disputes between unmarried cohabiting couples are still governed by the ordinary law. These disputes have become increasingly visible in recent years as more and more couples live together without marrying. The full picture has recently been painted by the Law Commission in Cohabitation: the Financial Consequences of Relationship Breakdown – a Consultation Paper 2006 Consultation Paper 179 part 2 and its overview papers paragraph 2.3-2.11. For example, the 2003 census recorded 10 million

married couples in England and Wales with over 7.5 million dependant children; but it also recorded over 2 million cohabitant couples, with over 1¼ million children dependant upon them. This was the 67% increase in cohabitation of the previous 10 years and a doubling of the numbers of such households with dependant children. The Government's Actuaries Department predicts that the proportion of couples cohabiting will continue to grow from the present 1 in 6 of all couples to 1 in 4 by 2031.

[45] Cohabitation comes in many different shapes and sizes people embarking on their first serious relationship more commonly cohabit than marry. Many of these relationships may be quite short-lived and childless. But most people these days cohabit before marriage – in 2003, 78.7% of spouses gave identical addresses before marriage, and the figures are even higher for second marriages. So many couples are cohabiting with a view to marriage at some later date – as long ago as 1998 the British Household Panel Survey found that 75% of current cohabitants expected to marry although only a third had firm plans: J Urmish Personal Relationships and Marriage Expectations (2000) Working Papers of the Institute of Social and Economic Research: Paper 2000-2027 University of Essex. Cohabitation is much more likely to end in separation than its marriage, and cohabitants which end in separation tend to last for a shorter time than marriages which end in divorce. But increasing numbers of couples cohabit for long periods without marrying and their reasons for doing so vary from conscious rejection of marriage as a legal institution to regarding themselves as good as married anyway (Law Commission op cit Part 2 paragraph 2.45). There is evidence of a widespread myth of the common law marriage in which unmarried couples acquire the same rights as married after a period of cohabitation (A Barlowe et al "Just a Piece of Paper? Marriage and Cohabitation" in A Park et al (eds) British Social Attitudes: Public Policy, social ties 18th Report (2001) pages 29-57). There is also evidence that the legal implications of

> marriage are a long way down the list of most couples's considerations when deciding whether to marry (Law Commission op cit, Part 5 paragraph 5.10)."

[22] As Lady Hale further points out in paragraph 46 of her speech the history of attempts at law reform illustrates the complexity of the problem created by the amorphous nature of the cohabitational relationship. The Law Commission in England and Wales in a Discussion Paper "Sharing Homes; a Discussion Paper" (2002) considered that it was quite simply impossible to devise a statutory scheme for the ascertainment and quantification of beneficial interests in shared homes which can operate fairly and evenly across the diversity of domestic circumstances which are now to be encountered.

[23] In Chapter 4 of its discussion Paper on Matrimonial Property the Law Reform Advisory Committee in this jurisdiction considered the property implications of the law in relation to cohabitants. It drew attention to the fundamental difference between the court's powers to adjust property rights on divorce and its inability to do so in the case of cohabitants. At paragraph 4.6 and 4.7 of the Discussion Paper the Committee stated:

> "4.6 Relationships of cohabitation do not conform to an identical pattern. At one end of the spectrum is the case of a couple who live together effectively as husband and wife in a joint family home with a child or children. At the other end may be the case of a couple sharing a sexual relationship, perhaps sharing a base from which to conduct that relationship but primarily leading separate lives, possibly with spouses and children of their own.
>
> 4.7 In the case of the former example it would seem likely nowadays that society would regard such a committed relationship as equivalent or at least very close to a state of marriage. In the case of the latter example society would still consider such a relationship as irregular and that neither party needs or merits any special legal protection as far as their property rights are concerned."

The Committee recommended changes in the property rights of cohabiting couples but recognised that it would be necessary to define that relationship to justify the extra rights. It recommended that parties to the relationship should be able to show that they have lived together for a continuous period

of at least two years within the last three years in the same household or have lived together in the same household and have had a child of the relationship. To date that recommendation has not been accepted or acted upon.

[24] Other jurisdictions have dealt with cohabitation relationships in a more radical way. Thus, for example, most Australian States have introduced legislation regulating the rights and obligations of those who are in so-called "de facto relationships". The powers applicable on the breakdown of de facto relationships are less wide-ranging than those operated on divorce and the court does not take account of the parties future needs. Australian relationship law is still developing. In 1999 New South Wales widened the scope of de facto relationship legislation so that it would also apply to domestic relationships between two unmarried adults where one or both provide domestic support and personal care for the other but there is no sexual intimacy. In New Zealand de facto relationships are treated in the same way as married couples for the purposes of property division on separation or death. In most cases the relationship must have lasted for at least three years before these rights come into play.

[25] Within the existing law certain rights and obligations are conferred on persons living together as the equivalent of husband and wife. Thus, cohabitants in common with married persons can apply for occupation orders and non-molestation orders, may claim to succeed to statutory tenancies; may claim damages under the Fatal Accidents legislation if the parties have lived together for two years; may apply for financial provision under the Inheritance (Provision for Family and Dependants) (Northern Ireland) Order and may act as relatives for the purposes of the Mental Health legislation.

[26] What this brief overview demonstrates is that there are functional and legal differences between parties living in a cohabitational relationship and married couples that make the relationship different in fact and in the eyes of the law. The overview also indicates the difficulties and sensitivities that exist in relation to formulation of law reform to deal with cohabitational relationships. In certain circumstances the relationship may be analogous to a marriage, in others it is not. Drawing the line when such a relationship should be functionally equated to a marriage calls for a policy decision. In the absence of a mechanism for drawing the line domestic law proceeds on the basis that the relationships are distinct and separate. The fundamental and central difference between the two relationships is that in the case of a marriage the parties have committed themselves to a binding (although not legally indissoluble) commitment whereby the parties commit themselves to an exclusive relationship and which has determined legal consequences in the event of dissolution during life or on death. The relationship also creates legitimacy rights in relation to the offspring of the marriage.

Conclusions

[27] As noted a state does not have a duty to provide a mechanism for adoption. If it is providing such a mechanism it must determine the category of persons who may adopt. It will have to make choices as to the appropriate category of persons to be permitted to adopt. The majority view in Fretté appears to have been that a wide margin of appreciation must be left to the authorities of the individual states. In fixing criteria for couples to adopt the question arises as to whether that more rigorous scrutiny would be called for or whether it is sufficient for there to have been some rational justification for the policy decision to differentiate between the categories of couples who may adopt.

[28] An adoption involving a couple and a child involves a triangulation of interests and duties unlike an adoption involving an individual and a child. Both adoptive parents have responsibilities to the child and their relationship with the child must be taken on the context of their relationship between themselves. The policy behind the 1987 Order clearly points to the national authorities' conclusions that a married relationship represents the type of stable relationship which should form the family background for the child. The parties are free by getting married to convert their relationship into the type of relationship which the legislation considers necessary for the adoptive relationship. They are free to do so without any interference with their private conscience or religious views. The appropriate test to be applied in the present instance is not that of rigorous scrutiny to see whether the differential is justifiable but whether the differentiation has a rational justification (per Lord Hoffman in Carson) or is "devoid of any rational basis" (per Lord Walker). Lord Nicholls in Carson pointed out that sometimes the answer will be plain if there is an obvious relevant difference between the claimant and those with whom he seeks to compare himself then the situations cannot be regarded as analogous. If the position is not clear 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 are appropriate and not disproportionate in their adverse impact.

[29] The fact of the cohabitation for the years of the relationship led to the child living in the context of that relationship with the inevitable conclusion that the couple had established a family life with the child and acted in the role of mother and father figures. The question, however, is whether in the context of qualification for adoption there is a material and relevant difference that can rationally justify treating the cases of married and unmarried couples differently. In Van Muselle v Belgium [1984] 6 EHRR 163 the applicant a pupil advocate, contended that being forced to do pro bono work without remuneration constituted forced labour under article 4 of the Convention when read in conjunction with article 14. He pointed to other professions

such as doctors and dentists who were not required to provide such free services to the poor. The court observed:

> "Article 14 safeguards individuals, placed in analogous situations, from discrimination. Yet between the Bar and the various professions cited by the applicant, including even the judicial and para judicial professions, there exist fundamental differences to which the Government and the majority of the commission rightly drew attention, namely differences as to legal status, conditions for entry to the profession, the nature of the functions involved, the manner of exercise of those functions etc. The evidence before the court does not disclose any similarity between the disparate situations in questions. Each one is characterised by a corpus of rights and obligations of which it would be artificial to isolate one specific aspect."

[30] The relationships between a cohabiting couple and a married couple are characterised by different rights and obligations. Indeed as between cohabitants there are in fact very few of the obligations approximating to the duties undertaken by spouses. Very different rights and obligations that flow from determination of the relationships. Bearing those factors in mind there are differences between the applicants and a married couple so that the situations cannot be regarded as analogous.

[31] In any event the differentiation has a legitimate aim. The adoption legislation aims to ensure rules designed for the protection of the rights of the adopted child. Article 9 of the 1987 Order clearly envisages the stability and harmony of the family home as a central relevant consideration. The choice of the means to significantly enhance the chances of such stability (namely restricting adoption to couples who were married) is a choice that the state authorities can legitimately make. Such a choice is not disproportionate. Unmarried couples in an entirely stable and committed relationship can without difficulty provide the evidence of the stability which the state can legitimately demand in the context of adoption. It is true that there may be cases where one party to such a relationship cannot marry because they are already married. However, in that limited circumstance adoption can be affected by a single person and when the parties do eventually marry the couple can adopt as a couple. In any event an example of hard cases does not mean that the provision as a whole is to be considered disproportionate for, as said in Massachusetts Board v Murgia [1976] 427 US, the drawing of lines to create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classification is neither possible nor necessary.

[32] Mr O'Hara in his argument relied strongly on the views expressed by the Parliamentary Joint Committee on the Human Rights on the Adoption and Children Bill (which was subsequently enacted). The original Bill conferred adoption eligibility on any individual regardless of sexuality, marital status or cohabitation arrangements and any couple, regardless of sex or sexuality, marital status or cohabitation arrangements if any. It also introduced the welfare of the child as the paramount consideration. In the House of Lords an amendment was proposed in the case of article 6 to restrict eligibility to married couples. The Committee concluded that the original Bill was compatible with the Human Rights Convention. That proposition cannot be gainsaid. It is always open to domestic law to go further in the protecting of rights then the Convention demands. It went on to conclude that in its view a blanket ban on unmarried couples becoming eligible to adopt children would amount to unjustifiable discrimination on the ground of marital status and would violate article 14 combined with article 8. Having regard to my analysis of the law set out above I differ from the conclusion reached by the Committee on that aspect of the matter. Domestic legislation and administrators may develop human rights law beyond what the Convention demands either as a matter of policy or out of excess of caution for fear that the state authorities may subsequently be criticised for being too restrictive in their formulation of a particular law in relation to a particular administrative act. This latter course represents one of the consequences of the Human Rights Act. This has contributed to the development of human rights law which has attracted both positive and negative reaction.

[33] However, the fact that in England and Wales the Adoption and Children Act now permits adoption by unmarried couples does not determine the question of the validity of the 1987 Order in Northern Ireland which is a separate jurisdiction and in which at times there is differing legislation on matters affecting family and moral issues. The question whether the 1987 Order should be altered in the light of changing social attitudes and living arrangements is, as Gillen J points out in his judgment, a matter for democratic debate and decision, a point underlined by the majority viewpoint in Fretté. Any debate in relation to a change in the law would, no doubt, take account of developments in other parts of the United Kingdom. In any review of the law if it was considered that a blanket ban on unmarried couples is unnecessarily wide in itself thought would have to be given to determining whether a blanket removal is appropriate or whether a more nuanced change in the law is appropriate, laying down guidelines for determining when a cohabiting unmarried couple can satisfy the requirements of providing a stable family environment. The English model of a wholesale removal of the ban on unmarried couples leaves it to the court to determine in individual cases the stability of the relationship. This may or may not commend itself as an appropriate model for reform.

[34] Although in the course of argument the question of homosexuals adopting children was touched on in this case the court was not called on to consider the question whether homosexuals in a civil partnership are in an analogous position to married couples. That question raises issues on which it would be unnecessary and inappropriate to comment further in this judgment.

[35] Accordingly, I would dismiss the appeal.