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IN 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)

Before Kerr LCJ, Higgins LJ and Girvan LJ

KERR LCJ

Introduction

[1] This is an appeal from the decision of Gillen J. He was asked to rule that articles 14 and 15 of the Adoption Order (Northern Ireland) 1987 contravene the rights of the appellants under article 8 of the European Convention of Human Rights and Fundamental Freedoms when taken in conjunction with article 14 of the Convention. The appellants are the mother of a child and her male partner.

[2] Since the child is still only ten years old nothing must be published that would tend to identify her or any of the parties in the proceedings. The judgment will refer to the various personalities by letter. The child will be referred to as 'P', (which is how she has been described throughout the proceedings before Gillen J). The child's mother will be called 'X', her partner will be referred to as 'Y' and, in so far as it necessary to refer to him, the child's father will be called 'W'.

[3] Notice that the court below was considering whether to make a declaration of incompatibility in relation to articles 14 and 15 of the 1987 Order was served on the Crown in accordance with Section 5 of the Human Rights Act 1998 and Order 121, Rule 3 of the Rules of the Supreme Court (Northern Ireland) 1980 and it has been an intervening party both before Gillen J and this court.

Background

[4] The child's father, W, has had no relationship with X since before P's birth. He has not contributed financially or otherwise to P's upbringing. Indeed, the relationship between X and Y began before P was born. They have lived together from before P's birth. P has been treated by Y as if she was his natural daughter. X, Y and P were found by the trial judge to be in all respects a stable family unit but X and Y are not married. They do not have religious or moral beliefs which require marriage and they do not believe that being married would in any way add to or strengthen their relationship. But they now both wish to be legally recognised as the parents of P by formally adopting her.

[5] In his judgment (which I have had the advantage of reading in draft) Girvan LJ has raised the question whether there was sufficient evidence for the conclusion that X and Y had established a family life. As he has pointed out, no evidence was given as to the stability of the relationship beyond the bare facts recited above. For the purposes of the present appeal, however, it is appropriate to proceed on the assumption that the family unit comprising X, Y and P is secure and durable.

The domestic legislation

[6] Article 9 of the 1987 Order provides: -

> "**Duty to promote welfare of child**
>
> 9. - 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."

[7] The paramountcy of importance of the welfare of the child that is recognised in this provision is of particular significance in any assessment of the justification for restricting the category of couples who may apply to adopt.

[8] Article 14 of the 1987 Order provides: -

"**Adoption by married couple**

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

(2) An adoption order may be made on the application of a married couple where both the husband and the 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.

[9] An unmarried couple may not therefore apply to adopt a child. But it is possible for a married couple to apply to adopt a child even though one of the couple is not domiciled in any part of the United Kingdom.

[10] Article 15 provides: -

"**Adoption by one person**

15. — (1) An adoption order may be made on the application of one person where he has attained the age of 21 years and—

(a) is not married, or

(b) is married and the court is satisfied that—

(i) his spouse cannot be found, or
(ii) the spouses have separated and are living apart, and the separation is likely to be permanent, or
(iii) his spouse is by reason of ill-health, whether physical or mental, incapable of making an application for an adoption order.

(2) An adoption order shall not be made on the application of one person unless he is domiciled in a part of the United Kingdom, or in any of the Channel Islands or in the Isle of Man.

(3) An adoption order shall not be made on the application of the mother or father of the child alone unless the court is satisfied that—

(a) the other natural parent is dead or cannot be found or, by virtue of section 28 of the Human Fertilisation and Embryology Act 1990 (disregarding subsections (5A) to (5I) of that section)], there is no other parent], or

(b) there is some other reason justifying the exclusion of the other natural parent, and where such an order is made the reason justifying the exclusion of the other natural parent shall be recorded by the court.'

[11] Insofar as it is material, article 40 of the Order provides: -

"**Status conferred by adoption**

40. — (1) An adopted child shall be treated in law—

(a) where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnized);

(b) in any other case, as if he had been born to the adopter in wedlock (but not as a child of any actual marriage of the adopter).

(2) An adopted child shall, subject to paragraphs (3) and (3A), be treated in law as if he were not the child of any person other than the adopters or adopter."

[12] The restriction on unmarried couples applying for adoption in England and Wales was removed by the Adoption and Children Act 2002. Section 49 of this Act provides: -

"**Applications for adoption**

49 – (1) An application for an adoption order may be made by

(a) a couple, or
(b) one person

but only if it is made under section 50 or 51 and one of the following conditions is met.

(2) The first condition is that at least one of the couple (in the case of an application under section 50) or the

applicant (in the case of an application under section 51) is domiciled in a part of the British Islands.

(3) The second condition is that both of the couple (in the case of an application under section 50) or the applicant (in the case of an application under section 51) have been habitually resident in a part of the British Islands for a period of not less than one year ending with the date of the application.

(4) An application for an adoption order may only be made if the person to be adopted has not attained the age of 18 years on the date of the application.

(5) References in this Act to a child, in connection with any proceedings (whether or not concluded) for adoption, (such as "child to be adopted" or "adopted child") include a person who has attained the age of 18 years before the proceedings are concluded."

[13] Section 50 dealt specifically with adoption by a couple. It provides: -

"**Adoption by couple**

50 – (1) An adoption order may be made on the application of a couple where both of them have attained the age of 21 years.

(2) An adoption order may be made on the application of a couple where –

(a) one of the couple is the mother or the father of the person to be adopted and has attained the age of 18 years, and
(b) the other has attained the age of 21 years."

[14] In its passage through Parliament the Bill that was subsequently enacted as the 2002 Act was amended in the House of Lords to allow regulations to be made to provide that only single persons or married couples would be eligible to be considered as adoptive parents. The Joint Committee on Human Rights reviewed the amended Bill and reported that "a blanket ban on unmarried couples becoming eligible to adopt children would amount to unjustifiable

discrimination on the grounds of marital status, violating Article 14 combined with Article 8." The amendment did not survive the passage of the Bill.

[15] As part of a wide ranging review on the 1987 Order the government obtained advice on its possible incompatibility with the Convention in a report from Dr Ursula Kilkelly entitled "The Adoption (Northern Ireland) Order 1987: Compatibility with the Convention on the Rights of the Child and the European Convention on Human Rights". Dr Kilkelly considered that the ineligibility of unmarried couples to apply for adoption was *prima facie* inconsistent with the Convention. Her views on this were contained in the following passage of the report: -

> "According to the ECtHR, discrimination on the grounds of marital status is particularly difficult to justify. Thus the current provisions of the 1987 Order, which exclude unmarried couples from adoption, would appear *prima facie* to be incompatible with the Convention in so far as they constitute arbitrary discrimination on the grounds of marital status. This has been remedied in section 50 of the Children and Adoption Act 2002 and a similar provision should be incorporated into the provision of the Northern Ireland Order to ensure ECtHR compatibility."

[16] The review of the 1987 Order was conducted as a precursor to its possible amendment and the government signalled an intention to remove the ban on unmarried couples applying to be adoptive parents. This was relied on heavily by the appellants in their argument that there was no longer any justification for what they claimed was the differential treatment of unmarried couples in relation to eligibility to adopt. The planned legislation was deferred and it is now a matter for the Northern Ireland Assembly to decide whether reform in this area should take place.

The European Convention on Human Rights

[17] Article 8 of the Convention provides: -

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

> democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[18] It is clear that article 8 does not confer a right to adopt. That has been accepted by all parties to this appeal and emerges unmistakably from the jurisprudence of Strasbourg – see, for instance *Pini and others v Romania (Applications nos. 78028/01 and 78030/01)* at paragraph 140. In *Akin v Netherlands* Application No 34986/97, referring to a long established line of authority, the ECmHR said: -

> "… the right to adopt is not, as such, included among the rights and freedoms guaranteed by the Convention and … there is no positive obligation for Contracting States under article 8 of the Convention to grant to a person the status of adoptive parent or adopted child (cf. No. 31924/96, Dec. 10.7.97 D.R. 90, p. 134)."

[19] Article 14 of the Convention provides: -

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[20] This is not a freestanding guarantee of equal treatment without discrimination. Rather, article 14 is "a parasitic prohibition of discrimination in relation only to the substantive rights and freedoms set out elsewhere in the Convention – Lester and Pannick, Human Rights Law and Practice, 2nd Edition paragraph 4.14.1. It may only be invoked where the facts fall within the ambit of a substantive Convention provision. See, for instance, *Stec v United Kingdom* (2005) 41 EHRR SE 295 *Abdulaziz, Cabales and Balkandali v United Kingdom,* (1985) 7 EHRR 471, para. [71]; *Karlheinz Schmidt v Germany,* (A/291-B), July 18, 1994, para. [22]; and *Petrovic v Austria*, (2001) 33 E.H.R.R. 14 para. [22].

Is the eligibility of unmarried couples to apply for adoption within the ambit of article 8?

[21] For the Crown Mr McCloskey QC submitted that the family life dimension of article 8 was concerned with substance and reality, as opposed to legal formality or technicality and that articles 14 and 15 of the 1987 Order were not a bar to the establishment and enjoyment of family life in reality and in substance. There was no need, he said, for an unmarried adult partnership to acquire the status of a formal adoptive couple to enable family life to be established and enjoyed in the Convention sense. In any event, he suggested, the true cause of the appellants' inability to acquire the formal status of adoptive parents was an exercise of choice and free will on their part. The appellants' wish to become the adoptive parents of P did not therefore come within the ambit of article 8.

[22] The difficulty in fashioning prescriptive rules for deciding whether a particular situation comes 'within the ambit' of a provision of the Convention was discussed by Lord Bingham of Cornhill in *M v Secretary of State for Work and Pensions* [2006] UKHL 11 at paragraph 4 where he said: -

> "It is not difficult, when considering any provision of the convention, including art 8 and art 1 of the First Protocol, to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, 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. Like my noble and learned friend in [60] below, I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind."

[23] The more direct the connection with a 'core value' therefore the more readily may one deduce that the situation comes within the ambit of the substantive article of the Convention concerned. The propinquity of the particular factual matrix to a core value is not always easy to ascertain, however. Lord Nicholls of Birkenhead described the essentially pragmatic approach that has been taken to this question in the following passages from his opinion in *M v Secretary of State*: -

> "[13] The extended boundary identified in the Strasbourg jurisprudence is that, for art 14 to be engaged, the impugned conduct must be within the 'ambit' of a substantive convention right. This term does not greatly assist. In this context 'ambit' is a loose expression, which can itself be interpreted widely or narrowly. It is not a self-defining expression; it is not a legal term of art. Of itself it gives no guidance on how the 'ambit' of a convention article is to be identified. The same is true of comparable expressions such as 'scope' and the need for the impugned measure to be 'linked' to the exercise of a guaranteed right.
>
> [14] The approach of the European Court of Human Rights is to apply these expressions flexibly. Although each of them is capable of extremely wide application, the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice. Rather, the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa. In other words, the European Court makes in each case what in English law is often called a 'value judgment'."

[24] In X, *Y and Z -v- United Kingdom* [1997] 24 EHRR 143, ECtHR said at paragraph 43: -

> "It is true that the Court has held in the past that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his family."

[25] It appears to me that the development of a family tie by the formal adoption of a child, particularly in light of the status conferred by article 40 of the 1987 Order, brings the issue of the eligibility of an unmarried couple to become

adoptive parents firmly within the ambit of article 8 of the Convention. Although X, Y and P can continue to live as a secure family unit without the formal recognition of their relationship that adoption would bring to it, it is impossible to deny that the recognition that Y is the legal father of P has the potential to reinforce the family tie that exists between them. That potential is not diminished because the appellants can opt to become eligible as adoptive parents by getting married.

[26] The conclusion that the eligibility of an unmarried couple to become adoptive parents is within the ambit of article 8 chimes well, I believe, with the judgment in *Fretté v France* [2004] 38 EHRR 21. In that case a single homosexual man applied for authorisation to adopt a child. His application was rejected by the Paris Social Services Youth and Health Department. The reasons given for the decision were that the applicant had "no stable maternal role model" to offer and had "difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child". The Paris Administrative Court set aside the decisions denying the applicant authorisation, saying that the authorities had impermissibly relied on the applicant's unmarried status and his homosexuality. The Conseil d'État reversed this decision and rejected Mr Fretté's application for authorisation to adopt a child on the ground that although his choice of lifestyle was to be respected, the type of home that he was likely to offer a child could pose substantial risks to the child's development.

[27] In his application to the European Court of Human Rights, Mr Fretté claimed that the rejection of his application for authorisation to adopt had been implicitly and exclusively based on his sexual orientation. The majority judgment of the European Court dealt pithily with the question whether the applicant's complaint came within the ambit of article 8, simply stating (in paragraph 32) that his right under Article 343-1 of the Civil Code (which allows any person over 28 years of age to apply to be an adoptive parent) fell within the ambit of article 8 of the Convention.

[28] In the partly concurring opinion of Judge Costa, in which Judges Jungwiert and Traja joined, the matter was not discussed to any significant extent but in the joint partly dissenting opinion of Sir Nicolas Bratza and Judges Fuhrmann and Tulkens the matter was dealt with at a little greater length in the following passage: -

> "… we consider that although Art.8 of the Convention does not guarantee the right to adoption as such, nor the right for a single person to adopt, the situation which forms the basis of the present application undoubtedly falls within the 'scope' or the

> 'ambit' of that provision. In the Court's case law, the notion of 'private life' within the meaning of Art.8 of the Convention is a broad concept which comprises, inter alia, the right to establish and develop relationships with other human beings and the outside world, the right to recognition of one's identity and the right to 'personal development'.
>
> Thus, by legally entitling single persons to apply for adoption, France went beyond what was required by way of a positive obligation under Art.8 of the Convention. Nonetheless, having granted such a right and established a system of applications for authorisation to adopt, it has a duty to implement the system in such a way that no unwarranted discrimination is made between single persons on the grounds listed in Art.14 of the Convention."

[29] Applying this reasoning to the present case, it seems to me that the appellants' claim that they should be eligible to apply to become the adoptive parents of P falls clearly within the 'scope' or 'ambit' of article 8. If the 'core value' of that provision is a "broad concept which comprises, inter alia, the right to establish and develop relationships with other human beings", the right to be recognised as the legal parent of a child must surely come within its ambit.

The application of article 14

[30] Article 14 does not forbid all forms of discrimination nor does it require that there be strict equality of treatment between all individuals, whatever their circumstances. Differential treatment causing a failure to secure the rights and freedoms guaranteed by the Convention is prohibited if it is based on one or more of the specified grounds. Lord Hoffmann described the two restrictions inherent in article 14 succinctly in *R (Carson) v Work and Pensions Secretary* [2005] 2 WLR 1369 at paragraph 10: -

> "The principle that everyone is entitled to equal treatment by the state, that like cases should be treated alike and different cases should be treated differently, will be found, in one form or another, in most human rights instruments and written constitutions. They vary only in the generality with which the principle is expressed. Perhaps the broadest is contained in the 14th Amendment to the

> constitution of the United States: 'No state shall … deny to any person within its jurisdiction the equal protection of the laws.' The scope of article 14 is narrower in two ways. First, it has a restricted list of the *matters in respect of which* discrimination is forbidden. They are 'the enjoyment of the rights and freedoms set forth in [the] Convention'. Secondly, it has a restricted list of the *grounds upon which* discrimination is forbidden. They are 'any ground such as [the enumerated grounds] or other status'."

[31] There is a further requirement of - or, perhaps, dimension to - discrimination in the article 14 context. That is that it must amount to a failure to treat like cases alike. Again, Lord Hoffmann in *Carson* captures this concept neatly, where he said at paragraph 14: -

> "Discrimination means a failure to treat like cases alike. There is obviously no discrimination when the cases are relevantly different. Indeed, it may be a breach of article 14 not to recognise the difference: see *Thlimmenos v Greece* (2001) 31 EHRR 411. There is discrimination only if the cases are not sufficiently different to justify the difference in treatment. The Strasbourg court sometimes expresses this by saying that the two cases must be in an 'analogous situation': see *Van der Mussele v Belgium* (1983) 6 EHRR 163, 179-180, para 46."

[32] The question immediately arises whether cohabiting, unmarried couples are in an analogous situation to those who have committed themselves to the state of marriage with the panoply of rights and duties that this entails. As Girvan LJ points out in his judgment at paragraph [21] *et seq*, the phenomenon of cohabiting couples is ever more frequently encountered. In its consultation paper "*Cohabitation: the financial consequences of relationship breakdown*" published on 31 May 2006, the Law Commission reported that government statistics show that around four million people cohabit in England and Wales, an increase of 67% in 10 years, and around three-eighths have a child or children. One in six opposite-sex couples cohabit without marrying but by 2031 that figure is expected to rise to one in four. Against this background one must ask, do cohabiting, unmarried couples constitute an analogous group to married couples?

[33] As Baroness Hale has pointed out in *Stack v Dowden* [2007] 2 WLR 831, the variety of types of cohabitation is wide, ranging from the short-lived and childless through those who cohabit with a view to marriage to those who commit themselves to a long term relationship but who consciously reject marriage as a legal institution or regard themselves as being 'as good as married'. Can such a disparate and heterogeneous group be regarded as analogous to married couples? Another way of expressing this question is to ask whether cohabiting, unmarried couples have a single, definable status for the purposes of article 14.

[34] In *Kjeldsen, Busk Madsen and Pedersen v Denmark* (1976) 1 EHRR 711, ECtHR, at paragraph 56, interpreted 'status' in article 14 as "a personal characteristic … by which persons or groups of persons are distinguishable from each other". In *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617 at paragraph 34 Brooke LJ suggested that Strasbourg appeared to have moved on since *Kjeldsen's* case and had applied article 14 in cases in which it was hard to say that the ground of discrimination was in any meaningful sense a personal characteristic. In *Carson* it was suggested in argument that the *Kjeldsen* test of looking for a personal characteristic is no longer part of the Strasbourg jurisprudence. But, as Lord Walker of Gestingthorpe pointed out (in paragraph 54 of his opinion), it has been followed by the Fourth Section of the European Court of Human Rights in two admissibility decisions, *Budak v Turkey* (Application No 57345/00) (unreported) 7 September 2004 and *Beale v United Kingdom* (Application No 16743/03) (unreported) 12 October 2004. The House of Lords had also applied *Kjeldsen* in *R (S) v Chief Constable of the South Yorkshire Police* [2004] 1 WLR 2196, 2213, para 48, per Lord Steyn. Lord Hoffmann considered that, as the House of Lords had recently adopted the *Kjeldsen* test, it was unnecessary to discuss the later Strasbourg jurisprudence. I consider, therefore, that this test remains applicable in the present context.

[35] The somewhat formless nature of the group comprising unmarried, cohabiting couples makes it difficult to recognise it as possessing a distinct personal characteristic. It is interesting to note that in its consultation paper on cohabitation the Law Commission's preliminary observations included the suggestion that having been in a cohabiting relationship should enable *some, but not all*, couples to make financial claims on separation. It was accepted that certain "eligibility to apply" criteria would be laid down, *e.g.* having had a child or having lived together for a certain period of time. This reflects the inaptness of comparing *all* unmarried cohabiting couples with those who are married. Allied to this is the significant discrepancy between the rights and duties that are intrinsic to the married state and the relative absence of those in the case of unmarried, cohabiting couples. This consideration reinforces the unsuitability of

a comparison between married couples as potential adoptive parents and *all* unmarried, cohabiting couples.

[36] I have concluded, therefore, that the purported comparison between cohabiting unmarried couples and married couples cannot activate article 14 of the Convention. Gillen J found that that there was no material distinction between an unmarried man such as Y who had established a family life with a young child and a married father who enjoyed a similar family life. He said that he did not believe that the marital status of the latter was a sufficiently relevant distinguishing factor. One must remember, however, that the complaint here is of the failure of the state to extend to unmarried couples *as a group* legal eligibility to apply to become adoptive parents. The appellants have not sought to compare themselves with married couples on the basis of belonging to a more narrowly defined group. It is on the sole ground of their unmarried status, a characteristic that they share with all manner of cohabiting couples, that they claim to have been discriminated against. For the reasons that I have given, I do not consider that this is a comparable group with married couples.

Justification for differential treatment

[37] If, contrary to the view that I have formed, the appellants can be regarded as belonging to a group sufficiently comparable to married couples, the question arises whether, in the words of Lord Nicholls in *Carson,* (in paragraph 3) "the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate to the adverse impact".

[38] I have no hesitation in concluding that the restriction on the eligibility of couples to apply for adoption to those who are married pursues a legitimate aim. In this regard, the principle that the objective of adoption must be to provide "a child with a family, not a family with a child" (*Fretté* at paragraph 42) is paramount. Confining eligibility to married couples has the obvious purpose of securing the familial stability that an adoptive child needs and is, of course, entirely consonant with the statutory requirement in article 9 of the 1987 Order. The only significant issue in this context, in my opinion, is whether the restriction is proportionate.

[39] In addressing the question whether a particular measure of social policy that interferes with a Convention right is proportionate, it is well settled that the courts should recognise that a discretionary area of judgment must be accorded the decision of the legislature as to what societal conditions demand – see, for instance *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 A.C. 326, per Lord Hope of Craighead at page 381 and *Brown v Stott* [2003] 1 A.C. 631 per Lord Steyn at pages 711/2. The measure of respect or, as it is sometimes called,

deference, to be accorded to the decisions of a representative democratic body will depend on the nature of the issue involved.

[40] The more purely political the issue is, the less likely it is to be appropriate for a judicial resolution. In *A v Secretary of State for the Home Department* [2005] 2 AC 68 at para. 38 Lord Bingham of Cornhill suggested that legislative choices, especially those involving balancing the rights of groups or individuals, or the public interest, were more likely to fall appropriately to those conducting the business of democratic government. Questions of contentious social or moral policy (especially where the Convention right in question itself allows a balance to be struck) are also more likely to fall within the democratic authorities' discretionary area, as are questions of economic policy, whereas there will be other areas including those of high constitutional importance where the courts are better placed to assess the need for protection.

[41] The width of the margin depends on context, and in *Re A and Others*, the well-known case involving Islamic terrorist suspects held for an indefinite period of extra-judicial detention at the Belmarsh detention centre, the context in which national security and the liberty of the individual were placed in balance gave rise to a narrow area of discretion, also set by the responsibility resting on the court to give effect to the guarantee to ensure the rule of law. Thus in that case **(**which was concerned with the specially enacted terrorist detention legislation in the United Kingdom), a critical factor in the decision of the House of Lords that the degree of deference should be attenuated was the fundamental nature of the Convention right involved *viz* the right of personal freedom under article 5(1).

[42] In paragraph 39 of his opinion, Lord Bingham observed that the degree of deference "will be conditioned by the nature of the decision". Where, as in that case, fundamental rights (liberty, life and the right to a fair trial) were engaged, the extent of judicial respect will reduce commensurately. But where matters of social or economic policy are involved, the level of deference must rise appropriately. Lord Hope expressed the principle in this way at paragraphs 107 and 108: -

> "Put another way, the margin of the discretionary judgment that the Courts will accord to the Executive and to Parliament where this right [article 5] is in issue is narrower than will be appropriate in other contexts. We are not dealing here with matters of social or economic policy, where opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to Government and to the legislature."

[43] The contextual scope of the balance between executive and judicial decision-making powers was summarised by Laws LJ in his dissenting judgment in *International Transport Roth GMBB v Secretary of State for the Home_Department* [2003] QB 728, 765 – 767, adopted by Lord Walker in the House of Lords *R (Pro Life) v BBC* [2003] UKHL 23. The passage neatly encapsulates the principles to be applied: -

> "(i) 'Greater deference is to be paid to an Act of Parliament than to a decision of the Executive or subordinate measure …'
>
> (ii) 'There is more scope for deference where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified' ….
>
> (iii) 'Greater deference will be due to the democratic powers where the subject matter in hand is peculiarly within their constitutional responsibility, and less when it lies more particularly within the constitutional responsibility of the courts' …
>
> (iv) 'Greater or less deference will be due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts'."

[44] Mr McCloskey argued that the application of these principles to the present case clearly favoured a significant measure of deference. The 1987 Order is a measure of legislation; the right invoked by the appellants is one of the qualified Convention rights; the subject matter of the 1987 Order lies peculiarly within the constitutional responsibility of the legislature; and its subject matter lies more readily within the expertise of the legislature than the courts.

[45] A point of potential importance in the present case, of course, is that the government had indicated that it intended to remove the ineligibility of unmarried couples to adopt. I do not consider, however, that this can ultimately affect the judgment as to whether the restriction on eligibility to apply for adoption is proportionate. This is *par excellence* a matter of social policy where, in the words of Lord Hope, "opinions may reasonably differ in a democratic society and where choices on behalf of the country as a whole are properly left to Government and to the legislature". That this is so is apparent not only from the

responses to the consultation exercise about the possible reform of the 1987 Order but also from the debates in Parliament that preceded the passing of the 2002 Act. The fact that the government had decided that the restriction on eligibility should be removed does not *ipso facto* render that restriction disproportionate. It merely represents the choice made by the Executive between competing views that have been – and, indeed, continue to be – held on this important question of social policy.

[46] I have therefore concluded that the restriction is not disproportionate and on that account, as well as for the other reasons that I have given, I would dismiss the appeal.