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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
QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

Northern Ireland Human Rights Commission's Application [2013] NICA 37

IN THE MATTER OF AN APPLICATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION

Morgan LCJ, Girvan LJ and Coghlin LJ

GIRVAN LJ (delivering the judgment of the Court)

Introduction

[1] This is an appeal from the judgment given and order made by Treacy J in judicial review proceedings brought by the Northern Ireland Human Rights Commission ("the Commission") which in the proceedings challenges provisions in Articles 14 and 15 of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order") on the grounds that the criteria to be fulfilled by a person seeking the making of an adoption order in respect of a child under the 1987 Order are unjustifiably discriminatory in relation to those in same sex relationships contrary to Articles 8 and 14 of the Convention.

[2] In its Order 53 statement the Commission sought a declaration that Article 14 of the 1987 Order is unlawful and *ultra vires*; an order quashing Article 14; a declaration that Article 15 of the Order as amended by Section 203(4) of the Civil Partnership Act 2004 is to be read down so that an individual who has entered into a civil partnership is eligible to apply to adopt a child, alternatively a declaration that section 203(4) of the 2004 Act is incompatible with Article 8 of the Convention in respect of lesbian and gay individuals who have entered into a civil partnership and who wish to adopt; a declaration that all individuals and couples regardless of marital status or sexual orientation are eligible to be considered as adoptive parents

under the 1987 Order and/or a declaration as to the rights of individuals and couples under Articles 8 and 14 of the Convention are breached by Articles 14 and 15.

<u>The relevant statutory provisions</u>

[3] 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;
>
> (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 due consideration to them having regard to his age and understanding."

[4] Under Article 4 an adoption order is an order vesting the parental rights and duties relating to a child in the adopters and such an order may be made by an authorised court on the application of the adopters. The effect of the making of an adoption order is to extinguish any parental right or duty relating to the child which is vested in a person, not being one of the adopters, who was the parent/guardian of the child immediately before the making of the order or which is vested in any other person by virtue of the order of any court.

[5] Under Article 14 it is provided:

> "(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 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;

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

[6] Under Article 15 it is provided:

"(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 a civil partner, 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 a 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."

The Commission's Case

[7] The Commission is charged by statute with a responsibility for keeping under review the adequacy and effectiveness of Northern Ireland law and practice relating

to the protection of human rights. In these proceedings the Commission expresses itself as being gravely concerned that Northern Ireland remains out of step with the rest of the United Kingdom as regards the ability of unmarried couples to apply to adopt. In England, Wales and Scotland unmarried couples irrespective of marital status or sexual orientation or whether in a civil partnership or not can apply to be considered to adopt a child.

[8] The Commission challenges Article 14 of the 1987 Order as representing a blanket ban on unmarried couples, whether heterosexual, homosexual or those in a civil partnership, from being able to apply for adoption as a couple. This it alleges to be unjustifiable discrimination. The Commission challenges Article 15 as it represents a blanket ban on any person in a registered civil partnership from being able to adopt, whether as an individual or as a couple.

[9] While recognising that it would have been preferable for a suitable individual or couple coming forward to bring proceedings in his/her or their own right the Commission considered that for reasons of preserving anonymity or because of uncertainty it is understandable that no individual or couple was willing to bring an application on the terms advanced in the present application. The Commission however, asserts a right to bring such proceedings in reliance on Section 71(2A), (2B) and (2C) of the Northern Ireland Act 1998 as inserted by Section 14 of the Justice and Security (Northern Ireland) Act 2007. It contextualises the application by referring to the concrete case of one individual, C, who is a lesbian considering adopting with her partner with whom she would like to enter a civil partnership.

[10] C has been in a same sex relationship with her partner for three years. They had been living together for one year at the time she swore her affidavit in June 2011 and it appears that she continues to live with her since then. Her partner has a biological son. C and her partner are keen to adopt a child other than the biological son of the partner whom C also regards as her son. They wish to enter into a civil partnership to signify their love and commitment to each other. She made enquiries to an adoption agency but discovered that she and her partner could not be considered for adoption as a couple and that if she entered into a civil partnership neither could ever adopt, either as a couple or as individuals. C decided to support the Commission in the present proceedings.

Preliminary Procedural Issues

[11] The Department raises three preliminary points at the outset which it contends should have led the judge to dismiss the proceedings. Firstly, it challenges the right of the Commission to bring the proceedings and, secondly asserts, that the proceedings fall foul of the time limits for the bringing of judicial review proceedings. The Attorney General for Northern Ireland ("the Attorney General") on behalf of the Department argued that the present proceedings constituted nothing other than an impermissible *actio popularis*. On the facts before the court it was contended that, while the Commission need not itself be a victim or potential

victim, it must identify someone who is or would be a victim or potential victim. C is not at present in a civil partnership nor has she sought to invoke the adoption provisions as an individual. The Attorney General argued that it was important to have a proper factual basis for such proceedings.

[12] The judge rejected the Department's argument at first instance. He considered that if the operation of the legislation would inevitably breach the Convention rights of a person or class of persons then it would be fully within the powers of the Commission to institute proceedings to correct that issue. He was satisfied that C was in fact a victim for the purposes of the Human Rights Act 1998. In his view the Commission would have had standing to take the case even if C had not come forward to give evidence of a concrete case.

[13] The relevant powers of the Commission are set out in section 71 of the Northern Ireland Act 1998 as amended by the Justice and Security (Northern Ireland) Act 2007. So far as material it provides:

> "(1) Nothing in Section 6(2)(c) or 24(1)(a) shall enable a person
>
> (a) to bring any proceedings in a court or tribunal on the ground that any legislation or act is incompatible with the convention rights; or
>
> (b) to rely on any of the convention rights in any such proceedings,
>
> unless he would be a victim for the purpose of Article 34 of the Convention if proceedings in respect of the legislation or Act were brought in the European Court of Human Rights.
>
> (2) Sub-section (1) does not apply to the Attorney General, the Attorney General for Northern Ireland, the Advocate General for Scotland or the Lord Advocate.
>
> (2a) Sub-section (1) does not apply to the Commission.
>
> (2b) In relation to the Commission's instituting, or intervening in, human rights proceedings:

(a) the Commission need not be a victim or potential victim of the unlawful act to which the proceedings relate;

(b) section 7(3) and (4) of the Human Rights Act 1998 (breach of Convention rights: sufficient interest etc) shall not apply;

(c) the Commission may act only if there is or would be one or more victims of the unlawful act; and

(d) no award of damages may be made to the Commission (whether or not the exception in section 8(3) of that Act applies).

[14] In the case of C it is clear that she is a person in an established same sex relationship who wishes to adopt jointly with her partner and wishes to enter into a civil partnership unless it would prejudice her ability to apply for an adoption. She is a person intimately affected by the purported ambit of Articles 14 and 15 of the 1987 Order provisions which she challenges as infringing her Article 8 and 14 rights. She has a clear interest in establishing the true state of the law affecting her in its context because it will impact on decisions on whether she should or should not enter into civil partnership and whether she can or cannot in any or in some circumstances adopt a child.

[15] In Klass v Germany [1978] 2 EHRR 214 the European Court of Human Rights pointed out that a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of any specific measure of implementation. In Campbell & Cousins v UK [1982] 4 EHRR 293 a pupil could show that he was a victim when complaining that corporal punishment was inhuman treatment simply on the grounds of his attendance at a school which was something which put him at risk of corporal punishment. In Tanrikulu v Turkey [2001] applications by journalists or newspapers whose circulation was banned in the relevant regions were admissible since the prohibition had real repercussions on the manner in which they exercise their profession. It is clear that the apparent prohibition of adoption by anyone entering into a civil partnership and the apparent prohibition of joint adoption by a gay couple, as asserted by the Department, have real repercussions on the manner in which C exercises her family rights and the structuring of her relationship with her partner.

[16] In the Commission case of De Lazzaro v Italy [Application No: 31924-96] the Commission accepted that it could not examine *in abstracto* the compatibility of national law with the Convention. However, it concluded that a person could complain that a law violated his rights by itself if he was at risk of being directly

affected by it. In that case an unmarried applicant could claim to be a victim of a violation of Article 8 where he or she was unable to adopt a child because the domestic law authorised adoption by a non-married person only in special circumstances:

> "In claiming that Italian adoption law is contrary to the Convention the applicant is not requesting permission to comment on laws in the abstract. She is challenging the legal situation – that of an unmarried person wishing to adopt a child – which affects her personally."

It is clear, accordingly, that C is a victim and the Department's objection on this ground is without substance.

[17] Miss Danes in her argument and the judge in his judgment also put a wider interpretation on section 71. Miss Danes contended that the Commission may act even if there is no concrete case of a particularised victim. If legislation creates a situation in which there will inevitably be persons suffering an interference with their Convention Rights, then the Commission may act because there inevitably must be a victim. Counsel contended that there must now be persons in existence in registered partnerships who would wish to adopt if free to do so but who are not able to adopt at all because of the Department's stance on Articles 14 and 15.

[18] Since C is clearly a victim it is strictly unnecessary to reach a conclusion on the alternative argument which has, however, considerable weight. For example, a law forbidding all homosexuals entering particular establishments would inevitably create victims even if none wished to come forward to identify himself in proceedings. The very purpose of allowing the Commission to bring such proceedings is to protect unpopular minorities. The law would impact on all homosexuals. By the same token Articles 14 and 15 as interpreted and applied by the Department impact on all gay couples and on all gay individuals who are considering entering into or actually in a co-habitational or a civil partnership relationship who wish to adopt at a future date.

[19] In relation to the Attorney General's assertion that the proceedings have not been timeously brought the judge decided this matter succinctly concluding, entirely correctly, that the issues raised in the proceedings relate to alleged rights violations which are ongoing. Accordingly, the proceedings cannot be considered to be brought out of time.

[20] It was argued that the Department was not the appropriate respondent in the proceedings and the judge was wrong to hold the contrary. The Attorney General's skeleton argument on this topic related to the question of whether it was open to the Minister to introduce guidance of the type required by the judge. In his final order the judge ordered the Department to ensure that any guidance should be in

accordance with the declaration which the court granted in the case. It is clear that the Department did have on its website information relating to adoption eligibility criteria which was incorrect and disregarded the effect of the House of Lords decision in Re G. It is clear that it is the Department which is the particular Department within whose remit this area of adoption law and practice falls. As the Attorney General's argument makes clear, the Department is the legitimate contradictor in the present proceedings which are, accordingly, properly constituted.

The Judge's Conclusion on the Substantive Issues

[21] The judge concluded that no-one has a right to adopt either under domestic law or under convention law. The sole purpose of adoption is to advance and promote the welfare of the child, the subject of the adoption proceedings. The statute creates an opportunity in the form of a right to apply to be considered for adoption. That falls within the ambit of Article 8 and the State is enjoined by Article 14 to secure the enjoyment of those rights without discrimination on any prohibited ground. In Re G the House of Lords concluded that the purpose of the 1987 Order was hampered by the statutory restriction in the eligibility criteria to married couples. A bright line rule which excluded all but married couples from consideration as adopters had no rational basis when the true focus should be on the interests of the child. The creation of an irrebuttable presumption against any couple other than a married couple was irrational. The judge concluded that Re G shows that the purpose of the 1987 Order is hampered by the current eligibility criteria. The difference in treatment could not be justified. The denial to unmarried couples of the legal opportunity to apply to adopt jointly which was available to those who enjoyed the status of being married could not be justified. The difference in treatment of persons in civil partnership affected by Articles 14 and 15 of the 1987 Order is even more deleterious. They also suffer unjustifiable discriminatory treatment when compared to individual members of an opposite sex couple who can apply to adopt as an individual. In choosing to make a public commitment evidenced by choosing to enter a civil partnership the civil partners become totally excluded both as individuals and as a couple from eligibility to adopt. In respect of homosexual couples whether in or hoping to enter a civil partnership such as C their Article 8 rights are affected in relation to the effect of the eligibility criteria in their right to choose to enter into a civil partnership. The legislation entails that a gay or lesbian person must choose between being eligible to adopt or affirming their commitment in public in a civil partnership ceremony. There is no rational basis for the proposition that the current eligibility criteria serve the best interests of the child by excluding persons from the whole adoption process on the sole basis of their relationship status. This only serves to narrow the pool of potential adopters. The scrutiny and assessment of suitability ensures that only persons capable of providing a loving, safe and secure adoptive home will ultimately be considered. The complete ban on applications for consideration for adoption in relation to civil partners does not bear a reasonable relationship of proportionality to the legitimate aim. The argument that alternative mechanisms short of adoption (such as the making of a Residence Order) are available does not make a difference. It could not

be in the interests of a child to deny that child the full benefit of having two fully legal and adoptive parents.

The Attorney General's Arguments

[22] In an argument which in effect largely repeated the line of argument originally adopted by the Court of Appeal in Re P and overruled by the House of Lords subsequently in the case (reported as Re G), the Department maintains that the criteria contained in the 1987 Order are lawful, appropriate, had the support of the Northern Ireland population and are in the best interests of the children. The policy driver which led to the decision in other parts of the United Kingdom to extend the eligibility to extend eligibility to adopt to persons other than those who are married or single persons implemented in England and Wales by the Adoption and Children Act 2008 was influenced by the number of available prospective adoptive parents to meet the demand for them. Those conditions did not prevail in Northern Ireland where it was suggested the pool of prospective adopters was satisfactory. The Department's view as to the best interests of children was supported by the public consultation process. The prevailing view is that the preferred model of parenting is a two parent father and mother model. The Department believes that the adoptive household structure should mirror that which delivers the best outcome, a family headed by a man and a woman. The Department is entitled and obliged to take a precautionary approach. There is insufficient evidence in favour of moving to new eligibility criteria. Articles 14 and 15 represent the democratically accountable judgment of the legislature.

[23] The Attorney General further argued that in EB v France App No 43546/02 under French law there was a "right to apply for authorisation". In contrast in Northern Ireland there is no unqualified right to apply for authorisation to adopt. In France the matter is regulated by the general civil law whereas in Northern Ireland adoption law is a matter of child welfare. The decision in X v Austria App No 19010/07 shows that the decision of the state to restrict couple adoption to married couples, as is the position in Northern Ireland, is Convention compliant. Significantly, and of importance in this case, the Attorney General did accept that if the state decided to extend eligibility to unmarried heterosexual couples then it cannot safely decline to open up adoption to unmarried homosexual couples.

[24] The Attorney General argued that Re G fell to be narrowly construed on its own facts. It concerned a child in an existing stable family unit, the couple having been living together for ten years. The House of Lords did not make a general declaration but contented itself with confining its declaration to the two appellants. Without going as far as saying the decision was wrongly decided or *per incuriam* the Attorney General said:

> "The theoretical underpinning of Re P (Re G) must be in some doubt since the decision in X v Austria."

The arguments before the House, he argued, proceeded on the incorrect basis that those in a stable unmarried union were in a relevantly similar situation to married persons. If this fundamental assumption is removed the decision in Re G is in doubt. Further, in Re G it did not appear that the Northern Ireland family law alternatives open to the appellants, which were capable of satisfying any obligation of the United Kingdom under Article 8 of the 1995 Order, were fully appreciated or stressed in argument. In Harroudj v France Application No: 4363/09 Strasbourg considered the entirety of the measures available to protect the family bonds. The unavailability in France of adoption in respect of an Algerian child did not give rise to any major hindrance to the continuance of family life under the Islamic *kafala* relationship which continued in the absence of the availability of the option of adoption. Although C cannot apply to adopt jointly with her partner, which is the case on the face of the statute, she is not precluded from entering into an adoption process as a single person as matters stand and the position of the partner can be recognised by the alternative orders available. The Attorney General outlined available options (possible adoption as an individual; possible adoption as an individual with the partner applying for a residence order under Article 8 of the Children (Northern Ireland) Order 1995; possible adoption as an individual with C and her partner applying for joint residence orders; possible adoption as an individual person and if a subsequent civil partnership is entered into applying for a parental responsibility order in respect of the partner). If (which the Attorney General did not accept) Article 8 was applicable and fell to be considered with Article 14, the court should compare the practical reality of the options available to C and her partner under the 1995 Order with the abstract insistence on an asserted right to adopt. When that comparison was made against the fundamental purpose of adoption it could be seen that the application "was a pursuit of shadows and a refusal to acknowledge substance".

Re G

[25] Notwithstanding his criticism of the reasoning in Re G the Attorney General accepted the decision was binding on this court. He sought, however, to confine the *ratio* of the decision and to restrict it to cover only a case factually similar to that case, which involved two persons in a longstanding heterosexual co-habitational relationship where one of the parties had a biological child which the two wished to adopt.

[26] In Kay v London Borough of Lambeth [2006] UKHL 10 the House of Lords clearly stated that, in order to ensure certainty in the law, courts should adhere, even in the Convention context, to the rules of precedent. It is the duty of judges to consider Convention arguments addressed to them and if they consider a binding precedent to be, or possibly to be, inconsistent with Strasbourg authority, they may express their views and give leave to appeal. In that way they discharge their duty under the 1998 Act but they should follow binding precedent. Lord Bingham in paragraph [44] went on to say:

> "There is a more fundamental reason for adhering to our domestic rules. The effective implementation of the Convention depends on a constructive collaboration between the Strasbourg Court and the national courts of member states. The Strasbourg Court authoritatively expounds the interpretation of the rights embodied in the Convention and its protocols, as it must if the Convention is to be uniformly understood by all member states. But in its decisions on particular cases the Strasbourg Court records a margin of appreciation, often generous, to the decisions of national authorities and attaches much importance to the peculiar facts of the case. Thus it is for national authorities, including national courts particularly, to decide in the first instance how the principles expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions. It is by the decisions of national courts that the domestic standard must be initially set and to those decisions the ordinary rules of precedence should apply."

[27] In Re G the House of Lords reached a conclusion which may on analysis have gone beyond what Strasbourg would itself have decided in the context of the particular case if the applicants in that case had lost at the domestic level and had proceeded to Strasbourg. In some instances the converse may be the case. If Strasbourg goes ahead of the House of Lords or Supreme Court authority, it remains the duty of the lower courts to apply the law according to the binding precedent of the highest court. By the same token if the result of the House of Lords or Supreme Court decision is to interpret and apply the Convention right on a wider basis in favour of an applicant as compared to later Strasbourg authorities, the lower courts remain bound to apply the decision. As Re G shows the House of Lords felt able if necessary to go further than Strasbourg. More recent Supreme Court authority suggests that the domestic courts should not go ahead of Strasbourg in the development of convention rights. However, as the judgment of Lord Hoffman in particular shows in Re G, different considerations may apply in cases where Strasbourg has deliberately declined to lay down an interpretation for all member states, as it does when it says that a question is within the margin of appreciation of the State. In particular in the case of Re G the House of Lords reached its conclusion applying and exercising the state's margin of appreciation.

[28] In as much as this court is bound by the *ratio* in Re G it is necessary to identify what principle was decided by the case. The House concluded that the Convention rights of the applicants, an unmarried couple in a longstanding enduring co-habitational relationship, were engaged by the legal bar on them being considered ineligible to be considered as adoptive parents. While the state was entitled to take

the view that in general it was better for children to be brought up by parents who were married to each other, it was fallacious to raise a reasonable generalisation into an irrebuttable presumption that no unmarried couple could make suitable adoptive parents. A fixed blanket or bright line rule excluding unmarried couples at the outset from the process of being assessed as potential adoptive parents was irrational. It contradicted one of the fundamental principles of adoption law that the best interests of the child were the most important consideration to which regard had to be had on a case to case basis. The House considered that in its interpretation of the 1998 Act it was free to give what it considered to be a principled and rational interpretation to the grounds of discrimination on the grounds of marital status. The court declared that the applicants were entitled to apply to adopt the child in question.

[29] Lord Hoffman, Lord Hope and Lord Mance considered that, given the developing state of its jurisprudence, it was likely that Strasbourg would hold that discrimination against a couple wishing to adopt a child on the ground that they were not married violated Article 14. Baroness Hale considered that it was by no means clear that Strasbourg would do so. Her reservations were justified in the light of the subsequent Strasbourg decision in <u>Gas and Dubois v France</u> App No 25951/07. However, Lord Hoffman (with whom Lord Hope agreed) made clear that he did not consider that if Strasbourg took a more restricted view it should make any difference. While there were good reasons why Strasbourg authority on interpretation of rights should be followed, the situation is different in a case in which Strasbourg has deliberately declined to lay down an interpretation for all member states as it does when it says that it is a question within the margin of appreciation of the state. In such a case it is for the United Kingdom court to interpret Articles 8 and 14 and to apply the division between the decision making powers of court and Parliament in the way which appears appropriate for the United Kingdom. Lady Hale pointed out that, particularly when dealing with questions of justification, national authorities are better able than Strasbourg to assess what restrictions are necessary in the democratic societies they serve. Lord Mance also considered that if the Strasbourg court considered that it was a matter for the national margin of appreciation it was for the United Kingdom court to assess whether objective justification existed for the discrimination. He concluded that there was no objective justification for the discrimination in question.

[30] What emerges from <u>Re G</u> is that the House rejected as irrational, disproportionate and unjustified the blanket ban on an adoption by an unmarried couple. In coming to that conclusion the House of Lords made clear that its decision was an exercise by the appropriate state authority, in that case the court, in respect of the state's margin of appreciation.

[31] Unless and until the Supreme Court decides to overrule its decision <u>Re G,</u> under the prevailing domestic law of Northern Ireland an unmarried heterosexual couple are eligible to be considered for adoption and their application to be considered as adopters cannot be rejected *in limine*. The reasoning of the House of

Lords in Re G stressed that its decision represented the establishment within the state's margin of appreciation of the eligibility of an unmarried heterosexual couple to be considered for adoption. This being so, the subsequent Strasbourg decision in Gas and Dubois v France seems unlikely to form the basis for the Supreme Court to reach the conclusion that Re G was wrongly decided.

[32] Once it is clear that under domestic law an unmarried heterosexual couple in Northern Ireland will be eligible to be considered for adoption, the decision in X v Austria App No 19010-07 makes clear that a heavy onus lies on the state to justify a differential treatment of unmarried homosexual couples. The court in X v Austria stated at paragraphs 140 and 141:

> "140. In cases in which the margin of appreciation is narrow, as is the position where there is a difference of treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement 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 from the scope of application of the provisions that issue (see Karner and Kozak).
>
> 141. Applying the case law cited above, the court notes that the burden of proof is on the government. It is for the government to show that the protection of the family in the traditional sense and, more specifically, the protection of the child's interest require the exclusion of same sex couples from second parent adoption which is open to unmarried heterosexual couples."

The court went on at paragraphs 151 and 152 to state:

> 151. The court is aware that striking a balance between the protection of the family in the traditional sense and the convention rights of sexual minorities is in the nature of things a difficult and delicate exercise which may require the state to reconcile conflicting views and interests perceived by parties concerned as being in fundamental opposition (see Kozak).

> However, having regard to the considerations set out above the court finds that the government have failed to produce particularly weighty and convincing reasons to show that excluding the second parent adoption in a same sex couple, while allowing that possibility to an unmarried different sex couple was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction is therefore incompatible with the Convention.
>
> 152. The court emphasises once more that the present case does not concern the question whether the applicant's adoption request should have been granted in the circumstances of the case. It concerns the question whether the applicants were discriminated against on account of the fact that the courts had no opportunity to examine in any meaningful manner whether the requested adoption was in the second applicant's interests, given that it was in any case legally impossible. In this context the court refers to recent judgments in which a violation of Article 14 taken in conjunction with Article 8 because the father of a child born outside marriage could not obtain an examination by the domestic courts of whether the award of joint custody to both parents or sole custody to him was in the child's interest."

[33] The Department has put forward no justification to exclude same sex couples as parties eligible to adopt as a couple. The Attorney General in effect conceded the point when he submitted in paragraph 58 of his skeleton argument that if a state decided to extend adoption eligibility to unmarried heterosexuals then it cannot safely decline to open up adoption to unmarried homosexual couples.

[34] Thus, in the context of a case such as that of C and her partner, before they enter into a civil partnership, they would be eligible to be considered for adoption as a couple. It would be unjustifiable discrimination, as compared to unmarried couples in the light of <u>Re G,</u> to treat them differently. While this does not mean that they have a "right" to adoption, they have in effect an entitlement as a matter of law to ask to be considered for adoption.

[35] It is then necessary to consider the consequences of C entering into a civil partnership with her partner. The Department contends that the effect of Article 15 prohibits a person in a civil partnership from being eligible for adoption in any capacity whether as an individual or as part of a couple. Such an outcome produces an absurd and irrational result. Before entering into the public commitment of a registered civil partnership which creates a status closely analogous to that of marriage (see Burden v UK Application 13378-05) C can apply to be considered for adoption as an individual or, in the light of the outcome of Re G as applied to homosexual couples, with her partner as a couple. If the Department is correct in its approach to Article 15 the consequence of same sex partners publicly cementing that relationship (which should normally be considered as enhancing the chances of establishing a stable and committed relationship) is to render each party wholly incapable of adoption. When asked what the rational basis for that would be the Attorney General struggled to advance any rational explanation other than to suggest that the prohibition was a stop gap prohibition until an ultimate decision was taken in relation to the ultimate form of adoption law in Northern Ireland. This cannot provide a rational basis or justification for the differential treatment of those in a civil partnership compared to same sex couples outside a civil partnership.

[36] There is, however, a prior question of construction in relation to Article 15 which was not raised before the judge. Article 15 as amended provides that an adoption order may be made on the application of one person provided he is not married or a civil partner. It is evident that the provision was originally designed to prevent one spouse applying for adoption without the other joining in the application. Where spouses are living together as a unit it makes good sense to ensure that the two spouses are equally involved in the joint undertaking of parenting the child and taking on the responsibilities of doing so. Article 15(1)(b) enables one spouse to adopt if, for example the other spouse cannot be found or the parties are separated on a permanent basis. If Article 15(1)(a) is construed in the same way in relation to one of two civil partners, the effect of Article 15(1)(a) is not to make it impossible for a gay person in a civil partnership to adopt but, as in the case of spouses, to require the adoption to be by both partners. If Article 14 must be read down to include heterosexual and homosexual partners in a stable relationship or, as suggested by Baroness Hale, is to be simply disregarded where an application is made by such persons, then Article 15(1)(a) read in this way makes sense and avoids the evident absurdity which would otherwise arise. Such a reading is consistent with the wording ("a civil partner" being a civil partner in the singular). Such a reading would also avoid any breach of the Article 8 rights of the civil partners who would be irrationally discriminated against as compared to homosexual couples outside or not yet in a civil partnership.

[37] If Article 15(1)(a) had to be read as prohibiting either partner to a civil partnership adopting in any circumstances, the outcome would be irrational and could not be a justified form of discrimination reading Articles 8 and 14 together. Since Article 15(1)(a) was inserted by primary legislation, there would then arise the question of whether the court should make a declaration of incompatibility in

relation to the relevant provision of the Civil Partnership Act 2004 which as primary legislation made the amendment to the secondary legislation. However, for the reasons given that issue does not arise.

[38] Even if Re G was wrongly decided (and only the Supreme Court could so conclude), in the context of adoption by civil partners (as opposed to same sex couples outside the framework of a civil partnership) the status of civil partners is closely analogous to that of married partners. It was pointed out by Strasbourg in Burden v UK that "since the coming into force of the Civil Partnership Act in the United Kingdom a homosexual couple now also have the chance to enter into a legal relationship designed by Parliament to correspond so far as possible to marriage". If Article 15(1)(a) is to be interpreted as the Department alleges, the discriminatory prohibition from adoption imposed on civil partners could not withstand challenge as an unjustified discriminatory provision when applied to homosexual civil partners as compared to heterosexual married couples.

[39] There was some debate in the judgment below and in the Attorney General's skeleton argument in relation to the issue of Departmental guidance. This was not central to the debate before this court. Any Departmental guidance to those looking for advice or information about adoption eligibility criteria should state the law clearly and accurately and should take account of relevant case law. It is regrettable that until relatively recently the Department's website failed to give correct advice in relation to cohabiting couples in relation to eligibility to adopt. It is equally regrettable and surprising that social workers were operating the adoption system without being made aware of the effect of the decision in Re G and its implications. If it is to avoid being misleading Departmental guidance must take account of the effect of the law as it currently stands. It must thus take account of the outcome of the present appeal.

[40] In the result we dismiss the appeal.