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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

The Northern Ireland Human Rights Commission's Application [2012] NIQB 77

AN APPLICATION BY THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION FOR JUDICIAL REVIEW

[COMPATIBILITY OF THE ADOPTION ORDER (NI) 1987 WITH THE ECHR]

TREACY J

Introduction

[1] The applicant is the Northern Ireland Human Rights Commission ("NIHRC") who is challenging Arts 14 and 15 of the Adoption (Northern Ireland) Order 1987 ("the 1987 Order") on the grounds that the eligibility criteria for adoption are unjustifiably discriminatory in breach of Art 8 and Art 14 of the European Convention on Human Rights and Fundamental Freedoms.

[2] The central issue in bringing the challenge for the NIHRC is that it does not consider that unmarried couples should be barred from applying to adopt. Whilst fully accepting that each individual case should be considered on its merits they contend that the eligibility criteria is unjustifiably discriminatory and acts as a bar to unmarried couples and those who have entered into a civil partnership from even being considered as potential adopters.

[3] The NIHRC is charged by statute with the responsibility for keeping under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of human rights. In its written argument it expressed itself "gravely

concerned" that Northern Ireland remains out of step with the rest of the UK 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.

[4] Art 14 of the 1987 Order is challenged as it represents a blanket ban on unmarried couples (whether same-sex, opposite sex, or those in a civil partnership) being able to apply adopt as a couple which it is alleged is unjustifiably discriminatory. Art 15 of the 1987 Order is challenged as it presents a blanket ban on persons in a registered civil partnership being able to adopt either as individuals or as a couple.

[5] Further the applicant challenges the absence of guidance to clarify the law in the wake of the decision in Re P [2008] UKHL 38; [2009] 1 AC 173 for unmarried couples hoping to apply to adopt in Northern Ireland. It is asserted that this absence of guidance creates uncertainty and the possibility for arbitrary application and is further discriminatory.

[6] The NIHRC contends that the issues raised in this application are a matter of public importance due to the detrimental impact that the existing legislation has on those groups of people seeking to adopt but who fall outside the narrow parameters of the 1987 Order.

[7] The NIHRC accepts that it may have been preferred if a suitable individual or couple could come forward and states:

> "However, as a result of, among other things, uncertainty, fear of identification, and the potential of a negative impact on their application, it is our understanding that no individual/couple was willing to bring an application to the court on the terms advanced in this application".

[8] Instead the NIHRC has taken this judicial review itself and provided contextualisation through the affidavit evidence of C. C is a lesbian who is considering adopting with her partner. She would also like to enter a Civil Partnership with her partner. If she enters a Civil Partnership she will not be able to apply to adopt in any circumstances either as an individual or as a couple.

[9] Further, the scope of this application, it is contended, would fall outside the particular circumstances of any individual applicant.

Factual Background

[10] The NIHRC has taken this case pursuant to their statutory function. It has a range of functions including reviewing the adequacy and effectiveness of Northern Ireland law and practice relating to the protection of human rights, advising on legislative and other matters which ought to be taken to protect human rights, advising on whether a bill is compatible with human rights and promoting understanding and awareness of the importance of Human rights in Northern Ireland.

[11] On 18 June 2008 the House of Lords delivered its judgment in Re P. Reversing the Court of Appeal in Northern Ireland, the House granted a declaration that it is unlawful for the Family Division of the High Court in Northern Ireland to reject the applicants for adoption as prospective adoptive parents on the ground only that they are not married. Following that case NIHRC entered into correspondence with the Minister of Health. This correspondence was initiated in July 2008 and concerned essentially a request from the Commission to the Minister for an update on the department's plans to implement the finding in Re P. No answer was forthcoming and eventually in April 2010 the proposed Adoption and Children Bill (which it was assumed would deal with the issues raised in Re P) was indefinitely postponed.

[12] The NIHRC then commenced correspondence with the OFM/DFM (Office of the First Minister and Deputy First Minister) in August 2010 but Tim Losty, the Acting Director at that time replied noting that his role was limited to highlighting issues, but not to challenge executive decisions. Considering that all avenues had been expended, and in view of the perceived ongoing human rights violations, the Commission considered that it had no option but to challenge the prevailing status quo through these proceedings.

[13] The pre-action protocol was duly followed and ultimately these proceedings were instituted. Simultaneous to the above correspondences, C contacted the NIHRC following her experiences with various adoption agencies.

[14] C is a lesbian who has been in a relationship with her partner for 3 years. They have lived together for one year and have a son who is the biological son of her partner. She describes their relationship as 'secure, loving and committed'. C and her partner are keen to be considered as adoptive parents. She says:

> "We have reached the decision about seeking to adopt a child after many discussions and reflections around the nature and implications for us and our existing family unit. We believe we could offer a child a loving and secure home

> and a nurturing family unit. Our son is aware of our plans and supports our decision to seek to adopt."

[15] C and her partner also wish to enter a civil partnership:

> "To signify our commitment to each other. We believe that this would be an outward indication of our commitment and love for each other and would serve to provide us with the recognition and enhanced legal protection that is afforded heterosexual couples when they marry".

In pursuit of their desire to be considered as potential adoptive parents, C made 'preliminary enquiries' to various adoption agencies. It was at this stage that she discovered that:

> "not only could my partner and I not even apply to be considered for adoption as a couple, but that should we enter a Civil Partnership, neither of us can ever adopt, either as a couple or as individuals".

[16] At the time when C made these enquires (early 2011) the information received from the Health Trust said that unmarried couples can only apply to adopt as individuals. C says at para 11 of her affidavit:

> "It became clear once I had informed myself of the legal position that the only way I could advance an application to adopt a child was if I did so as an individual. This would effectively mean ignoring my status with my partner and, if I was successful, would mean that I would have legal status in relation to the child but my partner would not. This not only offends the existence of my committed relationship but would result in what is effectively a legal hybrid for any child we adopt in that they would only have one legal parent while living with a committed couple in a loving home."

[17] Preliminary enquiries were followed by attendance at an information evening and then a follow up meeting with social worker Julie Shield. In a phone call prior to the meeting and at the meeting itself (on 24 May 2011), it was made clear that C and her partner could not adopt jointly and instead C would have to be considered as a single person. C raised the issue of Re P with the social worker who at that time knew nothing about the case.

[18] Due to her experiences trying to access adoption services, C contacted the NIHRC at which time she decided to support their application in this case by filing two affidavits.

[19] Julie Shield, in her affidavit, concedes that she was not aware of the judgment in Re P at the time of her meeting with C. She asserts that she told C at that meeting that she could apply to adopt as an individual and that her partner could seek a residence order.

> "This is indeed the position. In fact in such a case the Trust would assess persons such as C and her partner in the same manner as they do in a joint adoption application. From the social work perspective we want to look at the environment in which the child would be raised. We look at the applicant in the reality of the relevant home setting and what the ongoing relationships and circumstance mean for the child."

[20] There was substantial affidavit evidence provided by both the NIHRC and the Department in relation to the substantive issues in the case, the nature of adoption, evidence-based research on same-sex adoption and the executive powers of the various persons and bodies involved – these issues also formed part of the submissions and will be dealt with in discussion below. However, three other issues arose on affidavit which should form part of the factual basis of this application.

[21] First there is the issue of the 2006 consultation paper 'Adopting the Future'. That consultation paper raised many of the issues at the centre of this application. The paper received over 1000 responses, 95% of which were against extending the current eligibility criteria. At the time, however, in the departments' responses to the paper in 2006 they made clear an intention to support the proposed extension. Clearly the department has resiled from this stance at this stage.

[22] Second is the issue of guidance. After these proceedings were initiated, the department issued a new document and new advice on their website to deal with the issues raised in relation to Re P. This guidance was confined to a recommendation that unmarried couples seek legal advice before applying to adopt. This guidance was available online and similar advice was available in departmental guidance which was contained in a footnote to a paragraph which continued to assert that unmarried persons were not eligible to adopt as a couple.

[23] Finally, there is the issue of the amendment to Art 15 of the 1987 Order by S 203(4) of the Civil Partnership Act 2004 ("the 2004 Act") resulting in the total exclusion of a civil partner from adopting. Baroness Hale said:

> "This must have been a mistake. It means that registered civil partners have been totally excluded from adopting. It is difficult to see how this could survive a challenge under Article 14 of the European Convention, which takes a particularly firm line against discrimination on the grounds of sexual orientation" [para 101].

Lord Walker records that:

> "Leading counsel for the Department told your Lordships that there had been a mistake, but the point was not further explained. It is not directly relevant to the outcome of this appeal, but it will, it seems, be a point to be considered by the Northern Ireland Assembly at some time in the near future" [para 69].

To similar effect see Lord Hope at para 40, and Lord Mance at para 143. Despite these observations the problem was neither addressed in the near future or at all and the impugned provisions remain in place. In fact the Department now make the case that contrary to what the House had been told the total exclusion of registered civil partners from adopting was not a mistake but intended. Eilis McDaniel in this case avers that the amendment was intended to clarify the fact that those in a civil partnership could not be considered single (just as those in marriage cannot be considered to be single) and was intended to 'hold the ring' until the proposed new adoption legislation came into force.

Relief Sought

[24] The applicant seeks, inter alia:

(i) An order of certiorari quashing Art 14 of the 1987 Order;
(ii) A declaration that Art 14 of the 1987 Order has no force or effect;
(iii) A declaration that the department acted unlawfully and unreasonably in failing to implement the judgment in Re P [2008] UKHL 30 either properly or at all;
(iv) A declaration that Art 15 be read down to allow persons in a civil partnership to apply to adopt;

(v) A declaration that s203(4) of the 2004 Act breaches the Art 8 ECHR rights in conjunction with Art 14 ECHR of same sex couples;
(vi) A declaration that Art 14 and Art 15 of the 1987 Order breach the Art 8 ECHR rights in conjunction with Art 14 ECHR of unmarried persons.

Statutory Framework

[25] The relevant provisions of the 1987 Order provide:

> "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 due consideration to them, having regard to his age and understanding.
>
> Adoption Orders
>
> 12.–(1) 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 ...
>
> Adoption by married couple

14.–(1) An adoption order may be made on the application of a married couple where each has attained the age of 21 years but an adoption order shall not otherwise be made on the application of more than one person...."

[26] In December 2005 the Civil Partnership Act 2004 was brought into force, enabling same sex couples throughout the UK to enter into a registered partnership bringing with it almost all the legal consequences of marriage. It did not amend Article 14 of the 1987 Order to allow registered civil partners jointly to adopt. It did however amend Article 15 to exclude a civil partner from applying to adopt on an individual basis.

"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 a civil partner..."

[27] 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) provides:

"Human Rights Commission

(2A) Subsection (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 (c. 42) (breach of Convention rights: sufficient interest, &c.) 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).

(2C) For the purposes of subsection (2B)—

(a) "Human rights proceedings" means proceedings which rely (wholly or partly) on—
(i) section 7(1) (b) of the Human Rights Act 1998, or
(ii) Section 69(5) (b) of this Act, and

(b) An expression used in subsection (2B) and in section 7 of the Human Rights Act 1998 has the same meaning in subsection (2B) as in section 7."

[28] The Explanatory Note to the Justice and Security (Northern Ireland) Act 2007 provides a succinct summary of the amendments:

"Background and Summary

8. The Act makes provision to extend the powers of the Northern Ireland Human Rights Commission (the 'Commission'). It amends the Northern Ireland Act 1998 by granting three new powers to the Commission – powers to require the provision of information or a document, or for a person to give oral evidence; to access places of detention; and to institute proceedings in the Commission's own right, and when doing so to rely upon the European Convention on Human Rights. This will mean that the Commission can bring test cases without the need for a victim to do so personally. ... The use of these powers will be governed by safeguards to help ensure that they are used appropriately by the Commission and complied with by public authorities.

Section 14: Legal Proceedings

(50) This section amends Section 71(1), and inserts new section 71(2A), (2B) and (2C) into the Northern Ireland Act 1998. It allows the Commission to institute human rights legal proceedings in its own right, and when doing so to rely

upon the European Convention on Human Rights, provided that there is, or would be, a victim (as far as that Convention is concerned) of the unlawful act."

[29] Art 8 ECHR 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.

[30] Art 14 ECHR 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."

Arguments

The Substantive Issue

[31] The applicant argues that the current criteria which apply to the eligibility to apply to adopt are discriminatory in as far as they apply to unmarried couples – specifically unmarried heterosexual couples, same sex couples, and those in a civil partnership. It is contended that there is no justification in law or in fact for the current criteria, and that those criteria offend both national and international obligations. They observe that unmarried couples (whether same- or opposite-sex) are free to apply to adopt in England, Wales and Scotland.

[32] The applicant identifies three outworkings of the 1987 Order which it is argued breach the Art 8 ECHR rights, in conjunction with Art 14 ECHR, of unmarried couples. These are:

(i) The failure to implement Re P [2008] UKHL 30 has led to legal and practical uncertainty about the eligibility status of unmarried couples.

(ii) Unmarried couples may not adopt as couples.

(iii) No individual same sex person may adopt if they have entered into a civil partnership.

[33] The applicant expresses that there has been concern in the UK about having a blanket 'bright line' approach to the eligibility criteria and that such an approach cannot succeed in its averred aim, ie protecting the best interests of the child. Further, the applicant submits that the Department has failed to implement the judgment in Re P despite the finding there that Art 14 of the 1987 Order was incompatible with Art 8 and Art 14 ECHR. It says that this failure has created legal and practical uncertainty for anyone involved in the adoption process as well as the potential for arbitrary application of the eligibility standards.

[34] The applicant argues that in Re P it was stressed that while the Executive has responsibility for issues of social policy in implementing responses to social issues it may not act in an unjustifiably discriminatory manner. The applicant avers that while there is no Convention right to adopt, where national provision is made to *apply* to adopt, such provision may not be discriminatory. In this regard the applicant contends that Art 8 ECHR in conjunction with Art 14 ECHR is engaged.

[35] The applicant argues that given the various options which allow unmarried couples to share parental responsibility for a child (options which perform a similar function to adoption though in an incomplete and time-limited manner) there is no rational reason why full parental rights and responsibilities should not be granted to both partners in these couples via adoption.

[36] Finally the applicant argues that the respondent has failed to show that the discriminatory approach evidenced in Arts 14 and 15 of the 1987 Order is necessary or rationally connected to the averred legitimate end which is the best interests of the child.

[37] The respondents argue in response that there is no right to adopt. They argue that the eligibility criteria in Arts 14 and 15 of the 1987 Order represent the democratically accountable judgment of the department in relation to what best protects the best interests of children. They argue that they have a duty to act cautiously in delivering the aims expressed in Art 9 of the 1987 Order.

[38] The respondents argue that Art 8 ECHR is not engaged, as that article protects only *de facto* and not *de iure* family life. In Re P there was an actual family unit and to

use that case as a basis for the current action is to invite the court to make an 'extraordinary extension' of the reasoning therein. It is further noted that Re P confined itself to a declaration to the appellants and did not make a general declaration. They argue that the desire to adopt or found a family is not a relevant consideration in the adoption process.

[39] It is further argued by the respondent that the range of options available under the 1995 Children's Order in relation to Residence Orders, Joint Responsibility Orders, Parental Responsibility orders renders the practical reality convention compliant.

Standing of the NIHRC in the current case

[40] The respondent argues that in the current case there is no person who is or would be a victim of the alleged unlawful provisions and that accordingly the NIHRC has failed to satisfy s71 of the Northern Ireland Act. Further they argue that even if that section were satisfied, the applicant would be unable to satisfy Art 34 ECHR which would mean that this case would be doomed to fail in Strasbourg. They argue that if the case is doomed to fail in Strasbourg, it should not succeed in Northern Ireland.

[41] The NIHRC argues that it is operating within the legislative framework set out at s72(2B) (of the Northern Ireland Act 1998 (as amended) which empowers it to take 'test cases' in relation to Human Rights issues without having to fulfil the victim requirement found at s7 Human Rights Act 1998, provided that there 'is or would be one or more victims of the unlawful act'. They argue that in taking this case they are operating fully within their statutory remit. Further they note that the comprehensive range of challenges they are making would fall outwith any individual applicant, and that, accordingly, the Commission is best placed to take this challenge.

Limits on Departmental Action

[42] The Department argues that part of the applicant's case is related to the refusal of the department to bring in new primary legislation extending the eligibility criteria. It argues that this would have been impossible as the department has no control over primary legislation which control rests with the Northern Ireland Assembly. Further they argue that any decision to bring or not to bring legislation to the Northern Ireland assembly is not justiciable in a Judicial Review Court as such a decision has no legal consequences of itself.

[43] Due to the Ministerial Code the Minister was required to obtain the approval of the OFMDFM for such legislation. The responsibility was with that Office. Thus, they argue that Art 6(2) Human Rights Act is in play

Timing

[44] The respondent argues that this application falls outside the time limits found in Order 53(4) of the Rules of the Supreme Court and s7(5) Human Rights Act 1998.

Guidance

[45] The respondent argues that the provision of guidance would not have altered the position of unmarried couples as such couples would have to consult a lawyer when approaching the adoption process. Therefore any such complaint about the existence or quality of guidance is merely a complaint about the current content of the law.

Re P

[46] As Re P has acted as a catalyst to these proceedings it will be useful to analyse briefly what was decided in that case and how that decision relates to the issues in the current case.

What was decided in Re P?

The Facts

[47] The applicants in Re P were an unmarried couple seeking to adopt the biological child of the female partner in the relationship. While the child was not the biological child of the male partner in the relationship, the couple had in fact been together since before the child was born – over 11 years. The couple were prevented from applying to adopt as a couple by s14 of the 1987 order.

Relief Sought

[48] The applicants in Re P sought a declaration that Art 14 of the 1987 Order is incompatible with Art 8 in conjunction with Art 14 of the 1987 Order. They also sought a declaration that they were entitled to apply to adopt regardless of Art 14. In each of the majority judgments it was recognised that the operation of Art 14 to exclude unmarried couples from being eligible to adopt effected a breach of Art 8/Art 14. However, a specific declaration to that effect did not issue. A declaration that the couple were entitled to apply to adopt as a couple did issue.

Summary of the Key Points in the Judgment

[49] Lord Hoffman confirmed that being unmarried was a status protected by Art 14 ECHR [see para 8]. The other Law Lords concurred with this view.

[50] He then considered the issue whether the difference in treatment between unmarried and married couples as evidenced by Art 14 of the 1987 Order could be justified. He concluded that it was not justified for the following reasons. First, he noted that the effect of Art 14 is to exclude unmarried couples from being considered to adopt together, regardless of their other qualities. This means that if it is demonstrably in the best interest of a child to be adopted by a couple who are not married, a court would be forced to take a course of action that is **not** in the best interest of the child – ie to prevent that child from being jointly adopted by the couple in question. This would be to go against the purpose of the order as expressed at Art 9.

[51] It was acknowledged that the State is entitled to take the view that marriage is, in general, better for children. Lord Hoffman discussed the concept of a 'bright line rule' in legislation, acknowledging that there is sometimes a rational basis for such rules. However in the present case, where the paramount consideration is intended to be the welfare of the child, such an exclusionary rule is he said *"quite irrational"[*para 16] and contradicts the fundamental principle in the 1987 Order. Similarly, where the avowed aim of the order is to protect the welfare of the child, that must be more important than 'the interests of the community' which he described as a 'vague and utilitarian calculation'. His decision may be summarised thus: stability is an important criterion in evaluating suitability to adopt. Marriage is, at least, an indicator of stability. Thus it is a reasonable generalisation to prefer married couples over unmarried couples as potential adopters. However, it is not rational or justifiable to assume that all married couples are suitable adopters and all unmarried couples are not. The prevailing interest must always be the interest of the child, not the marital status of the prospective adopters. Such a difference in treatment cannot be justified as it is not justifiable to turn a reasonable generalisation into an irrebuttable conclusion.

[52] He also quoted with approval the decision of the South African Constitutional Court in Du Toit and Vos v Minister for Welfare and Population Development (2002) 13 BHRC 187, paras 21-22, where the prospective adoptive parents were a same-sex couple:

> "In their current form the impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships and who would otherwise meet the criteria set out in section 18 of the Child Care Act… *Their exclusion surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important*

> *to a child's development, which can be offered by suitably qualified persons… Excluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle [of the paramountcy of the interests of the child]…* It is clear from the evidence in this case that even though persons such as the applicants are suitable to adopt children jointly and provide them with family care, they cannot do so. The impugned provisions … thus deprive children of the possibility of a loving and stable family life… The provisions of the Child Care Act thus fail to accord paramountcy to the best interests of the children…"

[53] Lord Hoffman then considered whether the position that he was taking would go beyond what was required by the Strasbourg jurisprudence as the matter in hand was within a contracting states margin of appreciation. He concluded that the rights under the Human Rights Act 1998 are domestic rights and it is up to the domestic court to give a 'principled and rational interpretation' of these rights in the context of the UK. Ultimately Lord Hoffman found that it was unlawful to reject the applicants as prospective adoptive parents on the ground only that they are not married.

[54] Lord Hope noted that the issue in hand was an issue both of social policy and of constitutional responsibility and thus the courts had a key role to play in ensuring that people were not discriminated against in ways that engage their constitutional rights. He referred to EB v France [2008] Application No 43546/02 where it was acknowledged that where a State had gone beyond its obligations under Art 8 in creating a right to adopt it could not, in the application of that right take discriminatory measures within the meaning of Art 14. He then proceeded to decide on substantially similar grounds to Lord Hoffman that it was not justified to discriminate between married and unmarried couples with regard to their eligibility to apply to adopt.

[55] Lord Hope noted that the question of eligibility only was in issue in Re P (as here) and that this was "a short but highly sensitive issue of principle". He acknowledged that just because the law had changed in the rest of the UK it by no means followed that it should be changed in NI too nor that it should be changed by judicial decision rather than by the Assembly. However he said:

> "48 …Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention

> rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests."

Like Lord Hoffman he cited with approval the decision of the South African Constitutional Court in the case of Du Toit and Vos at para 54 stating that it is consistent with authority in Scotland citing T, Petitioner 1997 SLT 724, 732B-C, where the First Division of the Court of Session said:

> "There can be no more fundamental principle in adoption cases than that it is the duty of the court to safeguard and promote the interests of the child. Issues relating to the sexual orientation, lifestyle, race, religion or other characteristics of the parties involved must of course be taken into account as part of the circumstances. But they cannot be allowed to prevail over what is in the best interests of the child."

[56] Baroness Hale outlined the arguments for and against adoption by unmarried couples. Primarily the arguments against adoption by unmarried couples centred on security (including financial security) that comes from the legal obligations that flow from marriage. As against this was the argument that unmarried couples were in practice adopting children, but only one member of the couple could do so legally. Like Lord Hope she turned to the particular duty of the court in a democracy to safeguard the rights of even unpopular minorities against unjustified discrimination:

> "121. My Lords, I accept that there are differences between the cultural traditions of Northern Ireland and of Great Britain which should be taken into account in deciding whether this difference in treatment can be justified. On all the conventional measures, such as the rates of marriage, divorce, cohabitation and birth outside marriage, adherence to traditional family values is more widespread in Northern Ireland than in the rest of the United Kingdom, as is religious belief. But the legal traditions are the same as those in England and Wales. There is no special constitutional status afforded to marriage as there is in the Republic of Ireland. The sort of considerations which might lead Strasbourg to accord them a margin of appreciation on this matter do not apply.

122. The different cultural traditions in Northern Ireland might, however, make it more difficult for the legislature to act. *It is, as Lord Hope has pointed out, a particular duty of the courts in a democracy to safeguard the rights of even unpopular minorities against unjustified discrimination: therein lies the balance between majority rule and the human rights of all. As I said in Ghaidan v Godin-Mendoza [2004] UKHL 30, [2004] 2 AC 557, para 132, "democracy values everyone equally even if the majority does not". If, therefore, we have formed the view that there is no objective and reasonable justification for this difference in treatment, it is our duty to act compatibly with the Convention rights and afford the appellants a remedy. ...*

123. For the reasons given earlier, I agree that a blanket ban on all joint adoptions by unmarried couples can no longer be justified. ..."

[57] Lord Mance :

"135. The legislation is thus in my view unjustifiably discriminatory on any objective assessment in a manner which cannot in a United Kingdom or Northern Irish context be reconciled with the respect for private and family life protected by article 8 read with article 14. The rights of family and private life engaged and the interests of the children potentially affected merit a high level of legal and judicial protection. Objections to joint adoption by an unmarried couple face the problem that adoption by either one of such a couple is anyway permissible. Objections to cohabitation focus on the wrong point, quite apart from their Canute-like qualities. I share the view of Baroness Hale of Richmond (in paragraphs [121] and [122] of her speech) that cultural differences between Northern Ireland and Great Britain cannot justify a diametrically opposite approach to the possibility of adoption by an unmarried opposite sex couple in a child's interests.

144. The House's attention was drawn in argument to the review of the Northern Irish legislative position regarding adoption … The House was asked to allow this process to proceed, and the desirability of such an

> issue being resolved by the legislature was a significant factor in the judgments of both Gillen J at first instance in April 2006 and the Court of Appeal in June 2007. But it was not suggested that, if the House formed the view that the regime governing adoption in force in Northern Ireland under the Adoption (Northern Ireland) Order 1987 was objectively unjustified, it could on the facts of this case be an answer to the complaint of discrimination that national authorities had required time to adapt their laws to meet changing patterns of behaviour or attitudes …*The absolute exclusion from eligibility for adoption of unmarried opposite sex couples in all circumstances in Northern Ireland represents discrimination which has been identified as unjustified for a long period*. This is evidenced by the Joint Committee Report (above) which dates back to October 2002 and the report from Dr Ursula Kilkelly which was commissioned by the Department of Health and Social Services and Public Safety in Northern Ireland and is referred to by my noble and learned friend Lord Hoffmann in paragraph 28, and which was available and exhibited to an affidavit four years ago. The acknowledged absence of any reasonable justification appears to me to be further confirmed by the January 2007 report produced by the Department of Health and Social Services and Public Safety of Northern Ireland in response to the replies to its 2006 consultation document *Adopting the Future* (paragraph 135 above).

[58] As already pointed out several of the judges also noted that the enactment of the 2004 Act had the effect of excluding civil partners entirely from being considered to adopt either individually or as a couple. All judges failed to see any justification for this. Each member of the House of Lords agreed on the substantive point that it was not justifiable to discriminate between married and unmarried couples in relation to their eligibility to apply to adopt jointly. Accordingly the appeal was allowed and the House (reversing the Court of Appeal) declared that is unlawful for the Family Division of the High Court to reject the applicants as prospective adoptive parents on the ground only that they are not married.

Similarities and Differences between the present issue and the issue in Re P

[59] At its core, the issues in the present application are the same in that they concern the justification for the difference in treatment between unmarried couples (same and opposite sex and including members of a civil partnership) and married couples. In this regard the reasoning in Re P is directly applicable. This application is broader in its scope as it is taken by the NIHRC in pursuit of its statutory duty. Also, there is no child directly involved in the proceedings whose welfare calls to be considered.

Discussion

[60] I shall begin by addressing the some preliminary issues raised in the main by the respondents before addressing the substantive issues.

Limitations on Departmental Action

[61] The core of these proceedings relates to the unlawfulness of Art 14 and Art 15 of the 1987 Order and the ongoing breach of Art 8 in conjunction with Art 14 of the ECHR. Arts 14 and 15 of the Order are provisions of secondary legislation [see for example Baroness Hale at para 84] and Section 6(1) of the HRA applies.

Timing

[62] The rights violations which are allegedly effected by the outworking of Art 14 and Art 15 of the 1987 Order are ongoing and therefore I conclude this application does not fall foul of the time limits in Order 53(4) RSC and s7(5) of the Human Rights Act 1998.

Guidance

[63] On the issue of guidance, it is by no means clear that had Re P been properly implemented through guidance issued by the department, an unmarried couple would have to seek legal advice. If it was clearly noted in guidance to all relevant parties that the status of being an unmarried couple no longer constituted a bar to applying to adopt, one would assume that the adoption process would carry on as it does for all other potential adopters, with legal advice only being sought if there were any contentious issue. Eligibility would no longer be contentious in itself.

[64] The guidance as it currently stands clearly does not appropriately reflect the true state of the law. The judgment in Re P was definitive in deciding that the difference in treatment which is created by Art 14 of the 1987 Order was unjustifiably discriminatory and represented a breach of Art 8 in conjunction with Art 14 ECHR. In failing to clarify the true legal position of unmarried couples who wish to adopt jointly, the department have perpetuated the breaches identified in Re P. The department instead should have

made it explicitly clear that the status of being unmarried was no longer a bar to applying to adopt. It was of course open to the department to clarify that marital status and the reasons why a couple choose not to marry continue to be relevant considerations when deciding upon that couples suitability to adopt as such a status/decision may be indicative of the stability of that relationship.

Standing of the Human Rights Commission

[65] It is clear that the NIHRC may act only if there is or would be one or more victims of the unlawful act. I am satisfied from the affidavit evidence of C that she is a victim for these purposes. Further, given the remit of the NIHRC which is expressed in the explanatory notes to the 2007 Act as including 'bringing test cases without the need for a victim to do so personally', it seems clear that the Commission has a duty to pre-empt and prevent potential human rights violations. This is clear from the use of the future imperfect 'would' in S71(2B)(c).

[66] If, for example, it was clear that the operation of legislation would inevitably breach the convention rights of a person or class of persons then it would seem that it would be fully within their powers to institute proceedings to correct that issue. This logic is fully conversant with ECHR case law on the victim requirement where it has been held variously that it is not necessary for a victim to prove that he has in fact been prejudiced or suffered a detriment where his convention rights are breached. Thus in Campbell & Cosans v UK (1982) 4 EHRR 137 a pupil was a victim when complaining that corporal punishment was inhuman treatment simply on the ground that his attendance at the school put him at *risk* of being exposed to inhuman treatment; a claimant may successfully contend that a law violates their rights by itself in the absence of an individual measure of implementation if they run the risk of being directly affected by it (Marckx v Belgium (1979) 2 EHRR 330), or a claimant may be successful if he can show that there is a risk that his convention rights will be breached in the future (Soering v UK (1989) 11 EHRR 439).

[67] In this case I am satisfied that C is in fact a victim. Even without the evidence of C however, the NIHRC would have had standing to take this case by virtue of S71(2B)(c) of the Northern Ireland Act 1998 as amended.

Substantive Issues

[68] The challenge mounted in the present action relates to Art 14 and Art 15 (as amended) of the 1987 Order as it relates to unmarried persons. Art 14 has already been subject to challenge in the House of Lords in Re P where it was found that the status of being unmarried should not act as a bar to applying to adopt. As the law is presently stated, the only circumstances in which one can adopt are as follows:

a. If you are a married couple, you can only adopt as a couple;

b. If you are an unmarried person, you can only adopt as an individual;

c. Therefore, if you are an unmarried person, you are not eligible to adopt as a couple. This is the state of affairs which was addressed in Re P [2008] UKHL 30 and ruled unlawful and it is contended here that the ruling in Re P has not been effectively implemented with the effect that there remains an impermissible bar to applying to adopt if you are an unmarried couple.

d. If you are an unmarried person who has entered a Civil Partnership, you may not apply to adopt either as an individual or as a couple.

[69] The 1987 Order and the Children's (Northern Ireland) Order 1995 also offer a range of options with similar effect to adoption, such as residence orders, parental responsibility orders etc. However these orders differ from adoption in their lack of permanence and do not act to create two permanent legal parents for the child. The applicant contends that the law as it stands is discriminatory and breaches the Art 8 rights, together with Art 14 ECHR of unmarried couples (whether same-sex or opposite-sex), and there is no rational or justified basis for this discrimination. Therefore, in this case, as there is clearly a difference in treatment between unmarried and married couples, it must be shown that there is some good reason which justifies the difference in legal treatment.

[70] The respondents argue that the current adoption provisions are justified in that they serve the best interests of the child.

[71] In the first instance two things are clear. First, there is no right to adopt, either in convention law or domestic law. Secondly, the sole purpose of adoption is to advance and promote the welfare of the child by providing a safe and secure environment in which that child can grow to adulthood. It is important to note that there is no specific child who is at the centre of these proceedings, therefore the issue cannot be considered from the point of view of that child's best interests and welfare. It is true that there is no right to adopt. However, statute has created a legal opportunity in the form of the right to *apply* to adopt. That right or opportunity falls squarely within the ambit of Art 8 and the state is enjoined by Art 14 to secure the enjoyment of the right without discrimination on any prohibited ground.

[72] The justification for retaining the current eligibility criteria when considered from the point of view of a child's right to be adopted has been demolished by the

judgment in Re P. A brief quotation at para 13 of the judgment of Lord Hoffman should suffice to demonstrate the reasoning there:

> "The question therefore is whether in this case there is a rational basis for having any bright line rule. In my opinion, such a rule is *quite irrational*. In fact, it contradicts one of the fundamental principles stated in Art 9, that the court is obliged to consider whether adoption "by particular ... persons" will be in the best interest of the child. A bright line rule cannot be justified on the basis of the needs of administrative convenience or legal certainty, because the law requires the interests of each child to be examined on a case-by-case basis. Gillen J said that 'the interests of these two individual applicants must be balanced against the interests of the community as a whole". In this formulation the interests of the particular child, which A9 declares to be the most important consideration, have disappeared from sight, sacrificed to a vague and distant utilitarian calculation. That seems to me to be wrong. If, as may turn out to be the case, it would be in the interests of the welfare of this child to be adopted by this couple, I can see no basis for denying the child this advantage in "the interests of the community as a whole".

[73] Further, at para 18:

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

[75] Re P has shown that the purpose of the 1987 Order is hampered by the current eligibility criteria. In light of this, it is clear that the difference in treatment cannot be justified on any grounds and unmarried couples are suffering an ongoing breach of their Art 8 rights read together with Art 14 by the continued denial to them of the legal opportunity to apply to adopt jointly which is available to those who enjoy the status of being married.

The Effect on those in a Civil Partnership

[76] The difference in treatment of persons in a civil partnership affected by Art 14 and Art 15 as amended is even more deleterious. Not only do they suffer the same discrimination that unmarried opposite sex couples experience when applying to adopt jointly, they also suffer unjustifiable discriminatory treatment when compared against individual members of an opposite sex couple who can apply to adopt as an individual. This is despite the fact that the commitment evinced by choosing to enter a civil partnership ought to be similar to marriage in indicating the security of that relationship. In choosing to make a public commitment to one another, they become totally excluded both as individuals and as a couple from eligibility to adopt (ie not eligible at all). This is quite irrational and plainly unlawful. As Baroness Hale foreshadowed at para 101 of her judgment in Re P "it is difficult to see how this [total exclusion] could survive challenge under Article 14 of the European Convention, which takes a particularly firm line against discrimination on the ground of sexual orientation."

[77] It was noted in Re P that the security of marriage remains a relevant consideration when assessing the suitability of a couple as prospective adopters. The 2004 Act is intended to give same-sex couples similar legal rights as those which accrue in a marriage. As Lord Nicholls noted in Re P at para 18:

> "I would agree that the fact that a couple do not wish to undertake the obligations of marriage is a factor to be considered by the court in assessing the likely stability of their relationship and its impact upon the long term welfare of the child."

[78] Baroness Hale also noted at para 108-109:

> "108. But being married does at least indicate an initial intention to stay together for life. More important, it makes a great legal difference to their relationship. Marriage brings with it legal rights and obligations between the couple which unmarried couples do not have. There is, for example, the

> right to live in the family home irrespective of who is its owner or tenant; the right to financial relief and property adjustment should the marriage break down; the right to succeed to a substantial portion of the estate of a spouse who has died intestate; and the right to financial provision from the estate if the provision made in any will or on intestacy is insufficient.

[79] Clearly then, couples who have entered a civil partnership who enjoy all these legal rights should be even more capable of assuaging these concerns than other unmarried couples. In respect of gay and lesbian couples either in or hoping to enter a civil partnership, such as C in these proceedings, their Art 8 rights are also affected in relation to the effect of the eligibility criteria on their right to choose to enter into a civil partnership. Art 8 protects, *inter alia*, the establishment and development of emotional relationships with others, one's identity and the manner in which one chooses to present oneself, and one's sexual identity. One has a right to enjoy all of these freedoms unencumbered. The present legislation essentially entails that a gay or lesbian person must choose between being eligible to adopt, or affirming their relationship in public via a civil partnership ceremony. In pursuance of public expression of their commitment to one another they lose the legal opportunity that they had previously enjoyed. Thus Art 8/Art 14 are clearly engaged on all of the grounds above.

Summary of the Substantive Issue

[80] The respondent avers that the current eligibility criteria serve the best interests of the child. I can find no rational basis for this contention. Excluding persons from the whole adoption process on the sole basis of their relationship status can only serve to narrow the pool of potential adopters which cannot be in the best interests of children for the reasons identified in Re P. The rigorous scrutiny and assessment of suitability will ensure that only persons capable of providing a loving, safe and secure adoptive home will ultimately be considered. Looked at in this light it is clear that the complete bar to applying to adopt that the current eligibility criteria create cannot bear a reasonable relationship of proportionality to that aim.

[81] Further, the arguments in relation to the alternatives available under the relevant orders hold no weight. It cannot be in the best interests of a child to deny that child of the full benefits of having two fully legal adoptive parents.

Conclusion

[82] Adopting a child is no small undertaking. This is even more so nowadays when the profile of children who need adoptive families has changed dramatically. Baroness

Hale pointed out in Re P that the adoption of healthy babies (the traditional adoption) and adoption by step-parents are both becoming less common, while adoption of 'looked after' children is a more pressing need. Looked after children who require permanent adoptive homes tend to be older and often have special needs. They also often retain some links with their biological families. A loving, permanent, stable home is infinitely preferable to growing up in care. The potential benefit to a child adopted in such circumstances is immeasurable. As well as a huge benefit to the child, these adopters also provide an invaluable service to the State. No relationship is perfect and while there are benefits to an adopted child in entering a relationship where a web of legal rights exists between the parents, that web is no guarantee of a lifelong, stable, committed relationship. The most important consideration is that decisions are made in the best interests of the child. As the First Division of the Court of Session observed in T there can be no more fundamental principle in adoption cases than that it is the duty of the court to safeguard and promote the interests of the child. Issues relating to the sexual orientation, lifestyle, race, religion or other characteristics of the parties involved must of course be taken into account as part of the circumstances. But they cannot be allowed to prevail over what is in the best interests of the child.

[83] Accordingly the application for judicial review is allowed and I will hear the parties as to the appropriate relief.

Postscript

Following a remedies hearing on the 26 October the Court declared as follows:

(a) Notwithstanding Articles 14 and 15 of the Adoption (Northern Ireland) Order 1987 it does not prevent couples who are not married, or in a Civil Partnership, from applying to adopt a child pursuant to the terms of that Order. All individuals and couples, regardless of marriage status or sexual orientation are eligible to be considered as an adoptive parent(s);

(b) Any guidance published by the Respondent must accord with the declaration at (a) above.

The form of the order broadly reflects that which was proposed by the Respondent. Given what the Court said about the issue of published guidance at paras 63 and 64 of the judgment it is reasonable to assume that the Respondent will want to amend its guidance in a manner which reflects the judgment of the Court.