

Trinity Term
[2018] UKSC 32
On appeal from: [2017] EWCA Civ 81



Judgment

**R (on the application of Steinfeld and Keidan)
(Appellants) v Secretary of State for International
Development (in substitution for the Home
Secretary and the Education Secretary)
(Respondent)**

before

**Lady Hale, President
Lord Kerr
Lord Wilson
Lord Reed
Lady Black**

Judgment given on

27 June 2018

Heard on 14 and 15 May 2018

Appellants

Karon Monaghan QC
Sarah Hannett
(Instructed by Deighton
Pierce Glynn)

Respondent

Sir James Eadie QC
Dan Squires QC
(Instructed by The
Government Legal
Department)

Lord Kerr: (with whom Lady Hale, Lord Wilson, Lord Reed and Lady Black agree)

Introduction

1. Section 1(1) of the Civil Partnership Act (CPA) 2004 defines a civil partnership as “a relationship between two people of the same sex ... (a) which is formed when they register as civil partners of each other - (i) in England or Wales ...” Under section 2(1) of CPA two people are to be regarded as having registered as civil partners when they have signed the civil partnership register in the presence of each other, a civil partnership registrar and two witnesses. By section 3(1) of CPA, two people are not eligible to register as civil partners if they are not of the same sex. CPA was therefore explicitly and emphatically designed for same sex couples only. The obvious reason for this was that, at the time of the enactment of CPA, the government and Parliament did not consider it appropriate to extend the institution of marriage to same sex couples but recognised that access to responsibilities and rights akin to those which arise on marriage should be available to same sex couples who wished to commit to each other in the way married couples do.

2. All of that changed with the enactment of the Marriage (Same Sex Couples) Act 2013 (MSSCA). This made the marriage of same sex couples lawful from the date of coming into force of the legislation - 13 March 2014. From that date onwards, same sex couples who marry enjoy the same rights, benefits and entitlements as do married heterosexual couples. They also share the responsibilities that marriage brings.

3. CPA was not repealed when MSSCA was enacted. Consequently, same sex couples have a choice. They can decide to have a civil partnership or to marry. That choice was not - and is not - available to heterosexual couples. Under the law as it currently stands, they can only gain access to the rights, responsibilities, benefits and entitlements that marriage brings by getting married. This circumstance, it is now agreed, brought about an inequality of treatment between same sex and heterosexual couples. It is also now accepted by the respondent that this manifest inequality of treatment engages article 14 - prohibition of discrimination - read in conjunction with article 8 of the European

Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the Convention or ECHR) - the right to respect for private life.

4. It is also accepted by the respondent Secretary of State that the inequality of treatment of heterosexual couples requires to be justified from the date of its inception, *ie* the coming into force of MSSCA. The principal issue in this appeal, therefore, is whether justification of that inequality includes consideration of the period of time during which, the government claims, it is necessary to investigate how best to eliminate the inequality or whether the justification must be directed exclusively to the very existence of the discrimination. The respondent claims that justification does include an evaluation of the time needed to decide how the inequality of treatment can best be removed. The appellants argue that this relates solely to remedy, and is not relevant to the question of justification. Alternatively, they submit that, on the facts of this case, it is not proportionate to continue to deny civil partnerships to them in order to achieve the aim proffered by the government *viz* affording time thoroughly to investigate whether to abolish civil partnerships altogether; to extend them to different sex couples; or to phase them out.

5. The appellants therefore seek a declaration that sections 1 and 3 of CPA (to the extent that they preclude a different sex couple from entering into a civil partnership) infringe their rights under article 14 taken with article 8 of the Convention. They also seek a declaration of incompatibility under section 4 of the Human Rights Act 1998 (HRA).

Factual background

6. The appellants are a different sex couple who wish to enter into a legally recognised relationship. They have a conscientious objection to marriage. They want to have a civil partnership with one another. They have been in a long-term relationship and have had two children together. It is not disputed that their unwillingness to marry is based on genuine conviction. Nor is it disputed that their wish to have their relationship legally recognised is other than entirely authentic.

7. When Parliament enacted MSSCA it consciously decided not to abolish same sex civil partnerships or to extend them to different sex couples, even though, we were told, it was recognised at that time that this would bring about an inequality of treatment between same sex partners and those of different sexes and that this inequality was based on the difference of sexual orientation of the two groups. Rather, it was decided that further investigations were required.

Some investigations had been carried out in 2012 and further inquiries were made in 2014. In the government's estimation the investigations did not indicate that significant numbers of different sex couples wished to enter civil partnerships. It was judged, however, that the review and consultation which comprised the investigations in 2014 were inconclusive as to how to proceed. The government therefore concluded that it should not take a final decision on the future of civil partnerships until societal attitudes to them became clearer after same sex marriages had taken root.

8. On 21 October 2015 Tim Loughton MP introduced a Private Members Bill which proposed extension of civil partnerships to different sex couples. That Bill did not receive the requisite support and did not progress. A second Bill met the same fate in 2016. Mr Loughton introduced another Bill, entitled Civil Partnership, Marriages and Deaths Registration etc Bill in the 2017-2019 session. The Bill received its First Reading on 19 July 2017 and its Second Reading on 2 February 2018. It proposed that different sex couples should be permitted to enter civil partnerships. The government felt unable to support that proposal but in advance of the Second Reading it agreed the terms of an amendment with Mr Loughton and a joint amendment was submitted to Parliamentary authorities immediately after the Second Reading. The amendment is in these terms:

“(1) The Secretary of State must make arrangements for a report to be prepared -

(a) assessing how the law ought to be changed to bring about equality between same sex couples and other couples in terms of their future ability or otherwise to form civil partnerships, and

(b) setting out the Government's plans for achieving that aim.

(2) The arrangements must provide for public consultation.

(3) The Secretary of State must lay the report before Parliament.”

9. In May 2018, the government published a command paper in which it recorded that the consultations in 2012 and 2014 had failed to produce a

consensus as to how, or indeed if, the legal position as to civil partnerships should change. Those consultations had posited three possibilities: that civil partnerships should be abolished; that they should be closed to new entrants; or that they should be extended to allow different sex couples to register a civil partnership. The command paper stated that, because of the lack of consensus, the government “decided not to make any changes to civil partnerships at the time”. This is significant. The government knew that it was perpetrating unequal treatment by the introduction of MSSCA but it decided to take no action because of what it perceived to be equivocal results from its consultations.

10. In the 2018 command paper the government announced that it was looking at available data “on the take-up of civil partnerships and marriage amongst same sex couples”. It suggested that if demand for civil partnerships was low, the government might consider abolishing or phasing them out. If, on the other hand, there remained a significant demand for civil partnerships, this might indicate “that the institution still has relevance”. It concluded, therefore, that it was “proportionate” to obtain more data in order to decide that there was a need to preserve civil partnerships. It considered that by September 2019 it should have sufficient evidence to make a judgment about the demand for the institution. Thereafter, consultation on the future implementation of proposals for civil partnerships would take place. This would happen “at the earliest” in 2020. No indication was given as to how long the consultation period would last nor as to the likely date of any legislation that might be considered necessary.

The proceedings

11. The appellants sought judicial review of the government’s failure to extend civil partnerships to different sex couples, arguing that the introduction of MSSCA rendered the provisions of CPA which confined the availability of civil partnerships to same sex couples (sections 1 and 3) incompatible with article 8 of ECHR, when read in conjunction with article 14. That application was dismissed by Andrews J in a judgment delivered on 29 January 2016 ([2016] EWHC 128 (Admin)). The respondent had argued that article 8 was not engaged and that argument was accepted by the judge. At para 84 of her judgment she said that, “The difference in treatment complained of does not infringe a personal interest close to the core of the right to family life, still less the right to private life protected by article 8”. The judge held, however, that even if article 8 was engaged, there was “sufficient objective justification for maintaining the disparity [between same sex and different sex couples] in the short term whilst the Government takes stock of the impact of the 2013 Act on civil partnerships” - para 71 of the judgment.

12. Before the Court of Appeal (Arden LJ, Beatson LJ and Briggs LJ - [2017] EWCA Civ 81; [2018] QB 519) the argument that the appellants' case did not come within the ambit of article 8 was again advanced by the respondent. It was unanimously rejected (and has not been renewed before this court). By a majority (Beatson and Briggs LJJ), the Court of Appeal held that the interference with the appellants' rights under article 8, read together with article 14 was, at least for the time being, justified. At para 158, Beatson LJ said:

“In my view, at present, the Secretary of State’s position is objectively justified. The future of the legal status of civil partnerships is an important matter of social policy that government is entitled to consider carefully. At the hearing the Secretary of State’s approach was described as a ‘wait and see’ approach, although it would be more accurate to describe it as a ‘wait and evaluate’ approach. Whatever term is used to describe the approach, it would not have been available to the Secretary of State prior to the enactment and coming into force of the 2013 Act. This is because it would not have been possible at that time to determine how many people would continue to enter into civil partnerships or want to do so because they share the appellants’ sincere objections to marriage. The relevant start date for consideration is thus 13 March 2014 when the provisions extending marriage to same sex couples came into force.”

13. At para 173, Briggs LJ said:

“I can well understand the frustration which must be felt by the appellants and those different sex couples who share their view about marriage, about what they regard as the Government’s slow progress on this issue. Some couples in their position may suffer serious fiscal disadvantage if, for example, one of them dies before they can form a civil partnership. This is a factor in the proportionality balance, and because this is a case of differential treatment on the basis of sexual orientation, that balance must command anxious scrutiny. But against the background of a serious but unresolved difficulty which affects the public as a whole, and the practicable impossibility of some interim measure, such as temporarily opening civil partnership to different sex couples when the eventual decision may be to abolish it, I am unable to regard the Secretary of State’s current policy of ‘wait and evaluate’ as a disproportionate response.”

14. Although she found that the interference with the appellants' article 8 and article 14 rights was not justified (because it was not proportionate), Arden LJ considered that it pursued a legitimate aim - para 105, where she said that the state had the option to eliminate the discrimination "in any way it sees fit" and therefore must be entitled to "some time to make its choice."

15. The question whether the legislation pursued a legitimate aim occupied centre field on the hearing of the appeal before this court. In particular, the argument focused on the question whether the legitimate aim required to be "intrinsically" connected to the unequal treatment or whether it was enough that the government's aim was to take the time necessary to decide which form of removal of the discrimination was most appropriate.

The Convention rights

16. Article 14 of ECHR provides that the enjoyment of the rights and freedoms set forth in the Convention shall be secured without discrimination on any of a number of specified grounds (including sex, race or colour) and "other status". It is accepted that sexual orientation qualifies as a ground on which discrimination under article 14 is forbidden - *Salgueiro Da Silva Mouta v Portugal* (1999) 31 EHRR 47 at para 28. Article 14 does not enshrine a freestanding right to freedom from discrimination - see *Petrovic v Austria* (1998) 33 EHRR 14. It prohibits discrimination in the enjoyment of the Convention rights. It is now well settled, therefore, that, to have recourse to article 14, the complained of discrimination must "come within the ambit" of another Convention right.

17. The ECHR right within whose ambit the appellants claim to come is article 8 which provides:

"Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for

the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

18. Before Andrews J and the Court of Appeal it had been submitted that an adverse effect in relation to article 8 had to be demonstrated in order for an avowed infringement to come within its scope or ambit. Counsel for the respondent did not seek so to argue before this court. They were right not to do so. Recent case law from the European Court of Human Rights (ECtHR) makes it clear that no detrimental effect need be established - see, for instance, *Schalk and Kopf v Austria* (2010) 53 EHRR 20; *Vallianatos v Greece* (2013) 59 EHRR 12; and *Oliari v Italy* (2015) 65 EHRR 26. In particular, in *Vallianatos* ECtHR found that the introduction of registered partnerships only for different sex couples, to exist alongside marriage which was also only open to different sex couples, constituted a breach of article 14 read with article 8 of the Convention (paras 80-92).

19. It is therefore now accepted that access to civil partnerships falls within the ambit of article 8; that there is a difference in treatment between same sex couples and different sex couples in relation to the availability of civil partnerships; that this difference in treatment is on the ground of sexual orientation, a ground falling within article 14; and that the appellants are in an analogous position to a same sex couple who wish to enter into a civil partnership. In these circumstances, the only basis on which the respondent can escape a finding that there has been an infringement of the appellants’ article 14 rights is by showing that the unequal treatment is justified - *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, per Baroness Hale at para 130.

Justification - the arguments

20. On the question of justification, Ms Monaghan QC for the appellants advanced five propositions:

1. The burden of proving justification is on the respondent: *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2012] 1 AC 621, per Lord Wilson at para 44 and Lady Hale at para 61;
2. It is not the scheme as a whole which must be justified but its discriminatory effect: *A v Secretary of State for the Home Department*

[2005] 2 AC 68 per Lord Bingham at para 68 and *AL (Serbia) v Secretary of State for the Home Department* [2008] 1 WLR 1434 per Baroness Hale at para 38;

3. Where the difference in treatment is based on sexual orientation, a court must apply “strict scrutiny” to the assessment of any asserted justification: “particularly convincing and weighty reasons to justify” it are required - *EB v France* (2008) 47 EHRR 21, at para 91 and *Karner v Austria* (2003) 38 EHRR 24 at para 37;

4. The conventional four-stage test of proportionality (as outlined in cases such as *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 and *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just For Kids Law intervening)* [2015] 1 WLR 3820, at para 33) should be applied; and

5. In cases involving discrimination on the grounds of sexual orientation, to be proportionate, the measure must not only be suitable in principle to achieve the avowed aim, it must also be shown that it was necessary to exclude those of the specific sexual orientation from the scope of the application of the provision (*Vallianatos* at para 85).

21. For the respondent, Mr Eadie QC did not take particular issue with any of these propositions. He submitted, however, that the government wanted to have a “better sense” of how civil partnerships would come to be regarded after same sex marriage became possible, before taking a final decision on their future. This was, he claimed, a legitimate aim. Moreover, it required to be considered in its historical context. Between 2005 (on the coming into force of CPA) and 2014 (when MSSCA came into force) there was no question of discrimination between same sex and different sex couples. Both had access to all the rights, entitlements and responsibilities that marriage entailed. The only difference was that the gateways to those entitlements etc were differently labelled (although that is not quite how Mr Eadie put it).

22. Counsel emphasised that the various items of legislation were the product of evolution in societal values and standards; the executive’s and Parliament’s consideration of those changes; and the measured response of the legislature to the conclusions that they had reached about them. (Again, I acknowledge that this is a paraphrase, rather than a verbatim rendition, of Mr Eadie’s formulation of the argument).

23. The respondent's defence of the appeal therefore proceeded principally on two related but distinct strands. The first was that changes in the law in this sensitive area of social policy had been incremental. CPA had been introduced as a reaction to perceived changes in social attitudes and to address the increasingly recognised anomaly that same sex couples did not have the opportunity which different sex couples had of legal recognition of their commitment to each other, with all the benefits that flowed from such commitment. At the time CPA was enacted, it was judged by the government and Parliament that society as a whole in the United Kingdom was not ready to contemplate extending the institution of marriage to same sex couples. It is not disputed that this was a judgment that they were entitled to make.

24. The second strand of the respondent's argument can be described in the following way: when in 2013 it was decided that same sex couples should be allowed to marry, the government and Parliament were presented with a choice. Should they do away with civil partnerships for same sex couples or should they be retained? On one view, they should be abolished. After all, same sex couples were being placed in precisely the equivalent position as different sex couples. And, incidentally, in none of the countries of the Council of Europe where civil partnerships for same sex couples were transformed to marriage entitlement, had the civil partnership institution been maintained.

25. Rather than take that step, so says the respondent, the government and Parliament chose a sensible course of investigating whether there was a case for preserving the institution of civil partnership. After all, some same sex couples might not wish to marry but to remain, or become, civil partners. And, incidentally, a period of reflection and inquiry would allow a decision to be made on whether different sex couples should be allowed to avail of civil partnerships. Momentous decisions of this type need, the respondent says, time for proper inquiry and consideration. Requiring that time to be available while assessment of the options was taking place is a legitimate aim, it is claimed. It is legitimate, therefore, to perpetuate the acknowledged inequality of treatment between the two groups, since that inequality is going to be eliminated one way or another in due course. That course also fulfils, the respondent argues, the other requirements of proportionality.

Discussion of justification generally

26. In *Schalk and Kopf* the applicants were a same sex couple. They complained that Austrian law, which prescribed that the institution of marriage was available only to different sex couples, discriminated against them. ECtHR

held (by four votes to three) that there had been no violation of article 14, taken together with article 8. The court held, however, that same sex couples were in a relevantly similar situation to a different sex couple “as regards their need for legal recognition and protection of their relationship” - para 99. At the time that they lodged their application, there was no possibility of recognition of their relationship under Austrian law. That changed with the coming into force of the Registered Partnership Act on 1 January 2010. The court had to examine whether Austria should have provided a means of legal recognition of their partnership before that Act came into force. In para 105 of its judgment the court noted that there was a growing European consensus about the recognition of same sex couples but that there was not yet a majority of states providing for legal recognition of same sex partnerships. It concluded, therefore, that “the area in question must ... be regarded as one of the evolving rights with no established consensus, where states must ... enjoy a margin of appreciation in the timing of the introduction of legislative changes”.

27. The respondent relied on this decision as being an example of the many occasions on which the ECtHR has held that, in terms of timing of legislative change to recognise different forms of relationship, a wide margin of appreciation is appropriate. That was so, Mr Eadie argued, even where there had been differential treatment on grounds of sexual orientation for some time. He sought to draw an analogy between the *Schalk and Kopf* case and that of the appellants, by suggesting that a significant measure of discretion should be accorded to Parliament in its decision as to when the timing of legislative change in the field of civil partnerships should occur.

28. I do not accept that argument. In the first place, the approach of the ECtHR to the question of what margin of appreciation member states should be accorded is not mirrored by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified. As Lady Hale said *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, para 118:

“... it is clear that the doctrine of the ‘margin of appreciation’ as applied in Strasbourg has no application in domestic law. The Strasbourg court will allow a certain freedom of action to member states, which may mean that the same case will be answered differently in different states (or even in different legal systems within the same state). This is particularly so when dealing with questions of justification, whether for interference in one of the qualified rights, or for a difference in treatment under article 14.

National authorities are better able than Strasbourg to assess what restrictions are necessary in the democratic societies they serve. So to that extent the judgment must be one for the national authorities.”

29. It follows that a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out. It cannot avoid that obligation by reference to a margin of appreciation to be allowed the government or Parliament, (at least not in the sense that the expression has been used by ECtHR). The court may, of course, decide that a measure of latitude should be permitted in appropriate cases. Before Andrews J the respondent had relied on the well-known statement of Lord Hope in *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326 at 381B where he said:

“... difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.”

30. It was therefore suggested to Andrews J that since the decision on the timing of legislation to extend or abolish civil partnerships lay firmly in the field of social policy, the court should show an appropriate degree of reticence in deciding whether the unequal treatment between same- and different sex couples was justified. That argument was repeated in this court. Mr Eadie relied on the decision of the House of Lords in *M v Secretary of State for Work and Pensions* [2006] 2 AC 91. In that case M was the divorced mother of two children who spent most of the week with their father, M’s former husband. She contributed to their maintenance under the Child Support Act 1991. She lived with a partner of the same sex. In calculating the amount of her child support contribution according to regulations made under the 1991 Act, M’s partner’s contribution to their joint housing costs was treated as reducing M’s deductible housing costs whereas if she had been living with a man his contribution to the mortgage would have been treated as part of hers so that her weekly child support payment would have been smaller. She argued that the assessment of her child support contributions engaged her rights under article 8 and Article 1 of the First Protocol to ECHR, and that she had suffered discrimination in her enjoyment of those

rights contrary to article 14. By a majority, the House of Lords rejected M's arguments.

31. Mr Eadie placed particular emphasis on the statement of Lord Mance at para 153, where he said:

“... Because of the front-line importance of a home, the Strasbourg and United Kingdom courts have been active at a relatively early stage to eliminate differences in treatment which were evidently unfair. The area of law with which the House is concerned is not so front-line. It is one where there are swings and roundabouts, advantages and disadvantages, for same sex couples in achieving complete equality of treatment. There are many allied areas of legislation that used similar terminology and required close attention, to achieve coherent, comprehensive reform. It is an area in relation to which Parliament and the democratically elected government should be recognised as enjoying a limited margin of discretion, regarding the stage of development of social attitudes, when and how fast to act, how far consultation was required and what form any appropriate legislative changes should take.”

32. In as much as it can be suggested that what Lord Mance described as “a margin of discretion” is analogous to the margin of appreciation applied by the Strasbourg court, it must be noted that, even on the supranational plane, the margin in cases where distinctions are made on the ground of sexual orientation is narrow - *Vallianatos* at paras 84 and 85; and *Pajić v Croatia* (2016) (Application no 68453/13) para 59. The margin of discretion available to the government and Parliament in this instance, if it exists at all, must be commensurately narrow. Moreover, as Ms Monaghan has submitted (see para 20.3 above), where the difference in treatment is based on sexual orientation, a court must apply “strict scrutiny” to the assessment of any asserted justification and particularly convincing and weighty reasons to justify it are required.

33. In this context, it is significant that the government consciously decided that it would not extend civil partnerships to different sex couples, at the time that it introduced MSSCA. And, as Andrews J observed in para 65 of her judgment, quoting Mr Squires (who then appeared on behalf of the respondent), the government had not only reached that definite conclusion, it elected to carry out a review before deciding what, if anything, it should do. Indeed, when, in its estimation, that review proved inconclusive, the government decided “to wait for a time until further hard evidence was available to enable it to take a considered

view as to what to do". In light of what we were told was the government's awareness that the effect of introducing MSSCA was inequality between same- and different sex couples, this displayed, at best, an attitude of some insouciance.

34. Moreover, although it is now accepted that the inequality of treatment between the two groups has engaged article 8 and, when read with article 14, has constituted an interference with the appellants' rights which has required to be justified from the date of the coming into force of MSSCA, this cannot have been the government's view at that time. The respondent had argued before Andrews J and the Court of Appeal that article 8 was not engaged. If that argument had succeeded, no need for justification would have arisen. One can only infer, therefore, that, certainly before the judgments of the Court of Appeal were handed down, the government did not consider that steps needed to be taken to eliminate unlawful discrimination. The decision to carry out investigations as to the way forward must have been related to circumstances unconnected with the government's perception of its obligations under ECHR.

35. Andrews J rejected the suggestion that the present case was analogous to *Vallianatos*, stating, at para 71 of her judgment that "it is far closer to *Schalk*, in which there was recognition by the ECtHR that a member state should be afforded a relatively generous leeway as to the timing of introducing legislative changes in areas of social policy where there is no clear consensus among member states". I do not agree that the situation of the appellants is close to that of *Schalk and Kopf* or that some analogies with *Vallianatos* cannot be drawn.

36. Indeed, in my view, the case of *Schalk and Kopf* provides an obvious contrast to the circumstances of the present appeal. In that case the enactment of the Registered Partnership Act was the product of evolving societal acceptance of the need to provide some legal recognition of same sex partnerships. Here the inequality between same sex and different sex couples is the creature of Parliament. In one instance (the Registered Partnership Act in the *Schalk and Kopf* case), one can understand that the timing by the legislature of a measure to reflect the developing changes in attitude should be considered to fall within the government's margin of appreciation. In the case of MSSCA, however, it was Parliament itself that brought about an inequality immediately on the coming into force of the Act, where none had previously existed. The redressing by the legislature of an imbalance which it has come to recognise is one thing; the creation of inequality quite another. To be allowed time to reflect on what should be done when one is considering how to deal with an evolving societal attitude is reasonable and understandable. But to create a situation of inequality

and then ask for the indulgence of time - in this case several years - as to how that inequality is to be cured is, to say the least, less obviously deserving of a margin of discretion.

37. In *Vallianatos*, most of the applicants were in established same sex relationships. In November 2008 the Civil Unions Law came into force in Greece. It created civil unions as an official form of partnership other than marriage. Such unions could only be entered by two adults of different sex. The applicants claimed that the failure to make civil unions available to same sex couples breached their rights under article 14, taken in conjunction with article 8. The government claimed that the restriction of civil unions to different sex couples was to enhance the legal protection of children born outside marriage and indirectly to strengthen the institution of marriage.

38. At para 85 of its judgment the court said:

“In cases in which the margin of appreciation afforded to states is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for 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 at issue ...”

39. Applying that approach to the present case, it is for the government and Parliament to show that it was necessary, in order to achieve the aim of having time to consider what to do about the difference in treatment between same sex and different sex couples brought about by MSSCA, to exclude different sex couples from CPA. One can understand why the government might have wished to maintain the status quo while considering various options. But that is a far cry from saying that it was *necessary* to exclude different sex couples from the institution of civil partnership.

40. It appears to me, therefore, that some, albeit not perfect, analogy can be drawn between *Vallianatos* and the present case. In *Vallianatos* same sex couples were excluded from civil unions. In this instance, different sex couples are being denied the range of choice available to same sex couples. In the present case, of course, as the respondent has been at pains to point out, the

inequality of treatment arose because of the enlarging of options for same sex couples. It is also observed that the appellants do not suggest that before the coming into force of MSSCA, there was an interference with their article 8 rights, when read together with article 14. But this is nothing to the point. The government and Parliament must be taken to have realised that, when MSSCA came into force, an inequality of treatment would inevitably arise. For the reasons given earlier, one must assume that they did not recognise that that inequality would engage article 8. But, again, that is not relevant. What must now be shown is that it was necessary to exclude different sex couples from civil partnerships for an indefinite period, while inquiries, consultations and surveys were conducted and a decision based on these could be made. I consider that that necessity has not been established.

Legitimate aim

41. The four-stage test designed to establish whether an interference with a qualified Convention right can be justified is now well-established. The test and its four stages were conveniently summarised by Lord Wilson in *R (Aguilar Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para 45. They are (a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right; (b) are the measures which have been designed to meet it rationally connected to it; (c) are they no more than are necessary to accomplish it; and (d) do they strike a fair balance between the rights of the individual and the interests of the community? (See also Lord Reed at para 75 of *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 and Lord Sumption in the same case at para 20).

42. The legitimate aim articulated by the respondent in the present appeal is the need to have time to assemble sufficient information to allow a confident decision to be made about the future of civil partnerships. But, as Lord Bingham stated in para 68 of *A v Secretary of State for the Home Department* (para 20.2 above), “[w]hat has to be justified is not the measure in issue but the difference in treatment between one person or group and another”. To be legitimate, therefore, the aim must address the perpetration of the unequal treatment, or, as Ms Monaghan put it, the aim must be intrinsically linked to the discriminatory treatment. In this case it does not and is not. The respondent does not seek to justify the difference in treatment between same sex and different sex couples. To the contrary, it accepts that that difference cannot be justified. What it seeks is tolerance of the discrimination while it sorts out how to deal with it. That cannot be characterised as a legitimate aim.

43. In reaching its conclusion that a wait and see (or, as Beatson LJ called it, “a wait and evaluate”) policy amounted to a legitimate aim, the Court of Appeal relied on the decision of ECtHR in *Walden v Liechtenstein* (Application No 33916/96) (unreported, 16 March 2000). In that case the applicant was a pensioner who complained that calculation of the joint pension due to himself and his wife by reference only to his own contribution record discriminated unfairly against couples where the wife had a better contribution record than the husband. A new law, correcting this imbalance was introduced on 1 January 1997. (In May 1996 the State (Constitutional) Court had found the law to be unconstitutional but refused to set it aside as it would have been disruptive and contrary to good administration.)

44. The applicant complained that, until the new law had come into force, his Convention rights had been violated. The Strasbourg court agreed with the domestic court that the previous law had infringed the applicant’s rights under article 14 taken with Article 1 of Protocol 1, but that the refusal to quash the discriminatory law was equivalent to a stay. The temporary preservation of the offending law served the legitimate aim of maintaining legal certainty, and the period of just over six months to rectify the position was proportionate.

45. This decision was described by Lord Hoffmann in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29; [2005] 1 WLR 1681 as “puzzling” - para 62. *Hooper* concerned benefits under the Social Security Contributions and Benefits Act 1992 which were payable to widows, but not to widowers. The Welfare Reform and Pensions Act 1999 amended the 1992 Act so as to provide survivors’ benefits payable to both sexes on the death of their spouses with effect from 9 April 2001, whilst preserving existing rights. The widower claimants alleged a breach of article 14 taken with article 8 for the period between the coming into force of the Human Rights Act 1998 in October 2000 and the coming into effect of the 1999 Act during which period they did not receive survivor’s benefits.

46. Although the claimants’ appeal was dismissed on other grounds, the House of Lords rejected the argument based on the *Walden* decision, Lord Hoffmann observing at para 62:

“... I can quite understand that if one has a form of discrimination which was historically justified but, with changes in society, has gradually lost its justification, a period of consultation, drafting and debate must be included in the time which the legislature may reasonably consider appropriate for making a change. Up to the

point at which that time is exceeded, there is no violation of a Convention right. But there is no suggestion in the report of *Walden v Liechtenstein* that the discrimination between married couples was ever justified and I find it hard to see why there was no violation of Convention rights as long as the old law remained in place.”

It is clear from this passage that Lord Hoffmann rejected the notion that an otherwise unjustified discriminatory measure can be justified by a need for a period to change the law. The present case does not involve a form of discrimination that was historically justified but has gradually lost its justification. The exact reverse is the case here. A *new* form of discrimination was introduced by the coming into force of MSSCA. There was, therefore, in the words of Lord Hoffmann, no reason to conclude that this discrimination “was ever justified”.

Rational connection

47. If the aim of the government and Parliament could properly be described as legitimate, I accept that there would be a rational connection between the aim and the delay in addressing the discrimination.

Less intrusive means

48. It is accepted by all that, before MSSCA came into force, there was no discrimination against same sex or different sex groups. Since Parliament and the government are to be taken as having realised that discrimination would begin with the Act taking effect, it seems to me that at least two options were available. First, its introduction could have been deferred until the researches which are now deemed necessary had been conducted. Secondly, the government could have extended the institution of civil partnerships to different sex couples until those researches had been completed. (A third, but admittedly less palatable, option would have been to suspend the availability of civil partnerships to same sex couples, while the inquiries were carried out.)

49. Each of these options would have allowed the aim to be pursued with less, indeed no, discriminatory impact. In the Court of Appeal, Briggs LJ suggested that the second of the options outlined above was a “practicable impossibility” but it is not clear on what material this conclusion was based. One can certainly recognise that it would not be a particularly attractive proposition to introduce civil

partnerships for different sex couples as an interim measure, if ultimately, they were to be abolished altogether but that does not make that course impossible as a matter of practicability.

50. I should make it unequivocally clear that the government had to eliminate the inequality of treatment *immediately*. This could have been done either by abolishing civil partnerships or by instantaneously extending them to different sex couples. If the government had chosen one of these options, it might have been theoretically possible to then assemble information which could have influenced its longer term decision as to what to do with the institution of civil partnerships. But this does not derogate from the central finding that taking time to evaluate whether to abolish or extend could never amount to a legitimate aim *for the continuance of the discrimination*. The legitimate aim must be connected to the justification for discrimination and, plainly, time for evaluation does not sound on that. It cannot be a legitimate aim for continuing to discriminate.

51. Since the less intrusive means stage of the proportionality exercise did not feature to any significant extent in oral argument and as it is unnecessary for me to reach a final view in order to dispose of the appeal, I say nothing more on the subject.

A fair balance

52. If the interference with the appellants' rights could be regarded as being in pursuit of a legitimate aim, I would have no hesitation in concluding that a fair balance between their rights and the interests of the community has not been struck. The point at which the now admitted discrimination will come to an end is still not in sight. The interests of the community in denying those different sex couples who have a genuine objection to being married the opportunity to enter a civil partnership are unspecified and not easy to envisage. In contrast, the denial of those rights for an indefinite period may have far-reaching consequences for those who wish to avail of them - and who are entitled to assert them - now. As Briggs LJ observed in the Court of Appeal, some couples in the appellants' position "may suffer serious fiscal disadvantage if, for example, one of them dies before they can form a civil partnership".

53. Moreover, undertaking "research with people who are current civil partners to understand their views on civil partnership and marriage, and their future intentions and preferences" - (command paper para 20) is, at best, of dubious relevance to the question of whether the continuing discrimination against

different sex couples can be defended. Given that further inquiries are said to be necessary in order to decide how to eliminate the unequal treatment suffered by different sex couples, the government's investigations should surely have been geared to determining the extent of demand for civil partnerships among those of different genders who had a settled and authentic objection to being married.

Institutional competence

54. This court was encouraged to refrain from making a declaration of incompatibility because, it was said, the decision not to take action about extending or abolishing civil partnerships was one which fell squarely within the field of sensitive social policy which the democratically-elected legislature was pre-eminently suited to make.

55. That argument has significantly less force if the decision not to take action at present does not pursue a legitimate aim but it must nevertheless be considered for what principled basis it may have.

56. The starting point is that the court is not obliged to make a declaration of incompatibility when it finds that a particular provision is not compatible with a Convention right. Section 4(2) of HRA provides that if the court is satisfied that the provision is incompatible with a Convention right, it *may* make a declaration of that incompatibility. The provision clearly contemplates that there will be circumstances in which the court considers that an item of primary legislation is not compatible with a Convention right but that it is not appropriate to have recourse to the section 4(2) power.

57. The circumstances in which such self-restraint should be exercised have not been comprehensively catalogued. This is understandable. Different considerations may favour reticence. Others may call for a declaration to be made. An obvious example where reticence was considered appropriate was the case of *R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening)* [2015] AC 657 where what was at stake was the compatibility of section 2 of the Suicide Act 1961 (which makes encouraging or assisting a suicide a criminal offence) with article 8 of the Convention. At the time of this court's decision, Parliament was due to debate the issues arising in the appeal in the context of the Assisted Dying Bill introduced by Lord Falconer into the House of Lords on 5 June 2014. It was argued that the court should defer expressing any final view of its own regarding the compatibility of section 2 with article 8 until Parliament had first considered that Bill. A clear majority of the nine-member panel concluded that the

issue was one that lay within the institutional competence of the Court, but, of that majority, only two considered that a declaration of incompatibility should be made. The others decided that, as Parliament was on the point of considering Lord Falconer's Bill it would be premature for the court to consider making a declaration of incompatibility. Parliament should first have the opportunity to consider the issues for itself.

58. I do not consider that *Nicklinson* sets a precedent for reticence in this case. The amendment to Mr Loughton's Bill which the government has agreed does no more than formalise the consultation process to which it was already committed. It does not herald any imminent change in the law to remove the admitted inequality of treatment. Even if it did, this would not constitute an inevitable contraindication to a declaration of incompatibility. In *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467 it was said that where the court finds an incompatibility, it should "formally record that the present state of statute law is incompatible with the Convention" - para 55.

59. Observations by Lord Hobhouse at para 79 are especially pertinent:

"The Government cannot yet give any assurance about the introduction of compliant legislation. There will be political costs in both the drafting and enactment of new legislation and the legislative time it will occupy. The incompatibility having been established, the declaration under section 4 should be made."

60. In this context, it is salutary to recall that a declaration of incompatibility does not oblige the government or Parliament to do anything. This point was made in para 343 of *Nicklinson*:

"An essential element of the structure of the Human Rights Act 1998 is the call which Parliament has made on the courts to review the legislation which it passes in order to tell it whether the provisions contained in that legislation comply with the Convention. By responding to that call and sending the message to Parliament that a particular provision is incompatible with the Convention, the courts do not usurp the role of Parliament, much less offend the separation of powers. A declaration of incompatibility is merely an expression of the court's conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right. In other words, the courts say to Parliament, 'This

particular piece of legislation is incompatible, now it is for you to decide what to do about it.' And under the scheme of the Human Rights Act 1998 it is open to Parliament to decide to do nothing."

61. In my view, there is no reason that this court should feel in any way reticent about the making of a declaration of incompatibility. To the contrary, I consider that we have been given the power under section 4 of HRA to do so and that, in the circumstances of this case, it would be wrong not to have recourse to that power.

Conclusion

62. I would allow the appeal and make a declaration that sections 1 and 3 of CPA (to the extent that they preclude a different sex couple from entering into a civil partnership) are incompatible with article 14 of ECHR taken in conjunction with article 8 of the Convention.