**[2007–09 Gib LR 204]**

## CERISOLA v. ATTORNEY-GENERAL

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Lord Carswell, Lord Mance, and Lord Neuberger of Abbotsbury): March 6th, 2008

*Limitation of Actions—extension of time—minor "in custody of parent"—minor "in custody of parent" at time of personal injury (within Limitation Act, s.28(2)(b)) may not rely on unconstitutionality of denial of access to courts if claim only time-barred by solicitors' negligence*

*Limitation of Actions—extension of time—minor "in custody of parent"—absence of general discretion for court to extend time for claim by minor "in custody of parent" not unconstitutional as no reduction of access to courts guaranteed by 2006 Constitution, s.8(8)*

*Limitation of Actions—extension of time—minor "in custody of parent"—for purposes of 2006 Constitution, s.14, different treatment by Limitation Act, s.28(2)(b) of minors in and not in "custody of parent" not discrimination—objective, lawful and justified in providing alternative access route to courts for minors in different parental situations*

The appellant brought an action against the Government in the Supreme Court to recover damages for personal injury.

In January 1995, the appellant, who was then four years old, was walking in the area of the Upper Rock with his family when a rock fall occurred, causing him serious injury. The appellant's parents consulted Attias & Levy ("the solicitors") and they entered into correspondence with Isola & Isola ("Isolas") acting for Sights Management Ltd., who were believed to be the managers of the Upper Rock on behalf of the Government and Gibraltar Tourism Agency Ltd. Isolas were notified of the claim on March 24th, 1995, sending a reply four days later that they were seeking instructions and denying liability pending instructions. By January 30th, 1998, Isolas were unable to obtain instructions and following a further two letters to Isolas in 1998 and 1999, on November 25th, 1999 the solicitors submitted the claim directly to the Ministry for Tourism and Transport. After inconclusive correspondence with the Ministry and the Attorney-General's Chambers, on September 19th, 2005, the solicitors issued a claim form against the Attorney-General, with the appellant (by then 14 years old) represented by his litigation friend and mother, Maria Elena Cerisola. When the action came to trial, both the

Supreme Court (Schofield, C.J.) and the Court of Appeal (Staughton, P., Stuart-Smith and Kennedy, JJ.A.) determined, as a preliminary issue, that it was time-barred and dismissed the appellant's claim. The proceedings in the Court of Appeal are reported at 2005–06 Gib LR 238.

On further appeal, the appellant submitted that (a) s.28(2)(b) of the Limitation Act (which precluded the extension of the three-year limitation period for personal injuries to six years after a disability (including minority) ceased, unless that person "was not . . . in the custody of a parent" when the action accrued) offended the guarantee in s.8(8) of the 2006 Constitution of access to the courts and "a fair hearing within a reasonable time"; (b) the absence of any statutory mechanism in the Limitation Act to enable the court to extend the time-limit in the interests of justice in his case also conflicted with s.8(8) of the Constitution; and (c) s.28(2)(b) discriminated against minors in the custody of a parent contrary to the protection against discrimination afforded by s.14 of the Constitution.

In reply, the Attorney-General submitted that (a) the custody of a parent rule, though heavily criticized (and repealed in England), nevertheless remained in force in Gibraltar and therefore applied to the appellant who was a minor in the custody of his parents at the time the cause of action accrued and for a further three years; (b) since he was in the custody of a parent, by virtue of s.28(2)(b) of the Limitation Act the extended limitation period did not apply and thus his claim was time-barred having been brought after the expiry of the three-year limitation period; (c) there was no breach of s.8(8) of the Constitution since the appellant had sufficient access to the courts as his parents initially attempted to commence proceedings within the limitation period, but their solicitors' subsequent delay had invalidated the claim; (d) the custody of a parent rule in s.28(2)(b) did not discriminate against the appellant in breach of s.14 of the Constitution as the difference in treatment was reasonable, objective and justified since it was expected, as was the case with the appellant, that the parent of the minor would bring a claim on the minor's behalf; and (e) in any case, the appellant had no claim under s.14 of the Constitution since it followed art. 14 of the European Convention of Human Rights which was only engaged when a discrimination claim was coupled with the breach of another of the rights guaranteed by the Convention—which was not the case here.

**Held,** dismissing the appeal:

(1) The Court of Appeal had been correct to apply s.28(2)(b) of the Limitation Act and the appellant's claim would be dismissed as time-barred as he was in the custody of a parent at the time the cause of action accrued and his claim was therefore subject to the three-year limitation period. The reason for his loss of opportunity to bring a claim was not caused by any injustice resulting from his being in the custody of a parent (since his parents had properly attempted to commence proceedings in March 1995) but to the solicitors' delay in failing to bring the claim within the three-year limitation period. Neither the custody of a parent rule nor

the absence of the court's discretion to extend the time-limit contravened s.8(8) of the Constitution. Although the custody of a parent rule could operate unfairly (*e.g.* if the parent had become unable to bring a claim by reason of illness or death, or had itself been responsible for the injury to the minor claimant), it was not unfair to apply the rule to the appellant's case as the application of s.28(2)(b) and the absence of judicial discretion to extend the limitation period simply meant that the time-limit of three years for bringing a claim should have been adhered to as it could not be extended (para. 22; para. 24; para. 26; para. 31).

(2) There was no discrimination against a person in the appellant's position in breach of s.14 of the Constitution as, unlike art. 14 of the European Convention on Human Rights, it was a free-standing provision and the application of the custody of a parent rule simply provided an alternate route of access to the courts for minors in different parental situations. The difference in the treatment of minors who were and were not in the custody of their parents was objective, lawful and justified. The only way in which the rule could be in breach of the Constitution would have been if it created an obstacle to justice based on the facts of a particular case—which was not so here as he had not been deprived of access to the courts (paras. 33–34; para. 36–38).

**Cases Cited:**

(1) *Ashingdane* v. *United Kingdom*, [1985] ECHR 8; (1985), 7 E.H.R.R. 528, referred to.

(2) *Att.-Gen.* v. *Shimidzu*, 2005–06 Gib LR 34, referred to.

(3) *Belgian Linguistic Case* (1968), 1 E.H.R.R. 252, referred to.

(4) *Brown* v. *Stott*, [2003] 1 A.C. 681; [2001] 2 W.L.R. 817; [2001] 2 All E.R. 97; [2001] S.C. 43; [2001] S.L.T. 59; [2001] S.C.C.R. 62; [2001] R.T.R. 11; [2001] H.R.L.R. 9; [2001] UKHRR 333; (2001), 11 B.H.R.C. 179, referred to.

(5) *Hewer* v. *Bryant*, [1970] 1 Q.B. 357; [1969] 3 W.L.R. 425; [1969] 3 All E.R. 578, *dicta* of Lord Denning, M.R. referred to.

(6) *James* v. *United Kingdom* (1986), 8 E.H.R.R. 123, *dicta* of Vilhjálmssón, J. referred to.

(7) *R.* v. *Spear*, [2003] 1 A.C. 734; [2002] 3 W.L.R. 437; [2002] 3 All E.R. 1074; [2003] 1 Cr. App. R. 1; [2002] H.R.L.R. 40; [2002] H.R.L.R. 43; [2002] A.C.D. 97; [2002] UKHL 31, referred to.

(8) *Stubbings* v. *United Kingdom*, [1996] ECHR 44; [1997] 1 F.L.R. 105; [1997] 3 F.C.R. 157; [1997] Fam. Law 241; (1996), 23 E.H.R.R. 213; 1 B.H.R.C. 316, referred to.

(9) *Todd* v. *Davison*, [1972] A.C. 392; [1971] 2 W.L.R. 898; [1971] 1 All E.R. 994, referred to.

**Legislation construed:**

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.8(8): The relevant terms of this sub-section are set out at para. 10.

s.14: The relevant terms of this section are set out at para. 11.

Limitation Act 1960 s.28(1): The relevant terms of this sub-section are set out at para. 7.
s.28(2)(b): The relevant terms of this paragraph are set out at para. 8.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 17 (1953)), art. 14:

"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as . . . birth or other status."

*K. Azopardi* for the appellant;
*R.R. Rhoda, Q.C., Attorney-General,* appeared in person.

1 **LORD NEUBERGER OF ABBOTSBURY,** delivering the opinion of the Board: This is an appeal brought by Angelo Cerisola against a decision of the Court of Appeal for Gibraltar, upholding the decision of Schofield, C.J., that his claim against the Attorney-General was time-barred pursuant to the provisions of the Limitation Ordinance 1960.

**The factual background**

2 The relevant facts are as follows: On January 8th, 1995, the appellant, who was then four years old, was walking in the area of the Mediterranean Steps with his twin brother and grandfather, when a rock-fall occurred, causing him serious injuries, mainly to his left arm. Soon after the accident, the appellant's parents consulted solicitors, Attias & Levy ("the solicitors") who entered into correspondence with solicitors for Sights Management Ltd., Isola & Isola ("Isolas"), who were believed to be the managers of the Upper Rock, on behalf of the Government and Gibraltar Tourism Agency Ltd., a company owned by the Government and responsible for tourism on the Upper Rock.

3 The claim was notified to Isolas on March 24th, 1995, who replied four days later, stating that they were seeking instructions and denying liability pending those instructions. Nothing then happened until June 1997 when the solicitors again wrote to Isolas. After sporadic reminders from the solicitors, Isolas said that they had been unable to obtain instructions, but they would try again. A month later on January 30th, 1998, in a telephone conversation, Isolas informed the solicitors that they were still without instructions, and the solicitors said that they had obtained a medical report and would revert with general assessments with damages. The solicitors then sent two chasing letters in 1998 and another in January 1999.

4 On November 25th, 1999 the solicitors wrote to the Ministry for Tourism and Transport directly, intermitting a claim. Sporadic correspondence then

ensued with the Ministry and the Attorney-General's Chambers, with no apparent result, save that a site meeting took place on July 10th, 2003. Things then seem to have lapsed until February 2005, when further sporadic correspondence again proved inconclusive. On September 19th, 2005, the solicitors finally issued a claim form against the Attorney-General, with the appellant acting through his litigation friend and mother, Maria Elena Cerisola.

5 Once service of the proceedings had been effected on the Attorney-General, he took the point that they had been issued out of time, as the claim was subject to a three-year limitation period. If this contention were justified, it would have disposed of the claim, and accordingly it was sensibly decided that it should be dealt with as a preliminary issue. Both the Chief Justice and the Court of Appeal (where the main judgment was given by Stuart-Smith, J.A. with Staughton, P. and Kennedy, J.A. concurring) upheld the Attorney-General's contention that the proceedings were time-barred, as a consequence of which, the claim was dismissed. The Court of Appeal granted the appellant permission to appeal, and accordingly the issue now comes before the Board.

6 Although the appellant raised additional points in the courts below, the issues before the Board involve consideration of three arguments, all of which involve the contention that the Limitation Ordinance 1960, now known as the Limitation Act 1960 ("the 1960 Act"), contravenes the Gibraltar Constitution.

**The relevant legislative provisions**

7 Section 4 of the 1960 Act provides that the ordinary period for bringing a claim in tort in Gibraltar is six years but that where the claim is for personal injuries the period is three years. Section 28(1) extends the time for bringing a personal injury claim where the claimant is under a disability to such time "before the expiration of [three] years from the date when the person ceased to be under a disability." "Disability" is defined in s.2(2) as extending to persons who are minors or are suffering from mental disorder.

8 The crucial provision of the 1960 Act for present purposes is s.28(2)(b) which provides that s.28 "shall not apply unless . . . the person under the disability was not, at the time when the right of action accrued to him, in the custody of a parent."

9 The present appeal turns on whether the so-called "custody of a parent" rule in s.28(2)(b) contravenes the Gibraltar Constitution and, if so, what the consequences are for this case. At the time that the facts relevant to the present appeal occurred, the Constitution in force was the 1969 Constitution. However, it has since been replaced by the 2006 Constitution ("the Constitution") which came into force as a result of the Gibraltar

Constitution Order 2006 ("the 2006 Order") on "the appointed day" in January 2007. Very sensibly, the parties have agreed that this appeal should proceed by reference to the current Constitution.

10 Section 8(8) of the Constitution requires independent and impartial courts to be established "to determine the existence or extent of any civil right or obligation." It also provides that "where proceedings for such a determination are instituted by any person before such a court . . . the case shall be given a fair hearing within a reasonable time."

11 Section 14 of the Constitution provides in sub-s. (1) that, subject to certain exceptions, "no law shall make any provision that is discriminatory either of itself or in its effect." Section 14(3) defines "discriminatory" as—

> "affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of or social origin, political or other opinions or affiliations, colour, language, sex, creed, property, birth or other status, or such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory, whereby persons of one such description are subjected to disability or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description."

Section 14(4) excludes various laws from the ambit of sub-s. (1) including, in para. (e), any law—

> "so far as that law makes provision . . . whereby persons of any such description as is mentioned in subsection (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is consistent with the provisions of the European Convention of Human Rights."

12 Section 16 (1) of the Constitution provides:

> "If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress."

13 Annex 2 to the 2006 Order includes the following paragraph ("para. 2") under the title "Existing Laws":

> "(1) . . . [T]he existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the

> Constitution and shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution."

14 The three arguments raised by Mr. Keith Azopardi, in the course of his excellent oral submissions on behalf of the appellant, are as follows: (i) the effect of s.28(2)(b) is wrongly to deprive a child in the custody of a parent from access to the courts contrary to s.8(8); (ii) the absence of any statutory mechanism in the 1960 Act to enable the court to extend time in the interest of justice in an appropriate case contravenes s.8(8); and (iii) s.28(2)(b) contravenes s.14(1), as it discriminates indefensibly against children in the custody of a parent. These three arguments will be addressed in turn, although much of the reasoning on the first issue applies equally to the second and third issues.

**The first argument—s.28(2)(b) infringes s.8(8)**

15 The custody of a parent rule was first introduced into English law in the Limitation Act 1939, which provided the template for the 1960 Act. The rule was subsequently criticized in various judgments, most notably by Lord Denning, M.R. in *Hewer* v. *Bryant* (5) as he pointed out ([1969] 3 All E.R. at 580):

> "[N]ot everyone . . . was prepared to be his [a plaintiff's] next friend, especially as a next friend is liable to pay all the costs if he loses. Even the most loving parent might hesitate, and a neglectful parent would not bother. No parent was under any duty to bring an action on behalf of his child . . . Seeing, therefore, that an infant could not bring an action himself, and that no one was under any duty to bring it for him, the law (in its natural solicitude for infants) said that time did not run against an infant until he became of age and was able to bring an action himself. In 1939 Parliament started to encroach on this merciful principle . . . Parliament thus showed itself more solicitous for defendants and their insurers than for infants. It still left an infant without any right to bring an action for *himself*. It put *no one* under any responsibility to bring an action for him. Yet it barred him from any claim unless he proved that at the time of the accident he was not 'in the custody of a parent.'"

The history of the custody of a parent rule and the criticisms of it are more fully set out in the 20th Report of the Law Reform Committee, *Interim Report on Limitation of Actions in Personal Injury Claims*, at Appendix B, para. 98, at 45 (1974).

16 The custody of a parent rule, as enshrined in the English Limitation Act 1939 and in the Gibraltar 1960 Act, can also lead to inconsistencies and unfairnesses. Thus, the rule covers grandparents but not aunts and uncles; the rule applies even if the parents are responsible for the injury:

the rule applies even where the parents die, say, a day or two after the accident subject to the potential claim; the rule applies even if the child is abandoned by his parents immediately after the accident, but it does not apply to an orphaned child who is adopted immediately after the act.

17 For these reasons (among others), the 1974 Report recommended that the custody of a parent rule should be abolished, and that recommendation was duly adopted when the English limitation law was re-codified in the Limitation Act 1980. However (although amendments may have been made from time to time), the law of Gibraltar relating to limitation has not been re-codified since the 1960 Act, and in particular the provisions of s.28(2)(b) remain in force.

18 Of course, the fact that the law of Gibraltar has not followed the law of England does not mean that it is *ipso facto* open to attack or inconsistent with the Constitution (see *Att.-Gen.* v. *Shimidzu* (2)). Furthermore, the inclusion of some sort of custody of a parent rule is not, Mr. Azopardi accepts, inherently objectionable. He would not, for instance, contend that a custody of a parent rule which included a provision that it was to only apply in circumstances where it would not be unfair, was objectionable. In their Lordships' view this concession must be correct. What Mr. Azopardi criticizes is the blunt nature, and crude and potentially unfair consequences, of s.28(2)(b). In their Lordships' opinion, Mr. Azopardi's analysis is correct as a matter of general principle.

19 As pointed out at para. 17 of the *Edmund Davies Committee Report* (1962, Cmnd. 1829), cited in the 1974 Report at para. 23, the general purpose of limitation provisions is "to protect defendants from being vexed by stale claims . . . to encourage plaintiffs not to go to sleep on their right . . . [and] to ensure that a person may with confidence feel that after a given time he may treat as being finally closed an incident which might have led to a claim against him" (see *Todd* v. *Davison* (9) to the same effect). This principle was also accepted by the European Court of Human Rights ("E.Ct.H.R."), when considering the issue of access to the courts under art. 6 of the European Convention on Human Rights and Fundamental Freedoms ("the Convention") in *Stubbings* v. *United Kingdom* (8) (23 E.H.R.R. 213, at paras. 50–51).

20 In other words, as in so many other areas of law, limitation provisions have to balance the rights and interests of both plaintiffs and defendants, and it is a mistake to concentrate on the rights and interests of only one of those two classes when considering the justice of a particular provision. Without some custody of a child provision, a potential defendant who happens to injure a young child is potentially substantially worse off than one who injures an adult. Further, if a child has a right to bring proceedings before coming of age through a litigation friend (and it is very common) it would be expected frequently to be the case that a child

in the custody of a parent would take advantage of that right. Including some custody of a parent rule in a statutory limitation code would therefore not be objectionable under s.8(8).

21 The fact that the rule is not included in the limitation legislation of many, or even all, contracting parties to the Convention does not mean that it would infringe art. 6, the equivalent to s.8(8). The E.Ct.H.R. has recognized that different countries will, and can, have different rules governing limitation of actions and that a relatively wide margin of appreciation should be allowed in that connection, provided of course, that there is a real and practical opportunity of access to the courts to adjudicate a potential claim. Thus, in *Ashingdane* v. *United Kingdom* (1), the E.Ct.H.R. accepted that limitation rules (7 E.H.R.R. 528, at para. 57) "may vary in time and place according to the needs and resources of the community and of individuals" (a view reflected in its later decision in *Stubbings* (23 E.H.R.R. 213, at paras. 50–51). Accordingly, as the court went on to say in *Ashingdane* (7 E.H.R.R. 528, at para. 51) provided that it does not impair "the very essence of the right [of access to the courts]" and that it (*ibid.*) "pursue[s] a legitimate aim" which satisfies the requirement of proportionality, a limitation provision will not be struck down.

22 Their Lordships readily accept that there will almost certainly be circumstances in which the application of s.28(2)(b) to a particular claim would result in unfairness sufficient to give rise to the breach of the claimant's right of access to the court pursuant to s.8(8). There may be dangers in generalizing as each case will turn on its own particular facts, but it would seem likely that s.8(8) would be infringed if a claimant was prevented from bringing an action by the custody of a parent rule (i) in circumstances where the parent had been responsible for the injury; or (ii) in circumstances where the parent had died or become incapacitated as a result of the very accident giving rise to the claimant's potential claim, and the child was not in the care of another parent or a grandparent. Just as there may be special facts which would not render the application of s.28(2)(b) unfair even in such circumstances, so, it should be emphasized, there may be many other circumstances in which application of the section would be unfair.

23 However, the problem faced by the appellant is that the application of the custody of a parent rule in s.28(2)(b) in this particular case is not unfair. Indeed, once it is accepted (as it has been and as it must be) that the imposition of a custody of a parent rule can be justified in principle, then it seems to their Lordships that if it cannot be justified on the facts of the present case, it is very hard to see in what circumstances it could be justified.

24 The appellant was in the custody of both his parents at the time of the accident and during the whole of the three subsequent years; his parents

appreciated immediately that the appellant had suffered serious injury; his parents also realized immediately that it would be appropriate to instruct solicitors on his behalf; his parents were prepared to instruct solicitors in that connection; his parents did instruct solicitors; the solicitors accepted those instructions; indeed, the solicitors acted on those instructions. The only thing that went wrong is that the solicitors apparently failed to appreciate the existence of the limitation period, and therefore failed to advise the issue of proceedings within the three-year limitation period, or to ensure that such proceedings were issued. If, as Mr. Azopardi rightly accepts, the custody of a parent rule can be justified in some circumstances, it seems to their Lordships that there cannot be any objection to it being applied in this case.

25 In these circumstances, the only way in which the appellant can succeed on his first argument is either to contend that, because application of s.28(2)(b) may (indeed, as their Lordships accept, will) infringe s.8(8) in some circumstances, it must be disapplied in all circumstances, or alternatively to contend that s.28(2)(b) should be so re-fashioned by the court as to permit the present claim to succeed.

26 In their Lordships' view, neither of those arguments can be right. Where, as in the present case, the application of s.28(2)(b) does not result in any unconstitutional deprivation of access to the courts, then application of the provision in question does not conflict with s.8(8). Where, however, the facts are such that application of s.28(2)(b) would infringe s.8(8), then, by virtue of para. 2 to Annex 2 of the Constitution, it would be necessary for the court to impose appropriate "modifications, adaptations, qualifications [or] exceptions" on s.28(2)(b) so as to enable it to comply with s.8(8).

27 The notion that one should consider whether a constitutional right has been infringed by reference to the facts of the particular case is supported by the words "in relation to him" in s.16(1) of the Constitution. It is also consistent with the jurisprudence of the E.Ct.H.R., which establishes that, at least in a case where the complaint is not against the principle of the law under attack, but against its terms or its application, one should look at the facts of the particular case. Thus, as already mentioned, in its judgment in *Ashingdane* (7 E.H.R.R. 528, at para. 57), the E.Ct.H.R. said limitation provisions "may vary in time and in place according to the needs and resources of the community *and of individuals*" [Emphasis supplied.]. Their Lordships were also referred to the E.Ct.H.R.'s judgment in *James* v. *United Kingdom* (6) which related to art. 1 of the first protocol to the Convention, where the court (Vilhjálmssón, J.) (8 E.H.R.R. 123, at para. 36) emphasized "the principle that, without losing sight of the general context of the case, it must, in proceedings originating in an individual application, confine its intention, as far as possible, to the concrete case."

28 The fact-sensitive nature of the enquiry in cases involving alleged breaches of art. 6 of the Convention, the equivalent for present purposes of s.8(8), was also emphasized by the Board in *Brown* v. *Stott* (4) and also by the House of Lords in *R.* v. *Spear* (7) ([2003] 1 A.C. 734, at para. 66).

29 It is true that, in the *James* (6) case itself, the E.Ct.H.R. in its judgment considered whether the legislation as a whole contravened the Convention. However, that was not a case concerned with art. 6 of the Convention, and, more importantly, as consideration of the issues identified (8 E.H.R.R. 123, at para. 34) shows, the applicants in that case were attacking the whole basis of the legislation concerned (the Leasehold Reform Act 1967), not its application on the facts of the particular case. Here, however, as already mentioned, the appellant has quite rightly not attacked the propriety of a custody of the parent rule, merely the blanket effect of s.28(2)(b).

30 It is right to add that, even if their Lordships were persuaded that it was appropriate to apply para. 2 in every case where the defendant relies on s.28(2)(b), it would not have assisted the appellant in the present case. In effect, such an approach in this case would merely involve arriving at the same result as that indicated in the preceding paragraphs by a slightly different, and more cumbersome, route. The application of para. 2 to s.28(2)(b) must, as their Lordships see it, be effected by reference to the facts of a particular case. It would seem unnecessarily hypothetical and quite unrealistic if para. 2 were to be applied to a provision such as s.28(2)(b) in a particular case, without reference, indeed close reference, to the specific facts of that case. On that basis, essentially for the reasons already given, the application of para. 2 would not avail the appellant in the present case, as no "modifications, adaptations, qualifications or exceptions" need to be applied to s.28(2)(b). That is because, on the facts of this particular case as summarized in para. 24 above, reliance on s.28(2)(b) would not infringe the rights of the appellant under s.8(8).

31 Before leaving this first ground, their Lordships would add that another way of reaching this conclusion may be to focus on the real reason for the appellant being barred from proceeding with his claim. The direct cause was not really the effect of s.28(2)(b), but the unfortunate failure of the solicitors to appreciate the existence of the three-year limitation period so that the proceedings were not started in time. Of course, if it were not for s.28(2)(b), the appellant's claim would not be time-barred, however, it would be a little surprising if the appellant could invoke the alleged unconstitutionality of that provision on the ground that it prevented his having access to the courts, when the real reason for his being barred from access was the solicitors' oversight.

**The second and third grounds—discretion and s.14**

32 As to the second ground of appeal, the appellant contends that the absence of any provisions in the 1960 Act which give the court discretion in appropriate circumstances to allow claims to be brought out of time represents an infringement of s.8(8). Section 33 of the English Limitation Act 1980 gives the court discretion to permit a claim for personal injuries to proceed, even where it has been began outside the three-year limitation period. In exercising its discretion, the court is required to take into account the facts and matters of sub-s. (3) of that section. The Gibraltar Limitation Act 1960 has no equivalent provision, although ss. 5–7 do enable, indeed require, the court to extend time in circumstances where "material facts relating to [the] cause of action" were "at all times outside the knowledge (actual or constructive)" of the potential claimant.

33 Their Lordships are prepared to accept, without deciding, that there could be cases where the application of a strict statutory time-bar, which was generally unexceptionable, could, on the unusual facts of a particular case, operate so unfairly as to represent a breach of s.8(8). If that is right, then, in such a case, the provisions of para. 2 would come into play.

34 The problem for the appellant in the present case is that, for the reasons already given, the application of s.28(2)(b) of the 1960 Act to his claim does not represent on the particular facts of this case, an infringement of his rights under s.8(8). In those circumstances, essentially for the same reasons for rejecting his case on the first issue, their Lordships would reject his case on the second issue.

35 That leaves the third issue. There was some debate whether the rights under s.14 were free-standing or whether, as with the rights granted under art. 14 of the Convention, some other right under the 2006 Constitution must also be engaged. It is unnecessary to decide that point in this case, because on any view, another right is engaged, namely that contained in s.8(8). In this connection, the fact that a claim under art. 14 of the Convention has to engage a right under one of the other articles does not mean that a breach of one of the other articles has to be established: otherwise, art. 14 would be a dead letter.

36 It is right to say, however, that, at least on the basis of the arguments advanced, their Lordships incline to the view that, unlike art. 14 of the Convention, the right against discrimination in s.14 is free-standing. That appears to be the natural meaning of s.14(1) and, despite the Attorney-General's argument to the contrary, there does not appear to be anything elsewhere in the Constitution to call that conclusion into question.

37 Reverting to the third issue, the Attorney-General rightly accepts that s.14(3) enables s.14(1) to be potentially engaged where children in the custody of a parent are differently treated from children not in the custody

of a parent. However, he relies on a passage in a judgment of the E.Ct.H.R. in the *Belgian Linguistic Case* (3), in relation to art. 14 of the Convention (1 E.H.R.R. 252, at para. 10) namely that "the principle of equality of treatment is violated if the distinction [in treatment] has no objective and reasonable justification." The passage continues (*ibid.*):

> "The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment . . . must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised."

38 This approach is applicable to allegations of infringement of s.14(1), in the light of s.14(4)(e). In their Lordships' opinion, the contention that s.14 is infringed in the present case should be rejected for similar reasons for rejecting the appellant's case on the first and second issues. The acceptability of the custody of a parent rule in principle applies to an allegation of infringement of s.14, just as much as to a claim under s.8(8). There is a difference between a child in the custody of a parent or grandparent and a child not in such custody, and, although there could be cases where, on the particular facts, it could represent unjustifiable discrimination if a child in the custody of a parent were barred from bringing proceedings, that is not the position on the facts of the present case, as summarized in para. 24 above.

**Disposition**

39 For these reasons, their Lordships will humbly advise Her Majesty that this appeal should be dismissed. The parties have agreed that there should be no order for costs.

*Appeal dismissed.*