[2007–09 Gib LR 273]

R. (Application of RODRIGUEZ) v. MINISTER OF HOUSING and HOUSING ALLOCATION COMMITTEE

SUPREME COURT (Dudley, Ag. C.J.): December 3rd, 2008

Constitutional Law—fundamental rights and freedoms—protection from discrimination—no discrimination under Constitution if same-sex couple denied joint tenancy of Government housing—comparator for same-sex couple is unmarried opposite-sex couple—if both treated in same way, no discrimination

Housing–allocation of Government housing—exercise of discretion—no fettering of discretion by Housing Allocation Committee by applying usual policy rule without considering in exercise of discretion) whether departure justified

The claimant appealed to the Supreme Court against the second defendant's decision denying her a joint tenancy of a Government-owned flat with her same-sex partner.

The claimant and her same-sex partner (Ms. Muscat) had been in a stable relationship for 19 years. The claimant lived in Government-owned housing and the two women were financially interdependent. The claimant was registered as Ms. Muscat's next-of-kin and named "beneficiary" such that on Ms. Muscat's death, the claimant would be entitled to receive any of her funds not exceeding £5,000. The claimant was granted tenancy of her flat by the Housing Manager of the Government of Gibraltar and, under cl. 4.3(6) of her tenancy agreement, she could only allow persons

specifically mentioned in Schedule 3 to the tenancy agreement to sleep on the premises without the prior consent of the Housing Manager. The claimant was the only person named on the tenancy agreement. The claimant requested that Ms. Muscat be made a joint tenant of her flat and the Housing Manager referred the matter to the Housing Allocation Committee. The claimant provided the Committee with background information about the relationship and the financial interdependence between the two women which highlighted the claimant's poor health and their concerns that Ms. Muscat would not inherit the tenancy on the death of the claimant.

The Committee rejected the claimant's application on the grounds that there had been no reason for it to depart from the standard Government policy that, under the Housing Allocation Scheme, s.5(b), only persons who were either married, or unmarried with a child in common, could become joint tenants of Government-owned properties and since the claimant's case did not fall within either category and there was no alternative policy for same-sex couples, it should be adhered to. The claimant challenged the decision of the Committee.

She submitted, *inter alia*, that (a) the defendants had discriminated against her unlawfully, contrary to s.14 of the Constitution and the common law principle of equality, by treating same-sex couples in the same way as unmarried opposite-sex couples since opposite-sex couples had the option to marry in Gibraltar whereas same-sex couples did not—and as a pre-requisite for the grant of a joint tenancy, she and her partner should be treated in the same way as married opposite-sex couples; (b) the second defendant had fettered its discretion to grant her a joint tenancy through its rigid reliance on its policy and failure to consider adequately the evidence she had presented before the proceedings had commenced; (c) the defendants had contravened the prohibition of discrimination in s.14 of the Constitution, on which she could rely because, unlike art. 14 of the European Convention, it was a stand-alone prohibition which did not depend on the breach of another right to be invoked; (d) the court, on interpreting the rights guaranteed by the Constitution should "take account of" decisions of the European Court of Human Rights, as required by s.18 of the Constitution, and its decisions should be compatible with the equivalent European system; and (e) it followed that the rights guaranteed by the Constitution should be protected through a progressive interpretation of the Constitution in light of current conditions and, if necessary, the European Convention rights should be extended to protect the claimant adequately.

In reply, the defendants initially submitted that the claimant could not rely on the prohibition of discrimination in s.14 of the Constitution because, like art. 14 of the European Convention, it required the breach of another right for it to be invoked and there was no other right breached in the claimant's case. This submission was subsequently withdrawn as the defendants accepted that the case fell within the ambit of the right to "privacy of home" and the right to respect for "private and family life" and

"home" as prescribed by ss. 1 and 7 of the Constitution and a potential breach of these rights was enough for s.14 to be invoked.

They nevertheless submitted, *inter alia*, that (a) there had in fact been no discrimination, breach of the claimant's right to her "privacy of home" or right to respect for "private and family life" and "home" in ss. 1 and 7 of the Constitution since the proper comparator for allocating housing for a same-sex couple was an unmarried opposite-sex couple and, in treating the claimant's case as that of an unmarried opposite-sex couple, the Committee had fairly and correctly decided it; (b) the Housing Allocation Committee had not fettered its discretion since it had considered all relevant information at the time and had reached a reasonable decision; the evidence referred to by the claimant could not be considered as formal evidence but as pre-action communication for which legal advice was required; (c) there was no specific reason why the Committee should depart from its policy regarding joint tenancies contained in s.5(b) of the Housing Application Scheme since the claimant and her partner were neither married nor were they unmarried parents with a child in common; and (d) under s.18 of the Constitution, the court should "take account of" the decisions of the European Court of Human Rights but there was no need to go beyond those decisions and since it had not formally recognized the rights of unmarried same-sex couples, the same should apply to the claimant's case.

Held, granting the application and remitting the matter to the Committee for reconsideration:

(1) There had been no discrimination and the claimant's joint tenancy application would be remitted to the Housing Allocation Committee for reconsideration. The Committee should have reviewed the claimant's case fully (considering the contents of the claimant's pre-action communication and the need to use the limited supply of Government housing efficiently) before it assessed whether there was a need for a departure from its usual policy. Having not done as required of it, the Committee had dismissed the claimant's application prematurely and had fettered its discretion—its decision was procedurally flawed and should therefore be reviewed (para. 49; para. 51).

(2) Although it should still review its decision, the Committee had not discriminated against the claimant or Ms. Muscat. It had correctly determined that the proper comparator for same-sex couples was not that of married opposite-sex couples but of unmarried opposite-sex couples. In Gibraltar, there was no status equivalent to marriage for unmarried couples of either the same or opposite sex and since unmarried opposite-sex couples could not be granted a joint tenancy of Government housing, the treatment of same- and opposite-sex couples was the same and the Committee's rejection of the claimant's application did not constitute discrimination or offend ss. 1 or 7 of the Constitution. Although it was not necessary for the court to decide the issue, it observed that the claimant may have been able to rely on the prohibition of discrimination in s.14 of

the Constitution because, unlike art. 14 of the European Convention, it could be read as a stand-alone provision which did not require the breach of another fundamental right in order to be invoked (paras. 22–24; para. 38).

(3) The court was required by s.18 of the Constitution to "take account of" decisions of the European Court of Human Rights and should ensure its decisions were compatible with those of that court. Although national courts should therefore, in the absence of special circumstances, follow clear and constant Strasbourg case law, there was no need to go beyond the protection provided by it (paras. 28–29).

Cases cited:

(1) *British Oxygen Co. Ltd.* v. *Minister of Technology*, [1971] A.C. 610; [1969] 2 W.L.R. 892; [1970] 3 W.L.R. 488; [1970] 3 All E.R. 165, *dicta* of Lord Reid considered.

(2) *Cerisola* v. *Att.-Gen.*, 2007–09 Gib LR 204, *dicta* of Lord Neuberger considered.

(3) *Ghaidan* v. *Godin-Mendoza*, [2004] 2 A.C. 557; [2004] 3 W.L.R. 113; [2004] 3 All E.R. 411; [2004] 2 F.L.R. 600; [2004] 2 F.C.R. 481; [2004] H.R.L.R. 31; [2004] UKHRR 827; [2004] H.L.R. 46; [2004] Fam. Law 641; (2004) 16 B.H.R.C. 671; [2004] UKHL 30, *dicta* of Lord Nicholls applied.

(4) *Grant* v. *South-West Trains Ltd.*, [1998] All E.R. (EC) 193; [1998] 1 C.M.L.R. 993; [1998] I.C.R. 449; [1998] I.R.L.R. 206; [1998] 1 F.L.R. 839; [1998] 1 F.C.R. 377; 3 B.H.R.C. 578; [1998] Fam. Law 392; [1998] E.C.R. I-621, referred to.

(5) *Halford* v. *U.K.*, [1998] Crim. L.R. 753; [1997] I.R.L.R. 471; (1997), 24 E.H.R.R. 523; 3 B.H.R.C. 31, applied.

(6) *Johnston* v. *Ireland* (1986), 9 E.H.R.R. 203, followed.

(7) *Karner* v. *Austria*, [2003] 2 F.L.R. 623; [2004] 2 F.C.R. 563; [2003] Fam. Law 724; (2003), 38 E.H.R.R. 24; 14 B.H.R.C. 674, considered.

(8) *M.* v. *Work & Pensions Secy.*, [2006] 2 A.C. 91; [2006] 2 W.L.R. 637; [2006] 4 All E.R. 929; [2006] 2 F.L.R. 56; [2006] 1 F.C.R. 497; [2006] H.R.L.R. 19; [2006] UKHRR 799; 21 B.H.R.C. 254; [2006] Fam. Law 524; [2006] UKHL 11, *dicta* of Lord Mance considered.

(9) *Matadeen* v. *Pointu*, [1999] 1 A.C. 98, [1998] 3 W.L.R. 18, *dicta* of Lord Hoffmann distinguished.

(10) *Mouta* v. *Portugal*, [2001] 1 F.C.R. 653; [2001] Fam. Law 2; (1999), 31 E.H.R.R. 47, applied.

(11) *Satchwell* v. *South Africa (President)* (2002), 13 B.H.R.C. 108, followed.

(12) *Thlimmenos* v. *Greece* (2000), 31 E.H.R.R. 411, applied.

Legislation construed:

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.1: The relevant terms of this section are set out at para. 17.

s.7: "(1) Every person has the right to respect for his private and family life, his home and his correspondence."
s.14: The relevant terms of this section are set out at para. 19.
s.18(8):
"(a) A court or tribunal determining a question which has arisen in connection with a right or limitation thereof set out in this Chapter must take into account any—
(i) judgment, decision, declaration or advisory opinion of the European Court of Human Rights . . ."

Housing Allocation Scheme 1994, as amended, para. 5: The relevant terms of this paragraph are set out at para. 13.

Housing (Special Powers) Act 1972 Schedule 1, para. 2: The relevant terms of this paragraph are set out at para. 12.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; Treaty Series 71 (1953)) (Cmnd. 8969), art. 14: The relevant terms of this article are set out at para. 21.

R. Singh, Q.C., *Ms. K. Monaghan, Q.C.* and *J. Restano* for the claimant;
J.J. Neish, Q.C. and *M. Llamas* for the first and second defendants;
J. Trinidad for the intervener (Equality Rights Group GGR).

1 **DUDLEY, Ag. C.J.:** The claimant ("Ms. Rodriguez") is the tenant of 50 Archbishop Amigo House, Glacis Estate ("the premises"). Ms. Rodriguez lives at the premises with her same-sex partner of 19 years, Ms. Muscat. The relationship between them is loving, monogamous and permanent. Apart from their emotional and sexual attachment, Ms. Rodriguez and Ms. Muscat are said to be (and it is not disputed) financially interdependent. Ms. Muscat is employed by the Ministry of Defence and is the breadwinner of the household whilst Ms. Rodriguez is the homemaker. For the purposes of Ms. Muscat's employer, Ms. Rodriguez is registered as next of kin and named "beneficiary" such that, on Ms. Muscat's death, Ms. Rodriguez would be entitled to receive any wages and other moneys not exceeding £5,000 to which Ms. Muscat would be entitled on death.

2 Pursuant to an agreement dated September 30th, 2005 ("the agreement"), Ms. Rodriguez was granted a tenancy of the premises by the Housing Manager of the Government of Gibraltar. By virtue of cl. 4.3(6), Ms. Rodriguez was not to allow persons other than those specifically mentioned in the Third Schedule to the agreement to sleep on the premises without the previous consent of the housing manager. Ms. Rodriguez is the only person mentioned in that Schedule.

3 By letter dated October 16th, 2006, Ms. Rodriguez wrote to the

Principal Housing Officer (Dr. Coram) requesting that Ms. Muscat be made a joint tenant of the premises. The letter read:

> "I am writing to you about a matter that to me is of great concern. About a year ago, I was given a 1 R.K.B. flat, which I share with a partner of 18 years. For the two of us, this is very suitable accommodation but I have been told that my partner cannot be registered with me and I have not been given a reason why!
>
> As you can see my relationship is very important to me and I take it very seriously, seeing as it is lasting longer than many marriages. All I am asking for is an extra name on a piece of paper or a reason why this cannot happen.
>
> Waiting for your reply in writing."

4 This letter was followed by a meeting in what is described as the Housing Manager's Surgery with Ms. D. Holmes who was the Acting Housing Manager and which was attended by Ms. Rodriguez, her mother and Ms. Muscat. It is apparent from the minutes of the meeting that Ms. Rodriguez's mother informed Ms. Holmes that there was a female couple residing in a Government estate who had been allocated a joint tenancy in respect of a flat. According to the minutes, the Acting Housing Manager informed them—

> "that their case would be referred to the next Housing Allocation Committee as there is a precedent, although there is no Government policy on same-sex partners and the Committee may not agree to their request."

5 The matter came before the second defendant, the Housing Allocation Committee ("the HAC"), on January 24th, 2007. The minutes of that meeting read:

> "Miss Rodriguez is requesting to include her partner, Alicia Muscat, in her tenancy. They have been partners for over 18 years. The Committee agreed to consider her case for application purposes only."

According to the Principal Housing Officer, the letters addressed to him were before the HAC and, albeit not set out in the minutes (because these normally record decisions but not discussions), the reason for the HAC not acceding to Ms. Rodriguez's request was "on the basis of existing policy and in the absence of any circumstance which would warrant departure from that policy."

6 By letter dated February 1st, 2007, the Housing Allocation Officer informed Ms. Rodriguez of the outcome of the meeting and stated:

> "The Committee cannot approve the inclusion of Ms. Muscat in your

tenancy. However, they have agreed to accept a housing application from Ms. Muscat from your address for 'application purposes only' with your consent."

7 There then followed correspondence in which Ms. Rodriguez sought an explanation as to what was meant by "for application purposes only" and the reasons for the HAC's decision. On March 6th, 2007 the Housing Allocation Officer wrote to Ms. Rodriguez on the following terms:

"The Housing Allocation Committee agreed to accept a housing application from your address for 'application purposes only' with your consent, should Ms. Muscat wish to become an applicant in her own right, as the inclusion in your tenancy has been denied as per the Committee's policy that only parents, spouses or children may be included."

8 There then followed a letter before action from Ms. Rodriguez's solicitors, Messrs. Hassans, dated April 2nd, 2007, in which they outlined some of the contentions which have been advanced before me. By way of background they also provided details of the nature of the relationship between Ms. Rodriguez and Ms. Muscat; Ms. Rodriguez's state of health and the concern that Ms. Muscat would not inherit the tenancy on Ms. Rodriguez's death.

9 By letter dated April 13th, 2007, the Housing Officer informed Ms. Rodriguez that her case would again be submitted to the HAC for their consideration. The HAC met on April 18th, 2007. Their minutes, albeit once again the epitome of brevity, record that through her solicitors Ms. Rodriguez was asserting that the Ministry of Housing was, in rejecting her request, acting in a discriminatory manner. The minutes then go on to state that the "Committee do not believe that this is a case of discrimination, as no mechanisms exist, other than the involvement of children, to recognize cohabiting couples, irrespective of sexes."

The issues

10 The parties are agreed that the issues which fall to be considered in this case are as set out at para. 13 of the claimant's statement of case and detailed grounds:

"This application raises the following issues; whether in refusing or failing to permit Ms. Muscat to become a joint tenant of the premises,

(i) the defendant has discriminated against the claimant unlawfully contrary to s.1 of the Constitution;

(ii) the defendant has discriminated against the claimant unlawfully contrary to the common law principle of equality;

(iii) the defendant has violated the claimant's right to private and family life under s.7 of the Constitution;

(iv) the defendant has fettered its discretion to grant a joint tenancy, by rigid reliance on its policy . . . and

(v) the defendant has failed to give adequate reasons."

Legal and regulatory background

11 It is not in issue that there is no statutory duty on the Government of Gibraltar to provide housing. The relevant statute for present purposes is the Housing (Special Powers) Act 1972 ("the Act"). It is a short piece of legislation and one in which the long title accurately describes its purpose:

"An Act to further the proper and effective use of accommodation allotted by the Government in such a manner as to promote the public benefit by providing for the resumption of any such accommodation whenever it is not in the personal occupation of the tenant to whom it has been allotted, and for certain ancillary purposes."

12 Section 3 of the Act establishes the HAC and provides for its composition, duties and powers by reference to Schedule 1 to the Act. Paragraph 2 of Schedule 1 provides:

"The committee *shall administer any scheme on the allocation of Government housing approved by the Government* and when so required by the Government make such recommendations on the most equitable and effective use of Government housing as the committee may think appropriate, in addition to exercising the powers conferred upon the committee by this Act." [Emphasis supplied.]

13 The scheme is the Housing Allocation Scheme (Revised 1994) ("the Scheme") and which according to the Principal Housing Officer was amended with effect from August 4th, 2005. The scheme envisages that applications for housing will be made by individual applicants. Thus, s.5, which sets out the qualifying criteria, provides at sub-s. (b) that—

"an applicant must be either—

(i) a single person twenty-one years of age or over; or

(ii) eighteen years of age or over and the head of a family (that is, married, or single parent having care and control of at least one child)"

14 To understand how the HAC operates, it is useful to set out certain passages from the witness statement of Dr. Coram:

"Matters not covered by the Housing (Special Powers) Act or the

> Scheme are decided administratively on the basis of policies which have evolved over time and are not recorded in any codified form. Demand for Government housing is very high and exceeds availability.
>
> . . .
>
> The Scheme envisages that applications for Government housing will be made by individual applicants and not joint ones. However, there are cases where applications are made for joint tenancies either at or after the allocation stage. Such applications are not expressly covered by the Scheme.
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> . . .
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> Applications for joint tenancies are generally approved if the application is made by a married partner, parent, adult child or common law partner of the tenant. The protection of the family and in particular children is considered of prime importance . . . In the case of common law partners, approval is only granted if the common law partner of the tenant and the tenant have at least one minor child in common living with them . . . The reason for granting joint tenancies to common law partners with children in common is to protect the interests of the children by providing each of the parents with equal tenancy rights and in the spirit of protection of the family. The principle that unmarried persons with children may be treated more favourably than unmarried persons without children is reflected in s.5(b)(i)(bb) of the Scheme. It is in keeping with this principle and spirit that applications for joint tenancies by common law partners with children in common are favourably considered "

15 Dealing specifically with Ms. Rodriguez's application, Dr. Coram, at para. 18 of his witness statement, says: "The Committee did not grant the claimant's request on the basis of existing policy and in the absence of any circumstance which would warrant departure from that policy . . ."

The Constitutional arguments

16 Essentially, the core constitutional issue requiring determination is the proposition set out at para. 24 of the claimant's statement of case:

> "The claimant is, as a matter of law, unable to marry Ms. Muscat because they are of the same sex. Accordingly, the requirement that they be married to enjoy a joint tenancy is directly or indirectly discriminatory on grounds of sexual orientation and, absent justification, unlawful. Requiring partners to be married to enjoy the benefit of a joint tenancy inevitably disadvantages those partners who cannot, in any circumstances, marry because of their sexual orientation, namely same-sex partners. For the avoidance of doubt, the fact

that unmarried opposite-sex couples are treated in the same way is not material. Failing to treat differently persons who are differently situated (in this case because they can or, conversely, cannot marry) is as discriminatory as treating those who are similarly situated, differently . . ."

17 To do some measure of merit to the claimant's submissions, it is necessary to consider in some detail various provisions in the 2006 Gibraltar Constitution ("the Constitution"). The relevant passage of s.1 of the Constitution provides:

"It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of any ground referred to in section 14(3), but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely—

(a) the right of . . . the enjoyment of property . . .

. . .

(c) the right of the individual to protection for his personal privacy, for the privacy of his home . . ."

18 Section 7 sets out the specific right to respect for "private and family life" and "home" and, relevant for the present purposes, is as follows:

"(1) Every person has the right to respect for his private and family life, his home . . .

(3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—

(a) In the interests of . . . utilisation of any other property in such a manner as to promote the public benefit;

. . .

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

19 Section 14 affords protection from discrimination on the following basis:

"(1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting in the

> performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority."

20 In s.14(3) discrimination is defined and includes "such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory . . ." It is not in dispute that sexual orientation is one such ground (see *Mouta* v. *Portugal* (10)).

21 Before turning to the substantive issue, there are two preliminary matters which I should touch upon at this stage. The first, whether s.14(2) is a free-standing provision is, for reasons set out below, somewhat tangential. It is, however, because of its wider significance, worthy of consideration. Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") is self-evidently not a free-standing provision headed "Prohibition of discrimination." Article 14 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."

That it complements the other substantive provisions of the Convention but has no independent existence was reiterated by the European Court of Human Rights in *Karner* v. *Austria* (7).

22 Mr. Singh submits that s.14 differs from, and expands upon, the Convention and that the language of s.14(2) that "no person shall be treated in a discriminatory manner" creates a stand-alone equality provision which is not constrained by any reference to other rights. He further submits that sub-ss. (6), (7) and (8) are not relevant, in that sub-ss. (6) and (7) essentially deal with discrimination authorized by law (which does not arise in the present case) whilst sub-s. (8) deals with the wholly unrelated matter of the institution or discontinuance of court proceedings.

23 Mr. Neish argues that the language of sub-s. (2) is similar to that of sub-s. (1). That sub-s. (1) is subject to sub-s. (4)(e) which, in effect, provides that a law which is consistent with the provisions of the Convention is not caught by the prohibition of sub-s. (1). On that premise, he submits that sub-s. (1) cannot be a stand-alone provision because a law which is not contrary to the Convention is not discriminatory in this jurisdiction, and for the discrimination provision in the Convention to be engaged it must concern the subject-matter of a substantive right in the Convention. Put another way, if there is no breach of the Convention, there is no breach of the Constitution as discrimination is not free-standing in the Convention but is to be linked to a breach of a substantive right. The

corollary is that for s.14 of the Constitution to be engaged, the discrimination must be linked to a substantive right.

24 Whilst the logic in Mr Neish's submissions is admirable, it is an overly intricate construction of s.14 and I have some difficulty in accepting his submission given that it goes against what, in my view, is the natural reading of the section.

25 Moreover, my reading has also taken me to a very recent decision of the Privy Council on appeal from a decision of the Gibraltar Court of Appeal, *Cerisola* v. *Att.-Gen.* (2). In a judgment delivered by Lord Neuberger, he states (2007–09 Gib LR 204, at paras. 35–36):

> "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).
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> . . .
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> 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."

26 The matter does not, however, fall for determination because in his oral submissions, Mr. Neish very properly resiled from the position set out in his skeleton argument and accepted that the present case comes within the ambit of the right to "privacy of home" as protected by ss. 1 and 7 of the Constitution. It is therefore also unnecessary to consider whether or not the present case comes within the ambit of "enjoyment of property," "private life" and "family life."

27 The second preliminary point which needs to be addressed is this: By virtue of s.18(8) of the Constitution this court is enjoined, *inter alia*, to take account of decisions of the European Court of Human Rights when dealing with any question which has arisen in connection with the rights and freedoms protected by Chapter I of the Constitution. Mr. Singh, however, urges this court to go further and submits that the Constitution is a living instrument to be interpreted progressively in accordance with present day conditions.

28 In *M.* v. *Work & Pensions Secy.* (8), Lord Mance dealt with s.2(1) of the Human Rights Act which, like s.18(8) of the Constitution, uses the

language "must take into account" any decision of the European Court of Human Rights, and said ([2006] 2 A.C. 91, at para. 129):

> "The meaning of section 2(1) was authoritatively expounded by my noble and learned friend, Lord Bingham of Cornhill, in reasoning with which all other members of the House agreed in *R. (Ullah)* v. *Special Adjudicator* ([2004] 2 A.C. 323, at para. 20):
>
> > 'In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R. (Alconbury Developments Ltd.)* v. *Secretary of State for the Environment, Transport and the Regions* ([2003] 2 A.C. 295, at para. 26). This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.'"

29 Whilst strictly there is a distinction to be drawn between the Human Rights Act (which incorporates the Convention rights into UK domestic law) and the Constitution (which affords these rights by way of an overriding domestic legislative instrument), the fact that s.18 of the Constitution enjoins the court to take account of European Court of Human Rights cases leads me to the conclusion that, in interpreting the application of rights guaranteed by the Constitution, this court must look to the European Court of Human Rights rather than outrun it.

Discrimination

30 A very useful analysis of what amounts to discrimination under the Convention is to be found in *Thlimmenos* v. *Greece* (12) where Wildhaber, P. said (31 E.H.R.R. 411, at para. 44):

> "The court has so far considered that the right under art. 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification. However, the Court considers that this is not the only facet of the prohibition of discrimination in art. 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

31 The same approach is to be found in the House of Lords decision in *Ghaidan* v. *Godin-Mendoza* (3) where, in a case involving sexual orientation, Lord Nicholls said ([2004] 2 A.C. 557, at para. 9):

> "It goes without saying that article 14 is an important article of the Convention. Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced. Of course all law, civil and criminal, has to draw distinctions. One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. Like cases should be treated alike, unlike cases should not be treated alike. The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another. This has been clearly recognised by the European Court of Human Rights: see, for instance, *Fretté* v. *France* [2003] 2 FLR 9, at para. 32. Unless some good reason can be shown, differences such as these do not justify differences in treatment. Unless good reason exists, differences in legal treatment based on grounds such as these are properly stigmatised as discriminatory."

32 Mr. Singh's fundamental submission is that in the context of the present case, the State has chosen to draw the line at married couples (because whilst an unmarried couple can acquire a joint tenancy they can only do so if they have a child in common whilst a married couple need not have a child), that essentially therefore two categories of people are excluded from seeking a joint tenancy, opposite-sex unmarried couples

without a child and same-sex couples. Also, that there is a fundamental difference between these two categories in that whilst unmarried opposite-sex couples have the right in law to marry and if they so choose they can then seek a joint tenancy, in contrast a same-sex couple cannot marry and that therefore the position of both these categories is radically different. That there is inequality of treatment because the state is treating both these categories in the same way when they are differently situated in a material respect. Moreover, Mr. Singh made it clear that it is no part of the claimant's case that the state is required to treat in the same way unmarried opposite-sex couples and married couples.

33 In support of his submissions, Mr. Singh relies upon a decision of the Constitutional Court of South Africa, *Satchwell* v. *South Africa (President)* (11). This was a case involving benefits afforded to spouses of judges but not to same-sex partners who had established a permanent life relationship similar to marriage. Madala, J. said (13 B.H.R.C. 108, at para. 16):

> "Same-sex partners cannot be lumped together with unmarried heterosexual partners without further ado. The latter have chosen to stay as cohabiting partners for a variety of reasons, which are unnecessary to traverse here, without marrying although generally there is no legal obstacle to their doing so. The former cannot enter into a valid marriage. In my view it is unnecessary to consider the position of heterosexual partners in this case."

34 Undoubtedly, *Satchwell* is on all fours with the claimant's proposition. It is, however, of limited assistance because, for the reasons I have given, this court must look to Strasbourg jurisprudence as required by s.18 of the Constitution and, as it usually does, to English jurisprudence. It is, I think, accurate to say that there is no English or Strasbourg authority which is squarely on point. Mr. Singh and Mr. Llamas have traversed through numerous authorities in some detail. It is, I think, unnecessary for me to travel along the byways but rather I shall focus on those which I think are of particular relevance.

35 *Johnston* v. *Ireland* (6) is authority for the proposition that it is not possible to derive from art. 8 (which provides for the right to respect for private and family life) "an obligation on the part of . . . [Convention States] to establish for unmarried couples a status analogous to that of married couples."

36 *Grant* v. *South-West Trains Ltd.* (4) (before the European Court of Justice) was a referral from an industrial tribunal in the United Kingdom following a refusal by an employer to allow travel concessions to the person of the same sex with whom its employee had a stable relationship when such concessions were allowed to spouses and opposite-sex partners. Following an analysis of decisions by the European Commission of

Human Rights and the European Court of Human Rights, the court went on to state ([1998] 1 C.M.L.R. 993, at paras. 35–36):

> "35 It follows that, in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriages or stable relationships outside marriage between persons of opposite sex. Consequently, an employer is not required by Community law to treat the situation of a person who has a stable relationship with a partner of the same sex as equivalent to that of a person who is married to or has a stable relationship outside marriage with a partner of the opposite sex.
>
> 36 In those circumstances, it is for the legislature alone to adopt, if appropriate, measures which may affect that position."

37 Notwithstanding *Grant*, the stance taken by the defendants is that the proper comparator group for same-sex partners is that of opposite-sex partners but not married couples. The reason for that lies, I think, in *Ghaidan* (3). *Ghaidan* involved a claim for succession to an assured tenancy on the death of a tenant by a man living with the tenant in a permanent and stable homosexual relationship. What fell for determination was essentially whether para. 2(2) of Schedule 1 to the Rent Act 1977, which provided that a person living with the original tenant "as his or her wife or husband" was to be treated as the spouse of the tenant, was compatible with the Human Rights Act 1998. The court found that a homosexual couple whose relationship is marriage-like is analogous to an unmarried heterosexual couple whose relationship is marriage-like. Although counsel have referred to *Ghaidan* extensively there is a passage in the speech of Baroness Hale which, in my view, is particularly relevant both for the purposes of highlighting the issues in *Ghaidan* and as a clear signpost to the resolution of the issue before me ([2004] 2 A.C. 557, at paras. 137–138):

> "137 The parties differ on whether the survivors of unmarried heterosexual and homosexual couples are indeed in an analogous situation and therefore on whether the basis of the difference in treatment is sexual orientation or something else. But it is impossible to see what else the difference can be based on if not the difference in sexual orientation. Everything which has been suggested to make a difference between the appellant and other surviving partners comes down to the fact that he was of the same sex as the deceased tenant. It is the decisive factor.
>
> 138 We are not here concerned with a difference in treatment between married and unmarried couples. The European Court of Human Rights accepts that the protection of the 'traditional family' is in principle a legitimate aim . . . The traditional family is constituted by marriage. The Convention itself, in article 12, singles out the

> married family for special protection by guaranteeing to everyone the right to marry and found a family. Had paragraph 2 of Schedule I to the Rent Act 1977 stopped at protecting the surviving spouse, it might have been easier to say that a homosexual couple were not in an analogous situation. But it did not. It extended the protection to survivors of a relationship which was not marriage but was sufficiently like marriage to qualify for the same protection."

38 In my view, it is apparent that Strasbourg jurisprudence has not evolved to the point where (absent national legislation providing for civil partnerships), same-sex or opposite-sex partnerships can be analogous to marriage. In my view, in the present case, the proper comparator for the purposes of Ms. Rodriguez and Ms. Muscat is not of a married couple but an unmarried opposite-sex couple. Viewed from the perspective of that comparator, they cannot be said to have been discriminated on the basis of sexual orientation.

39 I do not ignore that opposite-sex couples with a child in common are in the present context, in effect, afforded the same rights as a married couple. However, I accept Mr. Neish's submission that, should the State fail to do so, it could amount to discrimination between legitimate and illegitimate children. To my mind such a fear is well-grounded both from the perspectives of the ss. 7 and 14 right to family life (see *Johnston* (6)). Although the issues do not now fall to be considered, I shall give my tentative view on some of the constitutional issues raised, had I determined that the comparator for a same-sex couple was of a married couple. The rights and freedoms protected by the Constitution are not absolute but, once engaged, if they are to be interfered with, it must be in accordance with the law—the interference must satisfy a legitimate aim and the interference must satisfy the principle of proportionality.

40 Mr. Singh makes the valid point that the "in accordance with the law" provision in art. 8 of the Convention requires the law interfering with the protected right to be compatible with the rule of law. Such compatibility requires the legal regime allowing for the interference with the right to be ascertainable. In the instant case, according to Dr. Coram, matters not covered by the Act or the HAC "are decided administratively on the basis of policies which have evolved over time and are not recorded in any codified form." The policy excluding Ms. Rodriguez from having Ms. Muscat added as a joint tenant to her property falls squarely within that evolved non-codified policy. In *Halford* v. *U.K.* (5) (a case involving the interception of communications), the court quoted the Commission's Opinion where it states (24 E.H.R.R. 523, at paras. 61–63):

> "61 As to whether the interference was 'in accordance with the law,' the Commission recalls that this phrase has been interpreted by the court as requiring that the interference must have some basis in

> domestic law and extends further to the quality of the law. In terms of the quality of the law, the Commission notes that the law must be compatible with the rule of law in providing a measure of protection against arbitrary interferences by public authorities and, in this context, it must be accessible to the person concerned who must moreover be able to foresee the consequences of the law for him.
>
> . . .
>
> 63 The Commission therefore finds that, in view of this absence of domestic law, there is no 'basis in domestic law' for the interference and, accordingly, the interference was not 'in accordance with the law' within the meaning of the terms outlined at paragraph 61 above. In the circumstances, the Commission does not find it necessary to go on to consider whether the interference was 'necessary in a democratic society.'"

41 The court, in line with that approach, having determined that there was an interference with the claimant's right to respect for her private life and correspondence and that the interference was not in accordance with the law for the purposes of art. 8(2) of the Convention, found a violation of art. 8 without turning to consider "justification" and "proportionality." That, to my mind, would also have been the proper approach in this case.

The common law principle of equality

42 Section 2(1) of the English Law (Application) Act 1962 applies the English common law and rules of equity to Gibraltar "subject to such modifications thereto as such circumstances may require" and subject further to statutory modification which of course includes the Constitution. In the Privy Council in *Matadeen* v. *Pointu* (9), Lord Hoffmann, delivering the opinion of the Board, said ([1999] 1 A.C. at 109):

> "As a formulation of the principle of equality, the court cited Rault, J. in *Police* v. *Rose* ([1976] M.R. at 81): 'Equality before the law requires that persons should be uniformly treated, unless there is some valid reason to treat them differently.' Their Lordships do not doubt that such a principle is one of the building blocks of democracy and necessarily permeates any democratic constitution. Indeed, their Lordships would go further and say that treating like cases alike and unlike cases differently is a general axiom of rational behaviour. It is, for example, frequently invoked by the courts in proceedings for judicial review as a ground for holding some administrative act to have been irrational . . . The fact that equality of treatment is a general principle of rational behaviour does not entail that it should necessarily be a justiciable principle—that it should always be the judges who have the last word on whether the principle has been observed. In this, as in other areas of constitutional law, sonorous

> judicial statements of uncontroversial principle often conceal the real problem, which is to mark out the boundary between the powers of the judiciary, the legislature and the executive in deciding how the principle is to be applied."

43 To my mind, the common law principle of equality does not advance Ms. Rodriguez's case any more than the constitutional argument. In applying the principle of equality, I must determine who a same-sex couple is to be compared with and, as I have previously determined in the context of the constitutional argument, that must be an unmarried opposite-sex couple. I cannot deny that there is some logic in Mr. Singh's submission that the comparator should be a married couple but if I were to accept such a submission, I would be usurping the powers of the legislature. It is in my view apparent from the Strasbourg case law that the legal recognition of same-sex and opposite-sex couples is a matter which does not have broad consensus across Western Europe. Indeed, it is unlikely that there is consensus in any one State. In those circumstances, when and what status is to be afforded to these relationships is not for this court to determine but for the legislature.

Fettering of discretion

44 As regards this issue there is no dispute as to the relevance of the principles expounded by Lord Reid in *British Oxygen Co. Ltd.* v. *Minister of Technology* (1) ([1971] A.C. at 625)*:*

> "The general rule is that anyone who has to exercise a statutory discretion must not 'shut his ears to an application' . . . I do not think there is any great difference between a policy and a rule. There may be cases where an officer or authority ought to listen to a substantial argument reasonably presented urging a change of policy. What the authority must not do is to refuse to listen at all. But a Ministry or large authority may have had to deal already with a multitude of similar applications and then they will almost certainly have evolved a policy so precise that it could well be called a rule. There can be no objection to that, provided the authority is always willing to listen to anyone with something new to say . . ."

45 As always, of greater difficulty is the application of principles to a particular set of facts. It is apparent that, given the very limited steer which the Scheme affords, there can be no criticism of the fact that the HAC operates on the basis of policies which have evolved over time. But of course policy of itself cannot result in rigidly excluding an alternative outcome in a deserving case. Indeed, it is not in issue that at least on one occasion the HAC must have deviated from their policy because there is a same-sex couple who enjoy a joint tenancy. Unfortunately, the evidence does not disclose what factors were taken into account in that case.

46 Although Dr. Coram's witness statement may add some flesh to the bones, he is, of course, not a member of the HAC and therefore in ascertaining whether the HAC fettered its discretion, it is particularly useful to scrutinize the conduct of the HAC itself in reaching its decision. In that regard of course the most relevant material is the minutes of the two meetings in which Ms. Rodriguez's application was considered.

47 The minutes of the meeting of January 24th and of April 18th, 2007 (as opposed to correspondence issuing as a consequence of these) make no mention of the application of the policy or provide any indication that any of the particular circumstances of Ms. Rodriguez's case were considered. Mr. Neish urges that there were no particular circumstances before the HAC other than the fact that Ms. Rodriguez and Ms. Muscat were a stable, long-standing same-sex couple. I accept that that assertion is right as regards the meeting held on January 24th, and therefore that there was nothing before the HAC which could be said to suggest that there were any special circumstances which would justify departing from their policy. However, by April 18th, 2007, the matter had in my view evolved.

48 Before that meeting was the pre-action letter in which Ms. Rodriguez's poor health and financial dependence on Ms. Muscat were highlighted, as was the concern that on Ms. Rodriguez's death Ms. Muscat would not inherit the tenancy. In my view, the HAC's duty not to fetter its discretion continued after its original decision of January 24th, particularly when following the pre-action letter of April 2nd, 2007, the Housing Officer wrote to Ms. Rodriguez informing her that her case would be submitted to the HAC on April 18th, 2007.

49 At one level I can see how the HAC treated Ms. Rodriguez's solicitors' letter of April 2nd, 2007 as exclusively a pre-action letter upon which they required legal advice. However, the correct approach would have been to have taken account of the new factual information which it contained and consider whether, on the basis of that factual matrix, they were persuaded to deviate from their policy. If, after undertaking that exercise, they remained of the view that they should not deviate from their policy, then would have been the time to consider and seek advice on the legal issues raised. By failing to do so they fettered their discretion and their decision-making process became procedurally flawed.

50 The HAC's decision refusing the application for a joint tenancy of the premises is quashed and I remit the matter for it to reconsider and reach a decision in accordance with my findings.

51 The only matter which remains is the adequacy of reasons, but given my determination of the substantive issues before me, and of the claim, it is unnecessary for me to deal with this. There was, however, an issue which was touched upon incidentally which was not before the HAC when they considered the application but which they may consider

relevant following remittal. There is a limited public housing stock which, in accordance with the purpose of the Act, is to be used for the public benefit. Ms. Muscat is entitled to a flat in her own right and would presumably, in due course, be provided with one. However, if she were to be made a joint tenant of the premises there would no longer be a need to provide Ms. Muscat with a flat and someone else on the list would be able to benefit. Whilst there may be good administrative reasons why this is not the case, at first blush it seems to me that this must be a further factor which the HAC should take into account in deciding whether or not to allow Ms. Muscat to become a joint tenant with Ms. Rodriguez.

Application granted; matter remitted to the Committee for reconsideration.