[2007–09 Gib LR 465]

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

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL (Lord Phillips of Worth Matravers, Baroness Hale of Richmond, Lord Collins of Mapesbury, Sir Jonathan Parker and Sir Henry Brooke): December 14th, 2009

Constitutional Law—fundamental rights and freedoms—protection from discrimination—indirect discrimination by Government housing policy against same-sex couple based on sexual orientation—never able to fulfil eligibility criteria for grant of joint tenancy—policy should include same-sex couples in stable, committed, long-term relationships

Housing—occupation of Government housing—same-sex couple—if proposed comparators unsuitable (e.g. for same-sex couple), court to consider whether difference in treatment justified by overall aims, means to achieve aims and level of adverse effects

The appellant 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 appellant and her same-sex partner (Ms. Muscat) had been in a stable relationship for 21 years. The appellant lived in Government-owned housing and the two women were financially interdependent. The appellant was registered as Ms. Muscat's next-of-kin and named "beneficiary" such that on Ms. Muscat's death, the appellant would be entitled to receive any of her funds not exceeding £5,000. The appellant 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 appellant was the only person named on the tenancy agreement. The appellant 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 appellant provided the Committee with background information about the relationship and the financial interdependence between the two women which highlighted the appellant's poor health and their concerns that Ms. Muscat would not inherit the tenancy on the death of the appellant.

The Committee rejected the appellant'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. Since the appellant's case did not fall within either category and there was no alternative policy for same-sex couples, the existing policy should be adhered to and her application for joint tenancy was rejected. The appellant challenged the decision of the Committee before the Supreme Court (Dudley, Ag. C.J.) which held that the Housing Allocation committee should reconsider the issue in light of all of the evidence provided by the appellant. It was also decided that there had been no discrimination by the Committee since the proper comparator for the appellant and her partner was an unmarried opposite-sex couple and they had been treated in the same way as such a couple. The proceedings in the Supreme Court are reported at 2007–09 Gib LR 273. The Court of Appeal (Stuart-Smith, P. and Kennedy, J.A., Aldous, J.A. dissenting) affirmed the decision of the Supreme Court.

On further appeal, the appellant submitted, *inter alia*, that (a) the Government housing policy was discriminatory in its unjustified preference towards married couples and unmarried couples with a child in common since it did not pursue a legitimate aim; (b) in denying her joint tenancy application, the Committee had indirectly discriminated against her on the basis of her sexual orientation in breach of ss. 7 and 14 of the Constitution; and (c) the treatment was particularly discriminatory because, although she and her partner were being treated in the same way as unmarried opposite-sex couples without children, this did not reflect their situation—that they could not qualify for a joint tenancy under the Government housing policy because they could neither marry nor have a child in common and this failure to treat unlike cases differently amounted to indirect discrimination towards same-sex couples on grounds of their sexual orientation.

In reply, the defendants submitted that (a) its treatment of the appellant and Ms. Muscat was not discriminatory as its policy applied equally to unmarried opposite-sex couples; (b) any alleged indirect discrimination towards the appellant could be justified as protecting three legitimate aims pursued by the policy and that the policy was in proportion to the protection of these aims—first, the protection and privilege of the status of marriage, secondly, the protection of the family home and thirdly, the protection of children; (c) the European Court of Human Rights had deemed that married and unmarried heterosexual couples were not in the same situation and therefore should not necessarily be treated in the same

way since marriage conferred a particular status on those who entered it; and (d) it followed that the appellant was in the same situation as unmarried opposite-sex couples as neither case involved the status of marriage and it was therefore logical that they should be treated in the same way.

Held, allowing the appeal:

(1) The decision of the Court of Appeal would be quashed since the appellant had been indirectly discriminated against by the Housing Allocation Committee contrary to ss. 1 and 7 of the 2006 Constitution. The policy in itself was directly discriminatory against unmarried couples (without a child in common) who would have also been denied a joint tenancy. However, the appellant's situation (in neither being able to marry nor have a child with Ms. Muscat) meant that there was additional indirect discrimination against them based on their sexual orientation because unlike unmarried opposite-sex couples, the requirements to marry or have a child in common were ones which the appellant and Ms. Muscat could never satisfy (paras. 18–19).

(2) The Committee had discriminated against the appellant as it had failed to treat unlike cases differently in that it had treated the appellant and Ms. Muscat in the same way as unmarried opposite-sex couples. Although there was no obvious difference in treatment (since both groups were subject to the same policy restrictions) the proper comparator for the appellant and Ms. Muscat could not be an unmarried opposite-sex couple as this did not reflect their situation. Since the comparator chosen by the Committee was not suitable, the court should consider whether the Committee's difference in treatment of the appellant could be justified by the pursuit of a legitimate aim, whether the means chosen to achieve the proposed aims were proportionate to the aim and that they did not have any adverse effects (para. 18).

(3) The discriminatory effects of the Committee's policy could not be justified since the aims suggested for the policy were incoherent and its terms were out of proportion and irrational for protecting those aims. Giving privilege to married couples could be a legitimate aim but it would be equally legitimate to give privilege to couples in civil partnerships. Similarly, there were no reasons why the policy should not extend to other couples who were recognized as being members of the same family or to those with parental responsibility over children (paras. 26–27).

(4) Nor did the policy come within the ambit of the exceptions in s.7(3) of the 2006 Constitution as it was neither "in accordance with the law" nor under the exception in s.14(7), as it was not made "under the authority of the law" since it was inaccessible—it was not written down coherently and the appellant only discovered the full extent of the policy when the Committee responded to her application for a joint tenancy in July 2007. Although the Board would not dictate what should be a suitable policy for the Committee to adopt, it should, in future, not discriminate against

same-sex couples in stable, committed and long-term relationships (paras. 29–30; para. 32).

Cases cited:

(1) *Burden* v. *United Kingdom*, [2008] S.T.C. 1305; [2008] 2 F.L.R. 787; [2008] 2 F.C.R. 244; [2008] B.T.C. 8099; [2008] W.T.L.R. 1129; [2008] Fam. Law 628; (2008), 47 E.H.R.R. 38; 24 BHRC 709, *dicta* of Judge Björgvinsson considered.

(2) *Cerisola* v. *Att.-Gen.*, 2007–09 Gib LR 204, referred to.

(3) *Courten* v. *United Kingdom*, E.Ct.H.R., App. No. 4479/06, November 4th, 2008, unreported, referred to.

(4) *D.H.* v. *Czech Republic*, [2008] E.L.R. 17; (2008), 47 E.H.R.R. 3; 23 BHRC 526, *dicta* of Judge Bratza considered.

(5) *E.B.* v. *France*, [2008] Fam. Law 393; [2008] 1 F.L.R. 850; [2008] 1 F.C.R. 235; (2008), 47 E.H.R.R. 21; 23 BHRC 741, referred to.

(6) *Estevez* v. *Spain*, App. No. 56501/00, May 10th, 2001, unreported, referred to.

(7) *Fitzpatrick* v. *Sterling Housing Assn. Ltd.*, [2001] 1 A.C. 27; [1999] 3 W.L.R. 1113; [1999] 4 All E.R. 705; [2000] 1 F.L.R. 271; [1999] 2 F.L.R. 1027; [2000] 1 F.C.R. 21; [2000] UKHRR 25; [2000] L. & T.R. 44; [2000] Fam. Law 14; (2000), 7 BHRC 200; 32 H.L.R. 178, referred to.

(8) *G., In re*, [2009] 1 A.C. 173; [2008] 3 W.L.R. 76; [2008] 2 F.L.R. 1084; [2008] 2 F.C.R. 366; [2008] H.R.L.R. 37; [2008] UKHRR 1181; [2008] Fam. Law 977; (2008), 24 BHRC 650; [2008] UKHL 38, referred to.

(9) *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 BHRC 671; [2004] UKHL 30, *dicta* of Lord Nicholls considered.

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

(11) *Korelc* v. *Slovenia*, [2009] ECHR 772, referred to.

(12) *Lindsay* v. *United Kingdom* (1997), 23 E.H.R.R. CD199, referred to.

(13) *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; [2006] Fam. Law 524; (2006), 21 BHRC 254; [2006] UKHL 11, *dicta* of Lord Mance considered.

(14) *McMichael* v. *United Kingdom*, [1995] 2 F.C.R. 718; [1995] Fam. Law 478; (1995), 20 E.H.R.R. 205, referred to.

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

(16) *National Coalition for Gay & Lesbian Equality* v. *Ministry of Justice* (1998), 6 BHRC 127, referred to.

(17) *P.M.* v. *United Kingdom*, [2005] S.T.C. 1566; [2005] 3 F.C.R. 101; (2006), 42 E.H.R.R. 45; 18 BHRC 668, referred to.
(18) *R. (Carson)* v. *Work & Pensions Secy.*, [2006] 1 A.C. 173; [2005] 2 W.L.R. 1369; [2005] 4 All E.R. 545; [2005] H.R.L.R. 23; [2005] UKHRR 1185; (2005), 18 BHRC 677; [2005] UKHL 37, applied.
(19) *R. (Ullah)* v. *Special Adjudicator*, [2004] 2 A.C. 323; [2004] 3 W.L.R. 23; [2004] 3 All E.R. 785; [2004] H.R.L.R. 33; [2004] UKHRR 995; [2004] Imm. A.R. 419; [2004] UKHL 26, referred to.
(20) *Shackell* v. *United Kingdom*, App. No. 45851/99, April 27th, 2000, unreported, referred to.
(21) *Sommerfeld* v. *Germany*, [2003] 2 F.C.R. 647; (2004), 38 E.H.R.R. 35, referred to.
(22) *Thilimmenos* v. *Greece* (2000), 31 E.H.R.R. 411, considered.
(23) *Yigit* v. *Turkey*, App. No. 3976/05, January 20th, 2009, unreported, referred to.

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. 6.
s.7: "(1) Every person has the right to respect for his private and family life, his home and his correspondence."

Ms. K. Monaghan, *Q.C.*, *R. Singh*, *Q.C.*, *J. Restano* and *Prof. A. McColgan* for the appellant;
J.J. Neish, *Q.C.* and *M. Llamas* for the respondents.

1 **LADY HALE OF RICHMOND**, delivering the judgment of the Board: Gibraltar is a small place and affordable housing is in short supply. At issue are the policies of the Housing Allocation Committee, the statutory body which is responsible for the allocation of Government housing. Their policy is to grant joint tenancies to couples only if they are married to one another or have a child in common. This inevitably excludes same-sex couples who can neither marry nor have children together. Is such a difference in treatment unconstitutional?

The history

2 The appellant is the tenant of a modest Government flat. She lives there with her same-sex partner. They have been in a relationship together for 21 years. It is a loving, monogamous, permanent, sexually intimate and financially interdependent relationship. The appellant is the home-maker and her partner is the breadwinner. They are unable to marry or enter into a civil partnership in Gibraltar and do not satisfy the residence requirements either to enter a civil partnership in the United Kingdom or to marry in Spain. If they were married, the appellant's partner would have a statutory right to be granted a new tenancy of the flat when the appellant tenant died, under the successor to s.12 of the Housing (Special Powers)

Act 1972, which was the legislation in force at the time of these events. To provide her partner with long-term security in the event of her death, the appellant applied to the Committee in October 2006 for them to be granted a joint tenancy.

3 In February 2007, the Committee refused that application, although they were prepared to accept an application from the appellant's partner for separate accommodation in her own name. The reason they eventually gave, in March 2007, was that "only parents, spouses or children may be included." The position was later explained in more detail in the witness statement of Dr. Ron Coram, the Principal Housing Officer of the Ministry of Housing:

> "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 . . . Similar applications by common law heterosexual partners who do not have children in common are not favourably considered."

The appellant's request was refused on the basis of that policy and "in the absence of any circumstance which would warrant departure from that policy."

4 She applied to the Supreme Court of Gibraltar for a declaration that the refusal to grant a joint tenancy was unlawful on four grounds: (a) discrimination, contrary to ss. 1 and 14 of the Constitution and/or the common law principle of equality; (b) unjustified interference with the privacy of the home, contrary to s.7 of the Constitution; (c) fettering the Committee's discretion; and (d) the inadequacy of the Committee's reasons. In December 2008, Dudley, Ag. C.J. found that there was no discrimination. The proper comparator was not a married couple but an unmarried opposite-sex couple and viewed from that perspective the Committee had not discriminated on the basis of sexual orientation. However, he quashed the decision on the ground that the Housing Allocation Committee had unlawfully fettered their discretion. The Committee promptly reconsidered their decision, but concluded in February 2009 that "they must abide by departmental policies."

5 The appellant's appeal to the Court of Appeal was heard shortly after this and judgment was given in April 2009. By a majority, the appeal was

dismissed. After reviewing the authorities at some length, Kennedy, J.A. concluded that the policy—

> "did not discriminate against the appellant, because the preference which it gave to married couples was a positive preference of a kind which the law regards as acceptable in circumstances such as these, and which did not require further justification."

Stuart-Smith, P. delivered a short concurring judgment and Aldous, J.A. dissented.

The Constitution

6 Section 1 of the 2006 Constitution of Gibraltar (Annex 1 to the Gibraltar Constitution Order 2006) is declaratory and explanatory:

> "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 individual to life, liberty, security of the person, the enjoyment of property and the protection of the law;
>
> (b) freedom of conscience, of expression, of assembly, of association and freedom to establish schools; and
>
> (c) the right of the individual to protection for his personal privacy, for the privacy of his home and other property and from deprivation of property without adequate compensation,
>
> and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

It would appear, therefore, although nothing turns upon the point in this case, that the substance of the rights there listed is protected, not by s.1, but by the later sections which spell them and their limitations out in more detail. Section 1 does, however, insist that they exist without discrimination on the prohibited grounds.

7 Section 7 deals with protection for privacy of home and other property, "home" clearly having an expansive meaning in this context. The effect is very similar to art. 8 of the European Convention on Human Rights

(ECHR), save that the list of legitimate aims is longer and the burden of proving that a law or act done under a law is not "reasonably justifiable in a democratic society" lies upon the person claiming that her rights have been violated. The material provisions for our purposes are:

> "(1) Every person has the right to respect for his private and family life, his home and his correspondence.
>
> . . .
>
> (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 defence, the economic well-being of Gibraltar, public safety, public order, public morality, public health, town planning, the development or utilisation of mineral resources, or the development or 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."

Section 1, of course, has already provided that the right to protection for the privacy of the home exists without discrimination on any ground referred to in s.14(3).

8 Section 14 deals with protection from discrimination on prohibited grounds:

> "(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.
>
> (3) In this section, the expression 'discriminatory' means 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 disabilities 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."

9 Most of the exceptions set out in sub-ss. (4) and (5) are not relevant to this case. However sub-s. (4) might be relevant:

"(4) Subsection (1) shall not apply to any law so far as that law makes provision—

. . .

(e) 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 on Human Rights."

10 Sub-section (6) provides that sub-s. (2) shall not apply to anything expressly or by necessary implication authorized to be done by laws which are excepted from sub-s. (1) by sub-ss. (4) or (5). Sub-section (7) is relevant to our case:

"(7) 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 whereby persons of any such description as is mentioned in subsection (3) may be subjected to any restriction on the rights and freedoms guaranteed by sections 7, 9 . . . being such a restriction as is authorized by section 7(3), 9(5) . . . "

11 These provisions do not enjoy the clarity and simplicity of the equivalent provisions in the ECHR. No doubt there are very good reasons for this. But there are at least two good reasons for thinking that they are intended to provide at least a similar level of protection as is provided under the ECHR. The first is that the United Kingdom extended the protection of the ECHR to Gibraltar (by declaration of October 23rd, 1953), so that it would be surprising if Gibraltarians were to enjoy a lesser level of protection for their fundamental human rights under their Constitution than they do under the ECHR. The second is that the Constitution refers to the ECHR in several places. These include s.18(8)(a), which provides that 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" the jurisprudence of the European Court and Commission of Human Rights and the decisions of the Committee of Ministers "whenever made or given, so far as, in the opinion of the court or tribunal,

it is relevant to the proceedings in which that question has arisen." However, the Board is interpreting the Constitution of Gibraltar, not the ECHR, so that the reasons for restraint in the interpretation of the "Convention rights" under the United Kingdom's Human Rights Act 1998 does not apply (see *R. (Ullah)* v. *Special Adjudicator* (19) ([2004] 2 A.C. 323, at para. 20)). It is now common ground that in at least one respect the Constitution goes further than the ECHR.

12 The parties are agreed on two points. First, it is not in dispute that sexual orientation is now among the grounds found to be discriminatory by the European Court of Human Rights (see *Mouta* v. *Portugal* (15)) and is thus included in the list of prohibited grounds in s.14(3). Second, it is not now in dispute that s.14(2) provides a free-standing protection from discriminatory treatment. Unlike art. 14 of the ECHR, it is not limited to discrimination in "the enjoyment of the rights and freedoms set forth" in the ECHR. Dudley, Ag. C.J was inclined to this view in the Supreme Court of Gibraltar, as was the Privy Council in the case of *Cerisola* v. *Att.-Gen.* (2) (2007–09 Gib LR 204, at paras. 35–36). Mr. James Neish, Q.C., on behalf of the Attorney-General, now concedes that point but in any event it does not arise because he also concedes that the case comes within the ambit of the protection of the "privacy of home" in ss. 1 and 7 of the Constitution.

13 The parties are also agreed on three other points, although these do not emerge as clearly from the wording of s.14. Both have proceeded on the basis that there must be read into s.14(3) the now well-established approach of the European Court of Human Rights to the prohibition of discrimination under art. 14 of the ECHR. A recent statement of long-established principles appears in *Korelc* v. *Slovenia* (11):

> "[T]he court reiterates that according to its established case law discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations . . . Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized."

14 To this, Mr. Singh, Q.C., on behalf of the appellant would add, and the Board does not understand Mr. Neish to disagree, the well-known principle from *Thilimmenos* v. *Greece* (22) which stated (31 E.H.R.R. 411, at para. 44): "The right not to be discriminated against . . . is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." In other words, just as like cases must be treated alike, unlike cases must be treated differently.

15 Mr. Singh also drew our attention to the unequivocal acceptance by the European Court of Human Rights of the principle of indirect discrimination in the recent case of *D.H.* v. *Czech Republic* (4) which states that (47 E.H.R.R. 3, at para. 194): "Where it has been shown that legislation produces such a discriminatory effect . . . it is not necessary . . . to prove any discriminatory intent on the part of the relevant authorities." Again, Mr. Neish does not disagree. Section 14(1) of the Constitution expressly covers a law which is discriminatory either "of itself" or "in its effect." It would be surprising if s.14(2) did not also cover treatment by public officials which is discriminatory either of itself or in its effect.

16 The parties are not agreed on two points. First, has there been discriminatory treatment at all? Second, if there has, can such discriminatory treatment be justified?

Discriminatory treatment

17 The simple proposition that like cases must be treated alike (and that unlike cases must be treated differently) begs the inevitable questions: How do we identify which cases are alike and which are unlike? When are people in a relevantly similar situation? There are times when the European Court of Human Rights surmounts this hurdle with ease and other times when it does not. Thus, in the recent case of *Burden* v. *United Kingdom* (1), the majority of the Grand Chamber held that two sisters living together were not in an analogous situation to civil partners because marriage and civil partnership were different forms of relationship from siblingship. The problem with that analysis is that the ground for the difference in treatment, the lack of marital or civil partnership status, is also the reason why the person treated differently is said not to be in an analogous situation. This can be dangerous. If the ground for the difference in treatment were a difference in sex, it would not be permissible to say that a man and a woman are not in an analogous situation because men and women are different. Hence in *Burden*, Judge Björgvinsson said that the comparison should focus, not on the differences in legal framework, but on the differences in the nature of the relationship as such. He and Judge Bratza concluded that the difference in treatment was justified.

18 The Board considers that the same result would be reached in all these cases, whatever the route taken, but in construing the Constitution of Gibraltar it prefers the approach of Judges Björgvinsson and Bratza. It would be unfortunate if discrimination in constitutional and human rights laws were to get bogged down in the problems of identifying the proper comparator which have so bedevilled domestic anti-discrimination law in the United Kingdom. There is no need for it to do so, because in constitutional and human rights laws, both direct and indirect discrimination can be justified, whereas in our domestic anti-discrimination law, direct discrimination can never be justified. In *R. (Carson)* v. *Work &*

Pensions Secy. (18), Lord Nicholls of Birkenhead preferred to keep the formulation of the relevant issues under art. 14 as simple and non-technical as possible when he stated ([2006] 1 A.C. 173, at para. 3) that—

> "the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

19 In this case we have a clear difference in treatment but not such an obvious difference between the appellant and others with whom she seeks to compare herself. The appellant and her partner have been denied a joint tenancy in circumstances where others would have been granted one. They are all family members living together who wish to preserve the security of their homes should one of them die. The difference in treatment is not directly on account of their sexual orientation, because there are other unmarried couples who would also be denied a joint tenancy. But even if, as Dudley, Ag. C.J. found, these are the proper comparator, the effect of the policy upon this couple is more severe than on them. It is also more severe than in most cases of indirect discrimination, where the criterion imposed has a disparate impact upon different groups. In this case, the criterion is one which this couple, unlike other unmarried couples, will never be able to meet. They will never be able to get married or have children in common and that is because of their sexual orientation. Thus, it is a form of indirect discrimination which comes as close as it can to direct discrimination. Indeed, Mr. Singh puts this as a *Thilimmenos* (22) case: they are being treated in the same way as other unmarried couples despite the fact that they cannot marry or have children in common. As Ackermann, J. put it in the South African Constitutional Court decision in *National Coalition for Gay & Lesbian Equality* v. *Minister of Justice* (16), the impact of this denial (6 BHRC 127, at para. 54) "constitutes a crass, blunt, cruel and serious invasion of their dignity."

20 Mr. Neish seeks to meet this argument by relying on the line of cases in the European Court of Human Rights which have upheld special privileges for married couples (and latterly civil partners). In some of these the court has said that married and unmarried heterosexual partners are not in an analogous situation (see, in particular, the admissibility decisions in *Shackell* v. *United Kingdom* (20), citing *Lindsay* v. *United Kingdom* (12) and the recent decision in *Yigit* v. *Turkey* (23), privileging

civil over religious marriages in Turkey). In *Burden* (1), Judge Björgvinsson observed (47 E.H.R.R. 38, at para. 63):

> "In *Shackell*, the Court found that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits, since 'marriage remains an institution which is widely accepted as conferring a particular status on those who enter it.' The Grand Chamber considers that this view still holds true."

21 Finally, Mr. Neish relies upon the admissibility decision in *Courten* v. *United Kingdom* (3) in which the survivor of a same-sex relationship complained that he had had to pay inheritance tax upon the couple's home. His partner had died before the Civil Partnership Act 2004 came into force and so they were unable to escape that liability by entering into a civil partnership. The court relied on *Shackell*, *Lindsay*, and *Burden*, pointing out that—

> "the court has had previous occasion to remark that, notwithstanding social changes, marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under article 12 of the Convention. It has held, for example, that the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent Government . . ."

The court dealt rather summarily with the argument that the couple were unable to get married at the relevant time by accepting that the United Kingdom could not be criticized for failing to legislate for civil partnerships earlier than it did. This confirms the prescience of the majority of the House of Lords in *M* v. *Work & Pensions Secy.* (13) which reached the same conclusion about the discriminatory treatment of same-sex couples under the child support scheme.

22 Mr. Singh rightly points out that all these cases concerned taxation and similar benefits within the ambit of art. 1 of Protocol 1 rather than within the ambit of art. 8. There is a much wider margin of appreciation for Member States in the former context than in the latter. He also points out that the concept of a margin of appreciation has no relevance to a national court interpreting its own laws. However, the Board would observe that the Strasbourg court's reliance on the margin of appreciation suggests that, despite the references to married and unmarried couples not being in an analogous situation, the court was in reality finding that to privilege marriage in the context in question could readily be justified. For the reasons given earlier, the Board also considers it more logical to ask whether distinctions between married and unmarried couples can be

justified than to regard the discriminatory status itself as placing them in different situations.

23 Hence, applying the approach of Lord Nicholls in *R. (Carson)* (18), the Board finds that the appellant has been treated in an indirectly discriminatory manner on account of her sexual orientation and turns to the question of justification.

Justification

24 The Board accepts that the ease of justification will vary with the context. It will be easier to justify differential fiscal benefits than differential interferences with the home and family life. In both *Shackell* (20) and *Estevez* v. *Spain* (6), the court considered whether privileging marriage for fiscal and benefit purposes could be justified and held that in those cases it could. The court has also required differences in treatment between married and unmarried fathers to be justified (see *McMichael* v. *United Kingdom* (14) where the difference was justified, *P.M.* v. *United Kingdom* (17) and *Sommerfeld* v. *Germany* (21) where it was not). And in *In re G.* (8), the House of Lords not only required a difference in treatment between married and unmarried couples in the law of adoption to be justified but also found that it was not—a blanket ban on joint adoption by any unmarried couple irrespective of the best interests of the child was irrational. Indeed, the majority took the view that the Strasbourg court would not find this to be within the State's margin of appreciation, relying in particular on *E.B.* v. *France* (5) where the denial of adoption to a woman in a same-sex relationship could not be justified.

25 The benefit of a justification analysis is that it encourages structured thinking. A legitimate aim of the difference in treatment must first be identified. There must then be a rational connection between the aim and the difference in treatment. And the difference must be proportionate to the aim.

26 No-one doubts that the "protection of the family in the traditional sense" is capable of being a legitimate and weighty aim (see *Karner* v. *Austria* (10) (38 E.H.R.R. 24, at para. 40)). Privileging marriage can of course have the legitimate aim of encouraging opposite-sex couples to enter into the status which the State considers to be the most appropriate and beneficial legal framework within which to conduct their common lives. Privileging civil partnership could have the same legitimate aim for same-sex couples. But, to paraphrase Buxton, L.J. in the Court of Appeal's decision in *Ghaidan* v. *Godin-Mendoza* (9), it is difficult to see how heterosexuals will be encouraged to marry by the knowledge that some associated benefit is being denied to homosexuals. They will not be saying to one another: "Let's get married because we will get this benefit and our

gay friends won't." Moreover, as Baroness Hale said in the same case in the House of Lords ([2004] 2 A.C. 557, at para. 143):

> "The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to 'everyone' including homosexuals, by article 8 since *Dudgeon* v. *United Kingdom* (4 E.H.R.R. 149). If it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships . . . Society wants its intimate relationships, particularly but not only if there are children involved, to be stable, responsible and secure. It is the transient, irresponsible and insecure relationships which cause us so much concern."

The aim of discouraging homosexual relationships is equally impermissible under ss. 7(1) and 14 of the Constitution of Gibraltar.

27 Of course, the policy does not privilege married couples above everyone else. It also privileges unmarried opposite sex couples who have a child in common. The aim is said to be to protect the children but, if so, it is difficult to understand why it is limited to couples with a child in common, and does not extend to other couples who have undertaken parental responsibility for minor children. The policy also extends to parents and adult children living with the tenant. The aim here must be to protect the family home. But if so, it is difficult to understand why it does not extend to protecting the homes of people whom we now recognize as being members of the same family (see *Fitzpatrick* v. *Sterling Housing Assn. Ltd.* (7)). In short, the suggested aims are incoherent and the means employed are not rationally connected to those aims.

28 In the Board's view, therefore, the discriminatory effect of the policy cannot be justified because it is not rationally related to a legitimate aim. But there is another reason why it cannot be justified.

In accordance with the law

29 Dudley, Ag. C.J., having held that there was no discrimination because the appellant and her partner were being treated in the same way as other unmarried couples with no children, went on to observe that once the rights and freedoms protected by the Constitution were engaged, any interference had to be in accordance with the law and to satisfy a legitimate aim and the principle of proportionality. These concepts are taken from art. 8(2) of the ECHR. They do not emerge with the same clarity from ss. 7 and 14 of the Constitution. However, the exceptions contained in s.7(3) apply only to things done "under the authority of any

law." Similarly, the exceptions in s.14(7) apply only to things done "under the authority of any law."

Conclusion

30 For these reasons, the Board will humbly advise Her Majesty that this appeal should be allowed. If this is so, the Board agrees with both Dudley, Ag. C.J. and the Court of Appeal, that this policy was not "in accordance with the law" or "under the authority of any law" because it was inaccessible. The evidence of Dr. Coram was that it had evolved over time and was not recorded in any codified form. The appellant found out about it when she applied to have her partner added to the tenancy. She was puzzled because she knew of two women who were joint tenants of another flat. She must have been even more puzzled as the statements of the policy evolved over time. She was first told that "only parents, spouses or children may be included" (letter of March 6th, 2007). The full extent of the policy only emerged in the witness statement of Dr. Coram (dated July 5th, 2007) and in the defendant's response to the claim (dated July 6th, 2007).

31 In the opinion of the Board, therefore, the appellant is entitled to a declaration that she has been treated in a discriminatory manner, in contravention of her rights under ss. 7 and 14 of the Constitution. In reaching this conclusion, the Board is not seeking to dictate to the Housing Allocation Committee exactly what its policy should be. But it should be a policy which does not exclude same-sex partners who are in a stable, long term, committed and interdependent relationship from the protection afforded by a joint tenancy.

32 The Board recognizes that, in the small number of such applications which are likely to be made, the Committee will have to make more inquiries than they do in other cases. This is something which public officials are used to doing in the United Kingdom. The Committee may well wish to adopt some simple *indicia* of interdependence and stability rather than to embark upon a more intrusive inquiry. The Board would also like to stress that this decision does not oblige Gibraltar to introduce same-sex marriage or civil partnership. It would only observe that this would enable the authorities to continue to grant privileges to those couples who had chosen to enter an officially recognized status and to deny them to those who had declined to do so.

Appeal allowed.