[2013–14 Gib LR 165]

P v. ATTORNEY-GENERAL

SUPREME COURT (Dudley, C.J.): April 10th, 2013

Constitutional Law—fundamental rights and freedoms—protection for privacy of home and other property—"family life" protected under Constitution, s.7 not limited to marriage-based relationships—child of unmarried opposite-sex couple clearly part of family unit, irrational if different when couple is same-sex

Constitutional Law—fundamental rights and freedoms—protection from discrimination—same-sex partners to be allowed to apply for joint adoption notwithstanding Adoption Act, s.5—s.5 discriminatory contrary to ss. 7 and 14 of Constitution—directly discriminatory against all unmarried couples, indirectly discriminatory against same-sex couples

Family Law—adoption—same-sex adopters—same-sex partners to be allowed to apply for joint adoption notwithstanding Adoption Act, s.5—s.5 discriminatory as contrary to ss.7 and 14 of Constitution—directly discriminatory against all unmarried couples, indirectly discriminatory against same-sex couples

The claimant sought a declaration that the terms of the Adoption Act 1951, s.5, which prevented her applying for an adoption order jointly with her partner, violated the Constitution.

The claimant and her same-sex partner, T, were in a committed, long-term relationship. Neither civil partnership nor same-sex marriage was available in Gibraltar, and in 2010 they therefore travelled to Scotland (where there were no residency requirements) and entered a civil partnership. In 2012, T gave birth to A, a child conceived via IVF using the claimant's ova, to whom the claimant had been a *de facto* parent ever since. She wanted to adopt A jointly with T, but the Adoption Act, s.5 allowed only single applicants or married couples to adopt, and for the claimant to adopt A, T would therefore have to sever her own parental rights, which she was unwilling to do.

The claimant submitted that s.5 breached ss. 1, 7 and 14 of the 2006 Constitution, violating her right to respect for her family life and to non-discrimination, and that the discrimination was not justified by any of the exceptions set out in s.7(3).

The defendant entered no evidence or defence, neither denying the alleged violation of the Constitution, nor seeking to justify it.

Held, granting the application:

(1) The claimant, notwithstanding the Adoption Act, s.5, would be allowed to apply for an adoption order jointly with her partner, as she had been discriminated against by that section contrary to ss. 7 and 14 of the Gibraltar Constitution 2006. The Act was directly discriminatory against all unmarried couples, and indirectly discriminatory against same-sex couples (para. 22).

(2) Section 7 of the Constitution, guaranteeing a right to family life, was engaged in this case. The notion of family life under s.7 was not limited to marriage-based relationships. Had the claimant and T been an unmarried opposite-sex couple there would have been no doubt that A was part of their family unit, and to hold differently in the case of unmarried same-sex couples would create an artificial distinction devoid of a rational basis (paras. 7–9).

(3) Section 5 of the Adoption Act was not discriminatory according to the case law of the European Court of Human Rights, of which the court was required to take account by s.18(8) of the Constitution. Under the European Convention, same-sex couples were not discriminated against as all unmarried couples (regardless of sexual orientation) were prevented from adopting, as in the Adoption Act (paras. 12–14).

(4) Section 5 of the Adoption Act was, however, discriminatory under Gibraltar law. The protection afforded under the Constitution was able to go further than the European Convention on Human Rights, and in this respect, did so. Section 5 clearly afforded different treatment to married and unmarried couples, and the claimant, by virtue of her sexual orientation, was unable to marry her partner and meet the statutory criteria for joint adoption. This was clearly different treatment on the basis of sexual orientation, whether framed as direct discrimination against unmarried couples or indirect discrimination in that the claimant did not have the option to marry her partner—which put her in a radically different position from someone in an opposite-sex relationship. In order to accord with the Constitution, the difference in treatment therefore had to be justified (paras. 15–16).

(5) The discrimination inherent in s.5 could not be justified. There must have been a legitimate aim of the difference in treatment, a rational connection between the aim and the difference in treatment and the difference had to be proportionate to the aim. In this case, the defendant did not advance any justification, the burden on establishing justification lay with the Attorney-General, and justification had not therefore been established. However, to elevate the consideration that married couples might be—in general—better suited to being adoptive parents than unmarried ones to the state of an irrebuttable presumption that unmarried couples were unsuitable to adopt was not rational; in particular, it ignored the interests of the child, which ought to be the paramount consideration. Having established that there was no basis for discriminating against

unmarried couples, there was no rational basis for distinguishing unmarried same-sex couples from unmarried opposite-sex ones (paras. 17–20).

Cases cited:

(1) *Cerisola* v. *Att.-Gen*. 2007–09 Gib LR 204; [2008] UKPC 18, referred to.

(2) *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 B.H.R.C. 741, considered.

(3) *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 B.H.R.C. 650; [2008] UKHL 38, applied.

(4) *Gas* v. *France*, E.C.H.R., March 15th, 2012, Application No. 25951/07, distinguished.

(5) *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 considered.

(6) *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 B.H.R.C. 677; [2005] UKHL 37, followed.

(7) *R. (Rodriguez)* v. *Housing Min.*, 2007–09 Gib LR 465; [2010] U.K.H.R.R. 144; (2010), 28 B.H.R.C. 189; [2010] EqLR 186; [2009] UKPC 52, applied.

(8) *Salgueiro da Silva Mouta* v. *Portugal* (2001), 31 E.H.R.R. 47; [2001] 1 F.C.R. 653, referred to.

(9) *Schalk* v. *Austria*, [2011] 2 F.C.R. 650; (2011), 53 E.H.R.R. 20; 29 B.H.R.C. 396; [2010] EqLR 194, followed.

(10) *X* v. *Austria*, E.C.H.R., February 19th, 2013, Application No. 1901/07, applied.

Legislation construed:

Adoption Act 1951, s.5: The relevant terms of this section are set out at para. 4.

Children Act 2009, s.4(1): The relevant terms of this sub-section are set out at para. 18.

Gibraltar Constitution Order 2006 (Unnumbered S.I. 2006, p.11503), Annex 1, s.7: The relevant terms of this section are set out at para. 6.

s.14: The relevant terms of this section are set out at paras. 6 and 21.

European Convention for the Protection of Human Rights and Fundamental Freedoms (Rome, November 4th, 1950; UK Treaty Series 17 (1953)), art. 8(1):

"Everyone has the right to respect for his private and family life, his home and his correspondence."

art. 8(2): "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

art. 14: "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."

J. Restano for the claimant;
R.R. Rhoda, *Q.C.*, *Attorney-General*, and *Ms. G. Gear* for the defendant;

1 **DUDLEY, C.J.:** This is a Part 8 action in which the claimant seeks a declaration that—"s.5(2) of the Adoption Act violates the Gibraltar Constitution Order 2006 by excluding the claimant from applying for an adoption order jointly with her partner." Pursuant to an order dated April 10th, 2012, the claimant ("P") was given anonymity. Although the defendant in the acknowledgment of service indicated that he intended to defend the proceedings, no defence or evidence was served, either denying the alleged violation of the Constitution or seeking to justify it. The factual background to the claim is not disputed and can be summarised briefly. I draw from Mr. Restano's skeleton argument and P's witness statement.

2 P and her same-sex partner ("T") are in a stable, committed, loving, monogamous, permanent and inter-dependent relationship. As neither a civil partnership nor marriage is possible in Gibraltar for same-sex couples, they travelled to Scotland (where there are no residency requirements) and on November 12th, 2010 they entered into a civil partnership. Shortly thereafter, they decided to start a family together, and to that end in early 2011 they attended the London Women's Clinic in London. P donated her ova to T who, with the aid of a sperm donor, received IVF treatment and on February 3rd, 2012, gave birth to a baby girl ("A").

3 Despite the genetic link between P and A, the fact that P and T entered into a civil partnership in Scotland, and that P has acted as *de facto* parent of A, P is unable to apply for adoption jointly with T. The only option open to P is to apply for adoption as a single applicant, which would require T to sever her parental rights over A. Not surprisingly, it is not an option which is acceptable to either P or T.

The statutory framework

4 Section 5 of the Adoption Act provides—

"(1) Subject to subsection (2), an adoption order shall not be made unless the applicant—

(a) is the mother or father of the minor;

(b) is a relative of the minor and has attained the age of twenty-one years; or

(c) has attained the age of twenty-five years.

(2) An adoption order may be made in respect of a minor on the joint application of two spouses—

(a) if either of the applicants is the mother or father of the minor,

(b) if the condition set out in paragraph (b) or paragraph (c) of subsection (1) is satisfied in the case of one of the applicants, and the other of them has attained the age of twenty-one years.

(3) Except where an adoption order is made on the joint application of two spouses, no adoption order shall be made authorizing more than one person to adopt a minor.

(4) An adoption order shall not be made in respect of a minor who is a female in favour of a sole applicant who is a male, unless the court is satisfied that there are special circumstances which justify as an exceptional measure the making of an adoption order.

(5) An adoption order shall not be made in favour of an applicant who is not resident and domiciled in Gibraltar or, save with the consent of the Minister responsible for personal status, in respect of any minor who is not a British subject and so resident.

(6) An adoption order shall not be made in respect of a minor who has been married."

The effect of s.5 is that only single persons (subject to certain conditions) and spouses are eligible to apply for adoption. Although s.5(2)(a) provides for a joint application to be made if one of the applicants is the mother or the father of the child, the applicants have to be married.

5 The claim is advanced in terms of it engaging and breaching ss. 1, 7 and 14 of the Constitution. Section 1 sets out in more generic form the fundamental rights and freedoms protected by the Constitution, which are then particularized and made subject to limitations in the remaining sections of Chapter 1. Although the case can be framed from the perspective of that provision, it does not require separate consideration, given that the substantive argument is framed in terms of s.7, which establishes the right to respect for, *inter alia*, family life, and s.14 which affords protection from discrimination.

6 Section 7 of the Constitution affords protection to the right to family life on the following terms:

> "(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."

The material provisions of s.14 for the purposes of this case are these:

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

. . .

(c) for the application, in the case of persons of any such description as is referred to in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the personal law applicable to persons of that description; . . . or

(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.

. . .

(6) Subsection (2) shall not apply to anything which is expressly or by necessary implication authorised to be done by any such provision of law as is referred to in subsection (4) or (5).

(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, 10, 11, 12 and 13, being such a restriction as is authorised by section 7(3), 9(5), 10(2), 11(2), 12(2) or 13(3), as the case may be."

Unlike art. 14 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which complements the other substantive provisions of the Convention but has no independent existence, it is now well established that s.14 of the Constitution affords free-standing substantive rights (see *Cerisola* v. *Att.-Gen*. (1) and *R.* (*Rodriguez)* v. *Housing Min.* (7)). That is of little practical relevance in this case, given that the limitations in s.7(3) extend to the rights guaranteed by both s.7 and s.14, and that whilst it may in any event appear self-evident, for the reasons which follow, s.7 is engaged.

Family life

7 In *Schalk* v. *Austria* (9), the European Court of Human Rights reiterated its established case law in respect of different-sex couples in relation to "family life" (53 E.H.R.R. 20, at para. 91):

> ". . . [N]amely that the notion of family under this provision is not confined to marriage-based relationships and may encompass other *de facto* 'family' ties where the parties are living together out of wedlock. A child born out of such a relationship is *ipso jure* part of that 'family' unit from the moment and by the very fact of his birth . . ."

The court went on to take account of the rapid evolution of social attitudes and said (*ibid*., at para. 94):

> "In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of art. 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would."

On the facts before me, it is evident that the relationship between P and her partner, T, falls within the notion of "family life." If P and T were an opposite-sex couple, there would be no doubt that A, although born out of wedlock, would form part of that family unit. The fact that P and T are a same-sex couple can make no difference, and it therefore follows that A is part of the family unit, and therefore P's s.7 right to family life is engaged. Any other outcome would create an artificial distinction between same-sex and opposite-sex couples and would be devoid of a rational basis. The fact that it is P's ova from which A was conceived may arguably on the facts strengthen her case, but it seems to me that in these cases, primacy ought not to be given to biological or genetic links but rather whether there are social familial ties, and whether the relationship is one of parent–child.

8 For these reasons, it is in my judgment evident that the s.7 right to family life is engaged. The issue, from the perspective of that provision, is whether the restriction imposed in P's family life by not being able to adopt A with T is saved by the s.7(3) limitations.

Discrimination

9 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 in one such ground (see *Salguiero da Silva Mouta* v. *Portugal* (8)).

10 Albeit in the context of the Convention, a very useful analysis of the nature of discrimination is to be found in the House of Lords decision in *Ghaidan* v. *Godin-Mendoza* (5) where, in a case involving sexual orientation, Lord Nicholls at 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 . . . 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 . . . 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."

11 Mr. Restano ably submits that P's inability to adopt A with her same-sex partner can be categorized as both direct and indirect discrimination. Direct discrimination in that if she were a man she would be able to marry T and thereby adopt A. Indirect discrimination because she is unable to marry T due to her sexual orientation and that the fact that the Act applies to unmarried opposite-sex couples does not redeem the constitutional invalidity of the provisions as heterosexual couples have the option of getting married whilst same-sex couples do not.

The European Court of Human Rights perspective

12 In the Chamber judgment of the European Court of Human Rights in *Gas* v. *France* (4), the court held that the refusal to allow a woman to adopt her same-sex partner's child was not discriminatory. The court relied on earlier decisions to the effect that marriage confers a special status and that the applicant's position was not comparable to that of a married couple when it came to second-parent adoption. It is noteworthy that the court determined that, as unmarried opposite-sex couples were likewise prohibited from adopting, there was no evidence of difference of treatment based on the applicant's sexual orientation.

13 That approach was in large measure adopted in the very recent case of *X* v. *Austria* (10), a decision of the Grand Chamber, which was handed down after the hearing of this case but which Mr. Restano properly brought to this court's attention. In *X*, the Grand Chamber held that there

had been a violation of art. 14, taken in conjunction with art. 8 (right to family life), on account of the difference in treatment of the applicants in comparison with unmarried different-sex couples in second-parent adoptions, but there had been no violation when the applicant's situation was compared with that of a married couple. *Gas* was approved and distinguished on the basis that, under French law, second-parent adoption was not open to any unmarried couple, be they heterosexual or same-sex. The Grand Chamber reiterated on the following terms that discrimination on the grounds of sexual orientation requires very weighty reasons for its justification (E.C.H.R., February 19th, 2013, Application No. 1901/07, at para. 140)—

> "In cases in which the margin of appreciation is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people, in this instance persons living in a homosexual relationship."

The court then summarized the basis for its decision as follows (*ibid*., at para. 146)—

> "All the above considerations—the existence of *de facto* family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple . . . and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples—cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption in same-sex couples . . . Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child, which is a key notion in the relevant international instruments . . ."

That, of course, is against the backdrop that the court had earlier reiterated the position that there is no obligation under art. 8 of the Convention to extend the right to second-parent adoption to unmarried couples. Essentially therefore, in *X*, the discrimination arose by virtue of the fact that Austrian law allowed second-parent adoption by unmarried opposite-sex couples.

14 The Adoption Act allows for adoption by either married couples or a sole applicant, but does not allow for adoption by unmarried couples

whether opposite-sex or same-sex. Those provisions, when viewed from the perspective of ECHR case law, do not offend the Convention. Although trite, I remind myself that by virtue of s.18(8) of the Constitution, in determining questions in connection with Chapter 1, this court is enjoined to take account, *inter alia*, of judgments of the European Court of Human Rights. Moreover, s.14(4)(e) of the Constitution essentially allows for laws to be discriminatory provided that they are consistent with the rights protected by the Convention.

Gibraltar and English case law

15 That, however, is not the end of the matter. In *Rodriguez* (7), a Privy Council decision binding on this court, the Board held that Ms. Rodriguez, who had been denied a joint tenancy with her same-sex partner of a Government tenancy, had been indirectly discriminated against because although unmarried opposite-sex couples were subject to the same policy and would also be denied joint tenancies, Ms. Rodriguez and her partner could not marry or have children in common. This came about by virtue of their sexual orientation, and therefore amounted to discrimination. The Board then went on to find that the discriminatory effect of the policy could not be justified because it was not rationally related to a legitimate aim. In the judgment delivered by Lady Hale, the Board at made it clear (2007–09 Gib LR 465, at para. 11) that—

> ". . . [it was] 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 . . ."

Essentially, therefore, the Board determined that the Constitution can go further than the Convention in the protection of fundamental rights.

16 In construing the Constitution, the Board adopted the approach laid down by Lord Nicholls who, in *R. (Carson)* v. *Work & Pensions Secy*. (6), said ([2006] 1 A.C. 173, at para. 3):

> ". . . [T]he 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."

Adopting that approach, and applying *Rodriguez*, in my judgment it is apparent that s.5(2) and s.5(3) of the Act affords different treatment to married and unmarried couples, and that P, because of her sexual orientation, is not able to marry T and thereby meet the statutory criteria so as to adopt A. Whether the argument is framed as being in the nature of direct discrimination, in that she is treated less favourably as an unmarried person than as a married person, or indirect discrimination because P cannot lawfully marry her same-sex partner and they are therefore in a position which is radically different from that of an opposite-sex couple is a distinction without a difference, the fundamental point being that P is being discriminated against because of her sexual orientation.

Justification

17 The approach to be taken by the court in carrying out the justification analysis is succinctly set out in the Board's judgment in *Rodriguez* (2007–09 Gib LR 465, at para. 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."

Identification of the legitimate aim is referable to the enumerated interests in s.7(3)(a) of the Constitution. The defendant has neither identified, nor advanced a case on justification. In contrast, P relies upon the witness statement of Charles Trico, the secretary of the Equality Rights Group GGR, who summarizes reputable scientific research to the effect that there is no significant difference between children brought up by same-sex and opposite-sex couples. Interesting as that material is, and although it corresponds with my wholly unscientific opinion that children can be brought up equally well (or equally badly) by married couples, same-sex couples, opposite-sex couples or single parents, it is not evidence which is before me in the nature of expert opinion evidence subjected to the usual form of scrutiny which is to be expected in a trial. Therefore, I place very limited reliance upon it. But, in any event, the burden of establishing justification lies with the defendant and there is no onus on P to counter an argument which is not advanced.

18 However, given the significance of the relief sought and its wider implications beyond this particular case, it is right that justification be explored further. In *In re G* (3), the House of Lords, dealing with an appeal from the Court of Appeal in Northern Ireland touching upon declaratory relief sought by an unmarried couple that the Adoption (Northern Ireland) Order 1987 contravened art. 8 and art. 14 of the Convention, held that being unmarried was a status within the meaning of

art. 14, and that the applicants' Convention rights were engaged by the legal bar on their being considered adoptive parents. Applying a similar limitation as our Adoption Act, art. 14 of the Adoption (Northern Ireland) Order 1987 provided that an adoption order could only be made on the application of more than one person if the applicants were a married couple. Notwithstanding that provision, the House declared that the applicants were entitled to apply to adopt the child. Lord Hoffmann dealt with justification extensively, and in his speech said ([2009] 1 A.C. 173, at para. 13)—

> ". . . The state is entitled to take the view that marriage is a very important institution and that in general it is better for children to be brought up by parents who are married to each other than by those who are not. If therefore, it was rational to adopt a 'bright line rule' to determine what class of people should adopt children, there would be much to be said for article 14 [of the Order]."

And later (*ibid*., at para. 16)—

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

And (*ibid*., at para. 18)—

> "It is one thing to say that, in general terms, married couples are more likely to be suitable adoptive parents than unmarried ones. It is altogether another to say that one may rationally assume that no unmarried couple can be suitable adoptive parents. Such an irrebuttable presumption defies everyday experience . . . I would agree that the fact that a couple do not wish to undertake the obligations of marriage is a factor to be considered by the court in assessing the likely stability of their relationship and its impact upon the long term

> welfare of the child. Once again, however, I do not see how this can be rationally elevated to an irrebuttable presumption of unsuitability."

That approach is equally applicable to the present case. Our Adoption Act does not, in its terms, provide that the adoption must be in the best interest of the child, but it seems to me axiomatic that any judge making such an order would apply that principle. In any event, s.4(1) of the Children Act requires the court, when it "determines any question with respect to . . . upbringing of a child . . . [to treat his welfare] the first and paramount consideration."

19 The fact that P and T are in a same-sex relationship cannot be a legitimate basis for distinguishing the present case from *In re G* (3). In *E.B.* v. *France* (2), Judge Costa, who dissented only on the application of the principles to the facts of the case, succinctly re-stated the principle established by that case (47 E.H.R.R. 21, at para. O–17):

> ". . . [T]he message sent by our Court to the states parties is clear: a person seeking to adopt cannot be prevented from doing so merely on the ground of his or her homosexuality. This point of view might not be shared by all, for good or not so good reasons, but—rightly or wrongly—our Court, whose duty under the Convention is to interpret and ultimately apply it, considers that persons can no more be refused authorisation to adopt on grounds of their homosexuality than have their parental responsibility withdrawn on those grounds . . ."

In a way, the fact that P and T are in a same-sex relationship highlights the irrationality of not allowing unmarried couples to adopt. It is, of course, not in the context of this action for me to make a determination as to the suitability or otherwise of P as an adoptive parent of A, but the fact that P and T have gone to another jurisdiction to have their relationship recognized, and then together embarked on IVF treatment, evidences the stability of their relationship and are clearly relevant factors when determining whether a second-parent adoption by P is in A's best interest.

20 In a sense, the apparent dichotomy between ECHR case law and the application of the principles in *Rodriguez* (7) is resolved by *In re G* (3). Applying *G*, it is clear that the Adoption Act discriminates against unmarried opposite-sex couples, whose constitutional rights are thereby infringed. Applying the principles of *X* v. *Austria* (10), it follows that once the right to adopt is extended to unmarried opposite-sex couples (as *G* does) there can be no difference in treatment between that group and same-sex couples.

21 A final issue on the construction of a limitation found in s.14 of the Constitution arises. By virtue of s.14(4)(c), s.14(1) does not apply to any laws so far as that law makes provision—

> ". . . for the application, in the case of persons of any such description as is referred to in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters that is the *personal law applicable to persons of that description*." [Emphasis supplied.]

Personal law is about the application of distinct legal provisions among different communities within a territory, sanctioned and applied by the state. The provision which was also to be found in the 1969 Constitution and the Constitutions of other overseas territories, is a historic vestige no doubt included for very good reason—to accommodate pre-colonial indigenous religious and cultural legal traditions whilst allowing for the application of English common law in the colonies. It is of no relevance in the present case, not least given that there are to my knowledge no personal laws which survive in this jurisdiction.

22 In my judgment, for these reasons, to the extent that s.5 of the Adoption Act requires joint applications by spouses, P's constitutional rights, guaranteed by ss. 7 and 14 of the Gibraltar Constitution 2006, are violated and notwithstanding the offending provisions in the Adoption Act, P may apply for an adoption order jointly with her same-sex partner.

Orders accordingly.
