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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **15/04/2020**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND FAMILY DIVISION

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IN THE MATTER OF A PETITION BY PETITIONER X

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Before: Morgan LCJ, Stephens LJ and Sir Donnell Deeny

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MORGAN LCJ (delivering the judgment of the court)

[1] The appellant and his husband were married on 27 September 2014 in England. The couple are British citizens domiciled in Northern Ireland. On 4 October 2014 the couple returned to Northern Ireland and have resided in this jurisdiction thereafter. On 19 December 2014 the appellant issued a petition pursuant to Article 31 of the Matrimonial and Family Proceedings (NI) Order 1989 ("the 1989 Order") seeking a declaration that his marriage in London is a valid and subsisting marriage under the law of Northern Ireland.

[2] Schedule 2, Part 1 paragraph 2(1) of the Marriage (Same Sex Couples) Act 2013 ("the 2013 Act") provides that the appellant's marriage under the law of England and Wales is to be treated in Northern Ireland as a civil partnership formed under the law of England and Wales and accordingly the appellant and his husband are to be treated as civil partners under the law of Northern Ireland. In the alternative, therefore, the appellant seeks a declaration that the said provision is incompatible with Articles 8, 9 or 12 ECHR either alone or read in conjunction with Article 14 ECHR.

[3] The learned trial judge concluded that the statutory provisions at issue did not give rise to any breach of the Convention. In this appeal Ms Quinlivan QC and Mr McQuitty appeared for the appellant, Dr McGleenan QC and Mr McAteer for the Department of Finance and Personnel ("the Department"), Mr Scoffield QC and Mr Egan for the Government Equalities Office which is part of the Department for Education in Westminster responsible for delivering the government's policy on extending marriage to same-sex couples in England and Wales through the 2013 Act,

and the Attorney General for Northern Ireland, Mr Larkin QC, also appeared as a respondent. We are grateful to all counsel for their helpful oral and written submissions.

Statutory Background

[4] Part 2 of the Northern Ireland Act 1998 ("the 1998 Act") sets out the legislative powers of the Northern Ireland Assembly. It is common case that marriage is a matter in respect of which the Assembly has competence. Section 1 and Schedule 1 to the Northern Ireland Act 2000 enabled the Parliament of the United Kingdom to make Orders in Council for Northern Ireland in respect of matters within the competence of the Northern Ireland Assembly during a period of suspension of the Assembly. It was during such a period that the 2003 Order was made.

[5] In order to solemnise a marriage in Northern Ireland Article 3 of the Marriage (Northern Ireland) Order 2003 ("the 2003 Order") provides that each of the parties must give the Registrar notice of intention to marry. If satisfied that there are no legal impediments, Article 7 of the 2003 Order provides that the Registrar shall issue a marriage schedule which will enable the marriage to be solemnised on the relevant date. Article 6 sets out a procedure for objections and Article 6(6)(e) provides that there is a legal impediment to a marriage if both parties are of the same sex. As a person domiciled in Northern Ireland and a party to the marriage which took place in England the appellant is entitled to seek a declaration under Article 31(1) of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 ("the 1989 Order") that the marriage was at its inception a valid marriage in Northern Ireland and that the marriage subsisted in Northern Ireland on 1 November 2014 when the appellant and his husband returned to Northern Ireland. Article 34 of the 1989 Order provides that if the truth of the proposition to be declared is proved the court must make that declaration and any such declaration is binding on the Crown and all other persons.

[6] Section 1 of the Civil Partnership Act 2004 provides that a civil partnership is a relationship between two people of the same sex ("civil partners") which is formed when they register as civil partners of each other. The arrangements for registration in Northern Ireland were established by the Civil Partnership Regulations (Northern Ireland) 2005. The Civil Partnership (Opposite-sex Couples) Regulations 2019 extended the opportunity to form a civil partnership to opposite sex couples in England and Wales.

[7] Section 1 of the 2013 Act provides that marriage of same sex couples is lawful in England and Wales. Schedule 2, Part 1 paragraph 2(1) stated that under the law of Northern Ireland, a marriage of a same sex couple under the law of England and Wales was to be treated as a civil partnership formed under the law of England and Wales and accordingly the spouses were to be treated as civil partners. That provision was the subject of debate in the Northern Ireland Assembly and a

legislative consent motion was passed in accordance with the Sewell Convention. It was submitted that the motion should have been the subject of consultation but that does not invalidate the primary statute. Section 9 of the 2013 Act enables the Secretary of State to make Regulations to provide for the conversion of civil partnerships to same sex marriages in England and Wales.

[8] Prior to the restoration of devolved government in Northern Ireland in January 2020 the Westminster Parliament passed the Northern Ireland (Executive Formation etc) Act 2019. Section 8 required the Secretary of State to make regulations by 13 January 2020 providing that two persons who are of the same sex are eligible to marry in Northern Ireland, and two persons who are not of the same sex are eligible to form a civil partnership in Northern Ireland. Section 8(5) enabled the Secretary of State to make provision for the right to convert a marriage into a civil partnership and a civil partnership into a marriage.

[9] The Marriage (Same-sex Couples) and the Civil Partnership (Opposite-sex Couples) Regulations 2019 were passed on foot of the legislation and provided that two persons of the same sex could marry in Northern Ireland and that any marriage solemnised in any part of the United Kingdom or elsewhere is not prevented from being recognised under the law of Northern Ireland as a marriage only because it is the marriage of a same sex couple. Similar provision was made for opposite sex civil partnerships. The appellant's marriage has, therefore, now been recognised in accordance with that provision.

Standing

[10] At the hearing before the learned trial judge the Department had contended that there was no jurisdiction to hear the petition. First it was argued that Article 31 of the 1989 Order did not give jurisdiction to the court to declare valid a marriage entered into outside Northern Ireland. Secondly, it was submitted that Article 31 did not afford jurisdiction to declare a civil partnership in Northern Ireland to be a marriage. Thirdly, it was submitted that Article 13 of the Matrimonial Causes (NI) Order 1978 rendered void a marriage in which the parties were not respectively male and female. Accordingly, in Article 31 the reference to "marriage" must be read as referring to an opposite sex marriage to be consistent with Article 13 of the 1978 Order and Article 6(6) of the 2003 Order.

[11] The learned trial judge rejected those submissions. He noted that Article 31 give the court jurisdiction to entertain the application on grounds which included domicile and habitual residence. Jurisdiction as to marriage status in the country of domicile was unsurprisingly based on the laws of the domicile state rather than on the law of the state in which the marriage was celebrated. No respondent's notice in relation to this issue was served on appeal and in our view the learned trial judge ruled correctly on this issue.

[12] At first instance the Attorney General submitted that a claim under section 4 of the Human Rights Act 1998 ("HRA") could not be pursued in the absence of establishing that the claimant was the victim of an unlawful act as required by section 7 of the HRA. This court examined that submission in the recent decision of Re Close and others [2020] NICA 20. Having considered paragraph [62] of the opinion of Lord Mance we concluded at paragraph [22] of Re Close:

> "[22] There are three relevant conclusions which are apparent from this paragraph. First, the victimhood requirement for the issue of proceedings under section 7 of the HRA does not apply in a claim under section 4 but the claimant must establish standing. Secondly, a claim under section 4 should be a claim of last resort and should only generally be pursued where a claim under section 7 is not available. Thirdly, a claimant will need to establish that they are a person adversely affected if they are to establish standing in a section 4 claim. As Lady Hale stated at [17] of Re NIHRC, R (Steinfeld and another) v Secretary of State for International Development [2018] UKSC 32 is an example of such a case."

[13] In this case we are satisfied that the appellant is entitled to pursue a claim for a declaration in accordance with Article 31 of the 1989 Order and on any view would be a person adversely affected for the purpose of challenging the compatibility of the relevant statutory provision with the ECHR. The respondent's notice on this point was significantly out of time but we felt it proper to deal with it substantively lest there be any confusion about the circumstances in which a section 4 claim can be presented.

The first instance decision

[14] The learned trial judge concluded that the appellant's Convention rights had not been violated as a result of his same-sex marriage in England and Wales being treated as a civil partnership in Northern Ireland. He noted first that the Chief Commissioner of the Northern Ireland Human Rights Commission accepted in a letter dated 11 June 2012 that the restriction of marriage to opposite sex couples did not violate international standards. The consultation process for the 2013 legislation did not suggest that the legislation was required to make English law compliant with the Convention. In light of the "Ullah" principle it was not open to the judge to give an interpretation of the Convention which was different from the Strasbourg Court. The Strasbourg Court had held that same-sex marriage was not even a Convention right. There was no reason to believe that the Strasbourg Court would take a different view in the foreseeable future in light of its clear, repeated and recent

rulings. We note that we have had the advantage of a number of recent decisions of the Supreme Court which were not available to the judge.

[15] The appellant submits that the learned trial judge has failed to deal with the case as presented. The appellant submits that this is not a case about whether or not the prohibition on same-sex marriage was contrary to the Convention but rather was a case about whether the same-sex marriage celebrated in England and Wales should be recognised in this jurisdiction. It was submitted that the impugned legislation took away the appellant's marriage.

[16] Although we understand the sentiment behind the presentation, the position is that the appellant and his husband went through a ceremony of marriage in England and Wales which is recognised as a marriage in that jurisdiction. In this jurisdiction the ceremony which the appellant and his husband went through is treated as a civil partnership. The appellant knew that when he took part in the ceremony and there is no issue about him having had a marriage taken away from him either in this jurisdiction or in England and Wales.

[17] The appellant also compares himself with other same-sex couples who have been married in England and Wales and notes that they, not having returned to Northern Ireland, are recognised as married whereas he is not. The petition suggested that as the comparator he relies upon in relation to the Article 14 claim. It is, of course, common case that the appellant's marriage continues to be recognised as such in England and Wales and that the marriage of those living in England and Wales is treated as a civil partnership when they come to Northern Ireland.

Consideration

[18] This court has already considered the issue of whether the prohibition on same sex marriage in Northern Ireland was in breach of Convention rights in Re Close and others and concluded that the prohibition had become unlawful by the summer of 2017. Clearly, in the period after the summer of 2017 during which the prohibition was in breach of the rights of same sex couples under Article 14, the failure to recognise the appellant's marriage must give rise to the same unjustified discrimination as compared to heterosexual couples whose marriages were recognised in similar circumstances. The issue in this case is whether there was any obligation to recognise the appellant's marriage in this jurisdiction during the period when the prohibition on same sex marriage was not in breach of Convention rights. We do not accept that section 3 of the HRA can be utilised to achieve that aim and consider that his is an incompatibility case.

[19] Although the appellant sought expressly to distinguish this case from Re Close a very considerable part of the skeleton argument sought to establish that the prohibition of same-sex marriage was in breach of Articles 8, 9, 12 and 14 of the Convention. For the reasons set out in Re Close we do not accept that Articles 8 or

12 require the availability of same-sex marriage. The appellant argued that he was expressing his religion and beliefs by being married. It may be that living as a same sex couple can engage that aspect of Article 9 but we do not consider that it adds anything to Articles 8 or 12. Under the Convention Article 9 cannot deliver what Article 12 does not deliver.

[20] In our view this is an Article 14 discrimination case. The test to be applied in such cases was set out at paragraph 46 of Close:

> "(1) Do the circumstances "fall within the ambit" of one or more of the Convention rights?
>
> (2) Has there been a difference of treatment between two persons who are in an analogous situation?
>
> (3) Is that difference of treatment on the ground of one of the characteristics listed or "other status"?
>
> (4) Is there an objective justification for that difference in treatment?"

[21] The principal authority touching on that matter is Wilkinson v Kitzinger (No 2) [2007] FCR 183. In that case the petitioner went through a form of same-sex marriage lawful and valid by the law of British Columbia. On her return to England she issued proceedings seeking recognition of her marriage or alternatively a declaration under section 4(2) of the HRA. The comparison relied upon by the applicant was between the position of same-sex couples whose marriage was not recognised in England and opposite sex couples whose marriage was recognised. The court accepted that the reality of the underlying position was that the different treatment was based on sexual orientation. The question was whether it could withstand scrutiny and that depended on whether it had a legitimate aim and whether the means chosen to achieve that aim were appropriate and not disproportionate in their adverse impact.

[22] Sir Mark Potter accepted that the aim was legitimate and rejected the argument that the provisions of the Civil Partnership Act represented an unjustifiable exercise in differentiation in light of its aims. He concluded that marriage was an age-old institution, valued and valuable, respectable and respected, as a means not only of encouraging monogamy but also the procreation of children and their development and nurturing in a family unit in which both maternal and paternal influences were available in respect of their nurture and upbringing.

[23] We do not share that analysis insofar as it suggests that same sex couples cannot provide a suitable environment for the procreation of children and a nurturing family environment for their development. We have accepted, however, that the maintenance of the traditional concept of marriage was a legitimate aim and

provided justification for the prohibition on the recognition of same sex marriage for the period until the summer of 2017 as set out in Close.

[24] Applying the tests set out at [20] above we do not accept that those same sex couples who were married in England and Wales are treated differently from the appellant and his husband. Both have their marriage recognised in England and Wales and both are treated as civil partners in Northern Ireland.

[25] The true comparator is between those same sex couples who married in England and Wales and those heterosexual couples who did likewise. The heterosexual marriage was treated as a marriage in Northern Ireland. There was a difference of treatment which required justification. We considered the question of justification in some depth in Close and are satisfied that exactly the same issues arise in this case. We see no basis, therefore, upon which it could have been argued that the failure to recognise a same sex marriage celebrated in England and Wales could have given rise to unlawful discrimination during the period up to the summer of 2017 during which period the prohibition on same sex marriage was justified in this jurisdiction.

Conclusion

[26] The legislative changes introduced by the 2019 Act mean that there is no purpose to be served by any Order in this case.