Susan Wilkinson v. Celia Kitzinger, Her Majesty's Attorney-General, The Lord Chancellor
Case No: FD05D04600
[2006] EWHC 2022 (Fam)

High Court of Justice Family Division

Fam Div

Before: The President

Monday 31st July 2006, Hearing date: 6th-9th June 2006

Representation

Ms Monaghan and Ms Ruth Kirby (instructed by Liberty) for the Petitioner.
First Respondent appeared in person and was not represented.
Ms Mountfield (instructed by Treasury Solicitors) for The Attorney-General.

Approved Judgment

Sir Mark Potter The President of the Family Division

Introduction:

1 In these proceedings, the Petitioner Susan Wilkinson seeks a declaration as to her marital status under s.55 of the Family Law Act 1986 ("the 1986 Act").
2 On 26 August 2003, the Petitioner and the first Respondent who were then and remain domiciled in England, went through a form of marriage, lawful and valid by the law of British Columbia which permits and recognises as valid marriages between persons of the same sex.
3 Prior to that ceremony, the Petitioner and the first Respondent, who are both University professors, had been living together as a couple for thirteen years. Upon their return to the United Kingdom, and in advance of the coming into force of the Civil Partnership Act 2004 ("CPA"), the Petitioner, with the support of the first Respondent, instituted these proceedings, seeking a declaration that the marriage was a valid marriage at its inception and:
"If necessary in order to make such a declaration, the Petitioner also seeks a declaration of incompatibility under s.4 of the Human Rights Act 1998 in relation to s.11(c) of the Matrimonial Causes Act 1973."
4 The orders sought have been expanded and clarified by Karon Monaghan who appears for the Petitioner as follows.
i) The primary order sought is that:
Pursuant to section 5 of the Family Law Act 1986, it is declared that the marriage

between Susan Jane Wilkinson and Celia Clare Kitzinger which took place in British Columbia in Canada on 26 August 2003 is valid under the law of England and Wales.
ii) In the alternative, if the court finds that the law in this jurisdiction means that it cannot recognise the said marriage, the Petitioner asks the court to declare that:
(a) Being contrary to Article 8, 12 and 14 (taken together with Article 8 and /or Article 12) of theEuropean Convention on Human Rights, the prohibition of marriage of two persons of the same sex in this jurisdiction is in breach of the Petitioner's human rights; and
(b) Sections 11 (c) of the Matrimonial Causes Act 1973 and Section 1(1) (b) and Chapter 2 of Part 5 of the Civil Partnership Act 2004 are incompatible with the obligations imposed on the United Kingdom by the European Convention on Human Rights and that the court will make a Declaration of Incompatibility in respect of the aforesaid sections under section 4 of the Human Rights Act 1998.

The position of the Petitioner and the first Respondent

5 The Petitioner's application is supported by her two witness statements dated 4 July 2005 and 18 May 2006, together with a witness statement of the first Respondent dated 12 May 2006. They set out the history and background to their relationship of some fourteen years standing and the Petitioner gives a detailed history of their marriage and the reasons why they seek recognition of it in this country. Having referred in her first affidavit to the impending implementation of the CPA and the potential "downgrading" of her Canadian marriage to the status of a civil partnership under its provisions, she states:
"18. ... I do not wish my relationship with Celia to be recognised in this way because we are legally married and it is simply not acceptable to be asked to pretend that this marriage is a civil partnership. While marriage remains open to heterosexual couples only, offering the "consolation prize" of a civil partnership to lesbians and gay men is offensive and demeaning. Marriage is our society's fundamental social institution for recognising the couple relationship and access to this institution is an equal rights issue. To deny some people access to marriage on the basis of their sexual orientation is fundamentally unjust, just as it would be to do so on the basis of their race, ethnicity, and nationality, religion, or political beliefs.
19. I believe that the argument of "separate but equal" is unacceptable because: (a) there should not be separate sets of laws for recognising different--sex and same-sex relationships; and (b) marriages and civil partnerships are clearly not equal. They are not equal symbolically, when it is marriage that is the key social institution, celebrated and recognised around the world; and they are not equal practically, when it is apparent that civil partnership is a lesser alternative, which will not be recognised around the world, or even across Europe. Even if the rights and benefits conferred by civil partnership are identical (at least in practical terms) to those conferred by marriage within Britain itself, this is not so beyond its boundaries ...
20. I feel a sense of moral outrage that, counter to my own personal experience of the importance of my marriage to Celia, this second marriage is deemed by society to be of less value than my first, simply because it is a marriage with a woman ...
21. ... I want my marriage, and same-sex marriages more generally, to be recognised in

Britain, and elsewhere, because I want to be able to refer to Celia as my wife and have that immediately and unproblematically understood as meaning that she is my life-partner with all the connotations and social consequences that using the term "wife" or "husband" has for a heterosexual couple. I want our marriage to be recognised institutionally by banks, insurance companies, the tax office, and so on. This symbolic status of marriage as a fundamental social institution is, in many ways, as important as its formal legal status. It provides for social recognition of key relationships, and to have our relationship denied that symbolic status devalues it relative to the relationships of heterosexual couples."

6 In the statement of the first Respondent she expresses similar views. So far as the significance of non-recognition is concerned she states at paragraph 18 of her affidavit that:

"Marriage is understood internationally and represents the highest form of recognition for a committed relationship (described by many as the "gold standard"). But this has more than symbolic significance for us. It has a practical bearing on issues such as whether one of us will be recognised as the other's next of kin in an emergency. Having our marriage recognised in our home country would lend weight to our relationship when we are travelling to places which do not have the same respect for same sex relationships."

7 She emphasises the significance of recognition to the human rights of lesbians and gay men generally and states at paragraph 20 of her statement that:

"... Other same-sex couples who have legal Canadian marriages are seeking recognition of those marriages in their home countries (including in Hong Kong, Ireland, Israel, and New Zealand). Legal changes which would allow same-sex marriages are also being considered in a number of countries throughout the world, such as Italy, Portugal, South Africa, Sweden, and the US. These two trends reflect the growing recognition of the importance of marriage to same-sex couples internationally."

8 She also exhibits a number of personal testimonials from people personally affected by or supportive of, the Petitioner's case. She states at paragraph 23 that:

"Marriage is a basic social institution and exclusion from it, whether on grounds of race or ethnicity, gender, religion, nationality or sexual orientation, means being deprived of full citizenship. It also leads to a sense of alienation and marginalisation which prevents Sue and me from feeling as though we are fully contributing members of society."

9 She goes on to draw historical analogies between the exclusion of gay persons from the institution of marriage and the banning of marriage between persons of different races under the apartheid regime in South Africa, the Southern States of America and Nazi laws banning marriages between Jews and "Aryans".

10 There is exhibited to the first witness statement of the Petitioner, the "expert report" of a Canadian lawyer, Cynthia Petersen, which not only establishes the validity of the Petitioner's marriage under Canadian law, but helpfully sets out the current state of Canadian Provincial and Federal law with respect to same sex marriage.

The relevant law of England and Wales

11 The common law definition of marriage is that stated by Lord Penzance in Hyde v Hyde (1866) LR 1 P&D 130 at 133:

"The voluntary union for life of one man and one woman, to the exclusion of all others."

This definition has been applied and acted upon by the courts ever since: see for instance

Corbett v Corbett (otherwise Ashley) [1971] P 83. As stated by Lord Nicholls of Birkenhead in Bellinger v Bellinger (Lord Chancellor Intervening) [2003] 2 AC 467 at 480 para 46:
"Marriage is an institution, or a relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex."
12 So far as statute is concerned, the common law test of marriage is given statutory force by s.11 of the Matrimonial Causes Act 1973 ("MCA") which provides
"A marriage celebrated after 30 July 1971 shall be void on the following grounds only, that is to say --
(a) ...
(b) ...
(c) That the parties are not respectively male and female"
13 So far as foreign marriages are concerned, the MCA and the common law test above do not address the recognition of foreign marriages.
14 S.14 of the MCA provides that
"Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11 ... above shall (a) preclude the determination of that marriage as aforesaid; or (b) require the application to the marriage of the grounds or bar there mentioned except so far as applicable in accordance with those rules."
Thus, in respect of foreign marriages, the rules of English private international law apply.
15 By the rules of private international law, whereas the form of marriage (subject to certain minor and immaterial exceptions) is governed by the local law of the place of celebration (see Berthiaume -v- Dastous [1930] AC 79 and Rule 67 of *Dicey & Morris*, *The Conflict of Laws* (13 ed) Vol 2 651 at para 17R-001), the capacity of the parties to marry is generally governed by the law of each party's ante-nuptial domicile: see Padolecchia -v- Padolecchia [1968] P 314 at 338 and Rule 68 in *Dicey & Morris* 671 at para 17R -- 054. Occasionally, the courts will judge the matter of capacity by reference to the intended matrimonial home (Lawrence v Lawrence (1985) FLR 1097 at 1105D-1106C) or by reference to the jurisdiction with which the marriage is adjudged to have its most substantial connection (Vervaeke -v- Smith [1983] AC145 per Lord Simon of Glaisdale at 166D). In this case as already indicated, the parties are both domiciled in England and Wales and, following their marriage, returned to live here. It is thus clear, that, on any ordinary application of the rules of private international law, their capacity to marry is governed by the law of England.
16 In the case where a person of English domicile purports to marry in another jurisdiction, but the parties lack capacity to marry in English law, the marriage is not recognised in England. See Mette v Mette (1859) 1 Sw & Tr 416, Brooks v Brooks (1861) 9 HL Cas 193 and Pugh -v- Pugh [1951] P 482.
17 I refer to any "ordinary" application of the rules of private international law because it is submitted on behalf of the Petitioner that those rules should be differently applied in this case. I will turn to those submissions hereafter.

The Civil Partnership Act 2004

18 The CPA came into force on 5 December 2005 i.e. at a date later than that on which the petition was lodged. However, nothing turns upon that for the purposes of the arguments raised before me.
19 The CPA creates a structure for the establishment and formal recognition of civil partnerships which are defined by section1(1) as follows:
"(1) A civil partnership is a relationship between two people of the same sex ("civil partners") --
(a) which is formed when they register as civil partners of each other ...
(b) which they are treated under Chapter 2 of Part 5 as having formed (at the time determined under that Chapter) by virtue of having registered an overseas relationship.
...
(5) References in this Act to an overseas relationship are to be read in accordance with Chapter 2 of Part 5."
20 The subsequent sections, over two hundred in number, provide the bureaucratic mechanisms necessary for the purposes of the civil registration process and remedy, and remove the financial and other legal and economic disadvantages caused by the prohibition on same sex partners marrying, by conferring on those who have entered a civil partnership similar rights, benefits and material advantages to those enjoyed by married couples. They also provide for the breakdown of the civil partnership in much the same way as marriage. The issues before me have been argued upon the basis that the financial and other material rights created in civil partners under the CPA are essentially equivalent to those of married persons. However, there are express distinctions observed between the ceremonies and processes of the two institutions. In particular, civil partnership may not be effected on religious premises, or in a religious ceremony and civil partnership is an institution exclusively open to same-sex couples.
21 By section 215 (in Chapter 2 of Part 5) the CPA treats certain overseas relationships including those the subject of a ceremony of marriage, as civil partnerships. The section provides that:
"(1) Two people are to be treated as having formed a civil partnership as a result of having registered an overseas relationship if, under the relevant law, they --
(a) had capacity to enter into a relationship, and
(b) met all requirements necessary to ensure the formal validity of the relationship.
(2) Subject to subsection (3), the time that they are to be treated as having formed a civil partnership is the time when the overseas relationship is registered (under the relevant law) as having been entered into.
(3) If the overseas relationship is registered (under the relevant law) as having been entered into before this section comes into force, the time when they are to be treated as having formed a civil partnership is the time when this Section comes into force.
...
(6) This section is subject to sections 216, 217 and 218."
22 S.216 and S.217 require both persons in the overseas relationship to have been of the same sex at the date the relationship was registered (under the relevant law) and withhold recognition of civil partnerships where one of the parties was under sixteen and in certain other circumstances not material to this case.
23 S.218 provides that:

"Two people are not to be treated as having formed a civil partnership as a result as having entered into an overseas relationship if it would be manifestly contrary to public policy to recognise the capacity, under the relevant law, of one or both of them to enter into the relationship".
24 This reflects the public policy area of discretion to be found in private international law; further considered below.
25 The Petitioner's marriage under Canadian law is an overseas relationship which, by reason of the above provisions, is treated as a civil partnership.

The European Convention on Human Rights ("The Convention")

26 In developing her submissions on behalf of the Petitioner, Ms Monaghan relies on Articles 8, 12 and 14 of the Convention contained in Schedule 1 of the Human Rights Act 1998 ("HRA").
27 Article 8 (**Right to respect for private and family life**) provides:
"1. Everyone has the right to respect for his private and family life, his home, and his correspondence.
2. There should 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."
28 Article 12 (**Right to marry**) provides:
"Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right."
29 Article 14 (**Prohibition of discrimination**) provides:
"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any grounds 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."

The Human Rights Act 1998 ("HRA")

30 S.2 of the HRA provides that any court determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the European Court of Human Rights or the Commission.
31 S.3 of the HRA provides that:
"(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way that is compatible with the Convention rights.
(2) This section --
(a) applies to primary legislation and subordinate legislation whenever enacted;
(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation

prevents removal of incompatibility"
32 S.4 of the HRA provides:
"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.
(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility."
33 S.6 of the HRA provides:
"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right. (2) Subsection (1) does not apply to an act if --
(a) as a result of one or more provisions of primary legislation, the authority could not have acted differently; or
(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
(3) In this section "public authority" includes --
(a) a court or tribunal."
34 The combined effect of s.3 and s.4 of the HRA is that the court's primary duty is to interpret legislation compatibly with Convention Rights and that, only when it cannot do so, does s.4 become engaged. The leading case upon the relationship and respective emphases of s.3 and s.4 is the decision of the House of Lords in Ghaidan v Godin-Mendoza [2004] 2 AC 557 in which Lord Steyn described section 3(1) as "the linch-pin" of the legislative scheme to achieve the purpose of the Human Rights Act, namely "to bring rights home". He made clear that s.4 is "a measure of last resort" (see para 46).
35 In relation to the requirement to interpret legislation compatibly with Convention Rights "so far as it is *possible* to do so" Lord Nicholls made clear that the word "possible" is not confined to requiring courts to resolve ambiguities. He explained (at para 29) that "... the application of section 3 does not depend on the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. The decision of your Lordships' house in R v A (No.2) [2002] 1 AC 45 is an instance of this ....
30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear ... The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament ....
31. ... Once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically on the particular form of words adopted by the parliamentary draughtsman in the statutory provision under consideration ...
32. From this the conclusion which seems inescapable is that the mere fact that the language under construction is inconsistent with a Convention-compliant meaning does not in itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the

meaning of the enacted legislation so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is "possible", a court can modify the meaning, and hence the effect of primary and secondary legislation."

36 In relation to the confines of "possibility", Lord Nicholls made clear that, since Parliament has retained the right to enact legislation in terms which are not Convention-compliant, any meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. He went on to cite as examples of situations where that was not possible, the decisions in R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837 and Bellinger v Bellinger (supra) in relation to which he stated that:

"Recognition of Mrs Bellinger as female for the purposes of section 11 (c) of the Matrimonial Causes Act 1973 would have exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures."

The same two cases were relied on as "obvious examples" by Lord Steyn (at para 49) where, having underlined the broad approach to be required, he observed:

"That is, of course, not to gainsay the obvious proposition that inherent in the use of the words "is possible" in section 3(1) is the idea that there is a Rubicon which courts may not cross. If it is not possible, within the meaning of section 3, to read or give effect to legislation in a way which is compatible with Convention Rights, the only alternative is to exercise, where appropriate, the power to make a declaration of incompatibility."

37 It is thus apparent that the House has recognised a boundary between permissible judicial interpretation by way of "reading down" or modification of the meaning of words in a statute and impermissible adoption of a meaning inconsistent with a fundamental feature of the legislation. It is wrong for the court, by an exercise of purported interpretation, effectively to legislate by making a decision in an area for which only Parliament, following legislative deliberation in respect of its ramifications or practical repercussions, is equipped to evaluate: see per Lord Nicholls in Ghaidan at para 33 and in Re: S (Care order: Implementation of Care Plan) [2002] 2 AC 291 at para 40. Such cases remain in the constitutional province of the legislature. All that the court can do in an appropriate case is make a declaration of incompatibility under s.4 HRA.

The Petitioner's submissions

38 The submissions of Ms Monaghan for the Petitioner can be encapsulated in this way. She submits that the provisions of the MCA and CPA, which on their face preclude recognition of a marriage between persons of the same sex, amount to a violation of the Convention rights of the Petitioner under Articles 12, 8 and 14 of the Convention. Supported by the first Respondent she asks the court to read and give effect to s.11 (c) of the MCA and s. (1) (b) and ss212-218 of the CPA in such a manner as to recognise same-sex marriages, lawfully effected in other jurisdictions, as valid in English law. She contends that this is necessary to ensure compatibility with the Petitioners rights and those of the first Respondent under the Convention, pursuant to s.3 of the HRA.

39 Alternatively, the Petitioner asks that the court develop the common law so as to recognise her Canadian marriage as a marriage in English law. In this respect, she asks the court to ignore or modify the requirement of private international law (administered

as part of the common law) that the legal capacity to marry be judged according to the law of the parties' domicile on the grounds that application of the ordinary rules of private international law would, as she submits, violate those same Convention rights.
40 Alternatively, the Petitioner seeks a declaration under s.4 (2) of the HRA that the statutory provisions of the MCA and CPA are incompatible with her (and the first Respondent's) Convention rights under Articles 12, 8 and 14 of the Convention.

The Intervener's submissions

41 It is the position of the Lord Chancellor as intervenor, for whom Ms Mountfield appears, that all the forms of relief claimed are essentially misconceived because the statutory provisions are clear and are compatible with the Petitioner's Convention rights. Assuming incompatibility with the Petitioner's Convention rights (which is denied), so-called interpretation or "reading down" to the opposite effect is not possible. Accordingly any remedy of the Petitioner in respect of those statutory provisions is, in any event, limited to a declaration of incompatibility. However, recognition of the institution of marriage as the union of a man and a woman does not involve any violation of the Petitioner's Convention rights under Article 12 or Article 8 as currently interpreted in European jurisprudence. That being so, there is no discrimination under Article 14, because Article 14 is not free-standing, and relates only to discrimination which falls within the ambit of one or more of the other Convention rights.
42 So far as the CPA is concerned, Ms Mountfield submits that, in according rights to same-sex couples equivalent to those of married couples, the CPA is an equalising and not a discriminating measure, which again involves no breach of the Petitioner's Article 12 or Article 8 rights, and hence no breach of Article 14. If, which Ms Mountfield does not accept, the CPA is to be regarded as discriminatory under Article 14 by denying to same sex couples the title and status of marriage, then such discrimination is justified and within the margin of appreciation accorded to individual States under the Convention.
43 Finally, Ms Mountfield submits that there is no scope for a "backdoor" modification of the rules of private international law in an attempt to circumvent the clear provisions of the MCA and CPA.
44 Before proceeding with the detailed arguments of the parties as to the scope of Articles 8, 12 and 14, I pause to observe that the claim of the Petitioner relates to an area of considerable social, political, and religious controversy, in respect of which there is no consensus across Europe. In such cases, there are certain principles which overarch the questions of interpretation of the Convention which are raised by the claimant. The European Court of Human Rights (ECtHR) has consistently declared itself to be slow to trespass on areas of social, political and religious controversy, where a wide variety of national and cultural traditions are in play and different political and legal choices have been made by the members of the Council of Europe: see for instance Frette v France [2003] 2 FLR 9; F v Switzerland (1987) 10 EHRR 411, especially at paragraph 33; Botta v Italy (1998) 26 EHRR 241 at paragraph 35; and Estevez v Spain (ECtHR, 10 May 2001).
45 In Estevez v Spain, a homosexual man claimed that the Spanish state's failure to pay him a social security allowance payable only to "surviving spouses", after the death of his partner, violated Article 14 in conjunction with Article 8. This claim was rejected. So far

as respect for *family* life under Article 8 was concerned, the court held (at p.4) that:
"... Despite the growing tendency in a number of European states towards a legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they will enjoy a wide margin of appreciation ... Accordingly the applicant's relationship with his late partner does not fall within Article 8 in so far as that provision protects the right to respect for family life."
The court also held that, whether or not the complaint was within the scope of Article 8 in relation to *private* life (which the court did not expressly decide), the claim under that head was also ill-founded because the Spanish legislation had:
"a legitimate aim, which is the protection of the family based on marriage bonds (see, *mutatis mutandis*, the Marcks v Belgium judgment of 13 June 1979, Series A No. 31.¶ 40). The court considers that the difference in treatment found can be considered to fall within the state's margin of appreciation ..."
46 In Karner v Austria (2003) 38 EHHR 528, on facts not unlike those in Mata Estevez concerning the right of the surviving same-sex partner seeking succession to a tenancy, the court stated as follows in relation to the margin of appreciation:
"40. The court can accept that the protection of family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment. It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.
41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures can be used to implement it. In cases in which the margin of appreciation afforded to Member States 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 that the matter chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of [the relevant provision] ... in order to achieve that aim."
47 Finally, in B & L v United Kingdom (App. No. 36536/02), 13 September 2005 the ECtHR stated at paragraph 36:
"Article 12 expressly provides for regulation of marriage by national law and given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, this court must not rush to substitute its own judgment in place of the authorities that are best placed to assess and respond to the needs of society."
48 The CPA was introduced and debated shortly after the decision in Bellinger v Bellinger, in which Lord Hope of Craighead observed at paragraph 69:
"It is quite impossible to hold that section 11(c) of the 1973 Act treats the sex of the party to a marriage ceremony as irrelevant, as it makes express provision to the contrary. In any event, problems of great complexity would be involved if recognition were to be given to same sex marriages. They must be left to Parliament. I do not think that your Lordships can solve the problem judicially by the means of the interpretative obligation in section 3(1) of the 1998 Act."
49 In 2004, in the course of the passage of the CPA, Parliament closely re-examined the complex problems involved if recognition were to be given to same-sex marriages. The

solution which it reached was that there should be statutory recognition of a status and relationship closely modelled upon that of marriage which made available to civil partners essentially every material right and responsibility presently arising from marriage, with the exception of the form of ceremony and the actual name and status of marriage. Parliament ostensibly passed the Act, not because it felt obliged to in order to comply with the norms of European law or the rulings of the European Court or the ECtHR, but because it elected to do so as a policy choice.

50 In so far as legislative intention is relevant to this issue, and in this respect both parties have made reference to Hansard in the course of the proceedings, the intention of the Government in introducing the legislation was not to create a "second class" institution, but a parallel and equalising institution designed to redress a perceived inequality of treatment of long term monogamous same-sex relationships, while at the same time, demonstrating support for the long established institution of marriage.

51 Baroness Scotland, introducing the second reading of the Civil Partnership Bill in the House of Lords, said that the Bill was "shaped by consultation with stakeholders and the public at large" She stated that:

"[It] offers a secular solution to the disadvantages which same-sex couples face in the way they are treated by our laws ... This Bill does not undermine or weaken the importance of marriage and we do not propose to open civil partnership to opposite-sex couples. Civil partnership is aimed at same-sex couples who cannot marry. However, it is important for us to be clear that we continue to support marriage and recognise that it is the surest foundation for opposite sex couples raising children ...." (*Hansard*, HL 22 April 2004, Col 388)

52 Jacquie Smith, the Deputy Minister for Women and Equality, introducing the second reading of the Civil Partnership Bill in the House of Commons, described it as:

"A historic step on what has been a long journey to respect and dignity for lesbians and gay men in Britain ... In creating a new legal relationship for same-sex couples, this Bill is a sign of the Government's commitment to social justice and equality ... The Bill sends a clear message about the importance of stable and committed same-sex relationships". (*Hansard*, HC, 12 October 2004, Col 174)

53 In answer to a question as to whether she would "come clean" and announce that the Government supported gay marriage, Ms Smith replied:

"... civil partnerships under the Bill mirror in many ways the requirements, rights and responsibilities that run alongside civil marriage. I recognise that hon. Members on both sides of the House understand and feel very strongly about specific religious connotations of marriage. The Government are taking a secular approach to resolve the specific problems of same-sex couples. As others have said, that is the appropriate and modern way for the 21st Century". (*Hansard*, HC, 12 October 2004, Col 177).

54 I turn now to deal with the arguments raised in relation to each of the Convention Articles. For convenience of exposition, I turn first to consider Article 12 and Article 8 by themselves. Upon concluding, as I do, that neither Article by itself guarantees the Petitioner the right to have her same-sex marriage recognised as having the status of a marriage in English Law, and that the facts of her case do not by themselves demonstrate any violation of those Articles, I turn to the further question whether, nonetheless, she can establish discrimination under Article 14 when considered in combination with Article 12 and Article 8.

Article 12:

55 Read in a straightforward manner it seems to me clear that the wording of Article 12 refers to the right to "marry" in the traditional sense (namely as a marriage between a man and a woman) according to the national laws governing the exercise of that right. As stated in Rees v United Kingdom (1986) 9 EHRR 56 para 49:
"In the Court's opinion, the right to marry guaranteed by Article 12, refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family."
See also Cossey v UK (1990) 13 EHRR 622 at 642, in which the ECtHR stated, in relation to the rights of transsexuals:
"Although some Contracting States would now regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the court does not consider that it is open to take a new approach to the interpretation of Article 12 on the point at issue."
56 So too, in Sheffield and Horsham v UK (1998) 27 EHRR 163 at para 66, the court stated:
"The right to marry guaranteed by Article 12 refers to the traditional marriage between persons of the opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right should be subject to the national laws of the Contracting States. The limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired. *However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind*." (emphasis added)
57 The reference to "biological sex" italicised in the last sentence quoted above can no longer stand in the light of the judgment of the court in Goodwin v UK (2002) 35 EHRR 447 at 479.
58 The Goodwin case was concerned with the rights of a post-operative male to female transsexual. The court found that the approach in Rees and Cossey limiting the ambit of Article 12 to marriage between persons of opposite biological sex was too restrictive. It stated at 479:
"98. Reviewing the situation in 2002, the court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision. 99. The exercise of the right to marry gives rise to social, personal, and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired.
100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. *The Court is not persuaded at the date of this case that it can still be*

assumed that these terms must refer to a determination of gender by purely biological criteria. There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of trans-sexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual ...

101. The right under Article 8 to respect for family life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their opposite sex. The applicant in this case lives as a woman, is in a relationship with a man, and would only wish to marry a man. She has no possibility of doing so. In the court's view, she may therefore claim that the very essence of her right to marry has been infringed." (emphasis added)

59 Having found that, in this respect, the matter was not one to be left to a State's margin of appreciation, the court observed at para 103:

"... While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly affected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.

104. The court concludes there has been a breach of Article 12 of the Convention in the present case."

60 Ms Monaghan has submitted that the decision in Goodwin and in particular, the observations at paras 98 and 99 quoted above, coupled with the words italicised in para 100, have cut free the traditional approach to marriage "rooted in biological determinism", as she puts it, so it is now possible to interpret Article 12 of the Convention as a "living instrument" and to interpret or extend it so as to recognise the unqualified right of a man or a woman to marry a person of the same, as well as the opposite, sex.

61 Ms Mountfield on the other hand submits that such an approach is a step too far, and is unjustified by the observations in Goodwin, read in the factual context of the case before the court. Indeed, she submits it is plain that the court was unwilling to take other than an incremental step in broadening the scope of Article 12. The breach of Article 12 found in the Goodwin case was based on the court's finding that gender can be determined by criteria other than simply *biological* factors (see paras 100 and 103). The case recognised the phenomenon of *re-assigned gender* whereby the applicant became eligible to marry, *as a woman*, a man of her choice. It was the effect of the national law in failing to recognise her gender reassignment as bringing her within the ambit of Article 12 which attracted the finding of the court that there had been a breach of her Article 12 rights.

62 I agree with the analysis of Ms Mountfield. There are clear limitations to the "living

instrument" doctrine and it cannot be applied to bring within the scope of the Convention issues which are plainly outside its contemplation. As stated by ECtHR in Johnston & Others v Ireland (1986) 9 EHRR 203 at para 53:
"It is true that the Convention and its Protocols must be interpreted in the light of present-day conditions. However, the court cannot, by means of an evolutive interpretation, derive from these instruments a right which was not included therein at the outset."
As I have already made clear at paragraph 44 above, this cannot be said to be an area where there is a Europe-wide consensus on the subject, by, reason or reference to which the Convention should be treated as having evolved and expanded its scope to encompass same-sex relationships within the concept of marriage. A ready guide to the position in other European countries is to be found in the judgment of Lord Mance at paragraph 152 of the recent House of Lords decision in M v Secretary of State for Work and Pensions [2006] 2 WLR 637 ("*M*"). While there has been a general move towards legal recognition towards same-sex relationships across Europe in recent years, only Netherlands, Belgium, and Spain have passed laws providing for same sex marriage. Outside Europe, it appears that only Canada, and the US state of Massachusetts and South Africa have given legal recognition to same-sex marriages.
63 It seems to me that there is a clear and consistent line of Strasbourg case law on the scope of Article 12. S.2 of the HRA requires United Kingdom courts and tribunals determining a question arising in connection with a Convention Right to take such law into account and, in the absence of any special circumstances, to follow it. The purpose of s.2 is to ensure that the same Convention Rights are enforced under the HRA by the United Kingdom courts as would be enforced by the ECtHR in Strasbourg. However, where United Kingdom law is clear, it is no part of the purpose of s.2 to oblige courts to interpret Convention rights, or to *develop* European jurisprudence, in a manner inconsistent with it. As stated by Lord Bingham in R(Ullah) v Special Adjudicator [2004] 2 AC 323 at para 20:
"... the Convention as an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court ... *it is of course open to member States to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of the interpretation of the Convention*, since the meaning of the Convention should be uniform throughout the States party to it. The duty of the national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less." (emphasis added)
64 In N v Secretary of State for the Home Department [2005] 2 AC 296 at para 25, Lord Hope, having referred to those observations, stated:
"Our task, then, is to analyse the jurisprudence of the Strasbourg court and, having done so and identified its limits, to apply it to the facts of the case. We must not allow sympathy for the appellant to divert us from this task. It is not for us to search for a solution to her problem which is not to be found in the Strasbourg case law. It is for the Strasbourg court, not for us, to decide whether its case law is out of touch with modern conditions and to determine what further extensions, if any, are needed to the rights guaranteed by the Convention. We must take its case law as we find it, not as we would like it to be."
65 The policy behind this statement of the position was explained by Lord Nicholls in M in the context of an allegation of discrimination on the grounds of sexual orientation

within the ambit of the Article 8 protection of respect for private and family life, to which I will shortly turn. However, Lord Nicholls' observations in respect of Article 8 in my view apply equally, or indeed it maybe thought with greater force, to Article 12. Having observed at paragraph 23 that under the law of this country as it is now developed a same-sex couple are as much capable of constituting a "family" as a heterosexual couple he went on:

"24 ... In the Convention itself the meaning of "family life" in Article 8 depends on the proper interpretation of this phrase in the Convention. In this context the phrase can only have one proper interpretation. In other words, the concept of family life in Article 8 is an "autonomous" Convention concept having the same meaning in all Contracting States. According to the established Strasbourg jurisprudence that meaning does not embrace same-sex partners. Under the Strasbourg case law same-sex partners still do not fall within the scope of family life.

25 This was reiterated by the ECtHR in Mata Estevez v Spain Reports of Judgments and Decisions 2001 --V1, 311. The court noted the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals. The court considered that, despite this there was still little common ground in the Contracting States. This was an area where the Contracting States "still enjoy a wide margin of appreciation". The court held that, accordingly, the applicant's relationship with his late partner "does not fall within Article 8 in so far as that provision protects the right to respect for family life".

26. This ruling by the ECtHR was unanimous and unequivocal. By the reference to "margin of appreciation" in this context I do not understand the court to be saying that each Contracting State may decide for itself whether the relationship between same-sex couples constitutes family life within the Convention. If that were so, the effect would be that, as applied to same-sex-couples, family life in Article 8 would have a different content from one Contracting State to another. That would be surprising. Rather, the court was saying that, in the present state of Strasbourg jurisprudence, Contracting States are not required by the Convention to accord to the relationship between same-sex couples the respect for family life guaranteed by Article 8. For the time being the respect afforded this relationship is a matter for Contracting States."

66 In this respect, Baroness Hale stated at paragraph 112:

"The European Court of Human Rights has not yet recognised that the relationship between adult homosexuals amounts to family life. But then I know of no case in which it has recognised that the relationship between two unmarried adult heterosexuals amounts to family life. Family life has so far been confined to relationships between married couples and between parents or other relatives or carers and their children."

67 Ms Monaghan invites me to adopt an interpretation of Article 12 which serves to read it in a manner contrary to the meaning which I have no doubt it bore at the time the Convention was drafted and adopted, is contrary to the sense in which it is apparently understood and applied by all but three European States, and which by Convention jurisprudence to date it continues to bear. I do not consider that to be a step which it would be proper or appropriate for me to take for the purpose of granting the declaration of incompatibility which the Petitioner seeks.

Article 8

68 Ms Monaghan's argument runs as follows. She rightly observes that Article 8 encompasses the right to personal development and physical and moral security in the full sense enjoyed by others: Goodwin v UK at para 90. So far as *private* life is concerned, she relies upon a passage in Niemietz v Germany (1992) 16 EHRR 97 in which the ECtHR stated at para 29:

"The Court does not consider it possible or necessary to attempt an exhaustive definition of the notion of "private life". However, it would be too restrictive to limit the notion to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude there from entirely the outside world not encompassed within that circle. *Respect for private life must also comprise to a certain degree the right to establish and develop relationships with other human beings*". (emphasis added)

She asserts, and Ms Mountfield does not dispute, that Strasbourg jurisprudence has given extremely wide scope to "private life" in this context, covering even business or professional relationships (see Niemietz v Germany). That being so, it is clear that intimate homosexual relationships which, just like intimate heterosexual relationships, may involve the features of financial and emotional interdependence, love, commitment and monogamy (see Fitzpatrick Sterling v Housing Association Limited [2001] 1 AC 27 and Ghaidan (supra) must equally fall within those relationships, the development and establishment of which is protected by Article 8(1)).

69 Further, and again this is not disputed by Ms Mountfield, Strasbourg jurisprudence has recognised that sexual orientation is the most intimate part of the person's private life, and there must exist particularly weighty reasons to justify any restriction on or interference with that right: see Smith & Grady v UK (2000) 29 EHRR 493 at para 89.

70 So far as *family* life is concerned, despite Ms Monaghan's submission to the contrary, the position seems to be clear.

71 In M Lord Nicholls made plain at paras 24-30 that, while in English law a same-sex couple are capable of constituting a family, the concept of family life in the Convention is an autonomous one with a universal meaning across the Council of Europe which does not extend to include same-sex partnerships.

72 Ms Monaghan argues that the majority of their Lordships did not agree with Lord Nicholls on that point. However, that is not how I read the decision. Lord Walker, with whom Lord Bingham agreed, did not deal with the issue, being content to assume for the purposes of the argument in that case that the unit consisting of Ms M, her new (female) partner, *and their children* (particularly when living together) should be considered a family unit.

73 Baroness Hale of Richmond, who dissented in the result, did so on the basis that the family unit with which the court was concerned in reaching its conclusion whether or not discrimination had occurred was not the relationship of M and her partner alone, but was one which comprised them *and their children*: see paragraph 112.

74 Lord Mance recognised the state of European jurisprudence and speculated at paragraph 152 that, if the matter were before the Strasbourg Court in 2006, a same-sex relationship

"could very well be regarded as involving family life for the purposes of Article 8".

Having set out the list of countries to which I have already referred at paragraph 60 above, he went on to observe:

"The legal restructuring evidenced by this list marks a general recognition by legislatures and societies of the need for equal treatment of opposite and same-sex couples. It is right to add that we were not given sufficient detail to judge how far all relevant inequalities in other countries' legislation, were eliminated (as they appear to have been in the United Kingdom) at the same time as same-sex civil registration, partnership or marriage schemes were introduced. So it may be the United Kingdom legislation is more advanced than that of some such other countries. But, on the face of it, a great change has taken place across Europe during the last five or so years, of which any court considering the current scope of Article 8(1) would take most careful account."(paragraph 152)

75 In my view it is clear that the House recognised that the Convention concept of family life does not in the present state of Strasbourg law extend to childless same-sex couples.

76 Whatever the position in that respect, the particular importance of the decision in M is the limitation which it has placed upon increasingly broad arguments being deployed in "human rights' cases to the effect that various aspects of social legislation impacting upon the personal and economic interests of citizens constitute a failure on the part of the state to afford respect to those citizens' private or family life.

77 As Lord Bingham made clear in M (at para 4), to interpret any matter having any connection with any of the areas for which respect must be accorded as falling within the scope of Article 8, however tenuous the link, would be

"a recipe for artificiality and legalistic ingenuity of an unacceptable kind."

78 Lord Walker, having conducted a careful review of the Article 8 case law (at paras 62-81) observed that the Strasbourg Court had shown itself to be

"well aware of the dangers of any unrestrained or unprincipled extension of Article 8" (para 63).

He rejected an argument that every alleged act of discrimination affecting the family or private life of a person falls within the ambit of Article 8 and observed (paras 82-83) that:

"... if that were right virtually every act of discrimination on grounds of personal status (gender, sexual orientation, race, religion and so on) would amount to a breach of Article 14 since these are all important elements in an individual's private life. There would be little or no need for the wider prohibition in Article 1 of the Twelfth Protocol on discrimination in the enjoyment of any legal right.

... in my opinion, that is not the effect of the Strasbourg case law which I have attempted to summarise. The ECHR has taken a more nuanced approach, reflecting the unique feature of article 8 to which I have already drawn attention: that it is concerned with the failure to accord *respect*. To criminalise any manifestation of an individual's sexual orientation plainly fails to respect his private life, even if in practice the criminal law is not in force (*Dudgeon; Norris*); so does intrusive interrogation and humiliating discharge from the armed forces (Smith & Grady; *Lustig-Prean & Beckett*). Banning a former KGB Officer from all public law sector posts, and from a wide range of responsible private sector posts, is so draconian as to threaten his leading a normal personal life (Sidabras & *Dziautas*). Less serious interference would not merely not have been a breach of Article 8; it would not have fallen within the ambit of the Article at all".

79 It is in this context and in the light of those observations that one must approach the argument of Ms Monaghan that English law, and in particular the provision of the CPA which recognises the Petitioner's marriage only as a civil partnership while conferring rights equivalent to those accorded to married couples and provided for in the Act,

violates the Petitioner's Article 8 rights by failing to respect the private or family life of the Petitioner. In this connection, Ms Monaghan does not point to or rely on any direct interference with or intrusion upon with the private or family life of the Petitioner, but founds her submissions on the broad proposition that it is a breach of Article 8 for the legislature having, in the phraseology of Lord Mance, eliminated all relevant inequalities as between marriage and same-sex partnerships, nonetheless to withhold from same-sex partners the actual title and status of marriage.

80 Applying the principles and adopting the approach laid down in M, I do not accept Ms Monaghan's submission. To impugn an action or measure by reference to the "private life", or for that matter the "family life" limb of Article 8 it is necessary to focus on an aspect of a person's private or family life in order to ascertain whether there has been any breach of the State's guarantee to respect that right. Thus in M, Lord Walker conducted a lengthy review which it is unnecessary for me to repeat, before drawing the conclusions he did as to the failure to establish a lack of respect for private life and for family life in that case.

81 At paragraph 81, Lord Walker completed his review with a reference to the most recent case decided by the ECtHR concerning the ambit of Article 8: Sidabras v Lithuania 42 EHRR 104. That case concerned former KGB Officers who were debarred by legislation from holding any post in the public sector and many responsible jobs in the private sector. In concluding that their complaint fell within the ambit of Article 8 (respect for private life) the court observed at para 49:

"In the instance case there is more at stake for the applicants than the defence of their good name. They are marked in the eyes of society on the account of their past association with an oppressive regime. Hence, and in view of the wide-ranging scope of the employment restrictions which the applicants have to endure, the court considers that *the possible damage to their leading a normal personal life* must be taken to be a relevant factor in determining whether the facts complained of fall within the ambit of Article 8 of the Convention." (emphasis added)

82 Lord Walker then rejected the argument of Ms Monaghan for the claimant in M with the words I have already quoted in paragraph 76 above.

83 In stating his conclusions in relation to family life, he stated:

"... the legislation is intended, in a general sort of way, to be a positive measure promoting family life (or, it might be more accurate to say, limiting the damage inevitably caused by the breakdown of relationships between couples who have had children). But I do not regard this as having more than a tenuous link with respect for family life. I do not consider that this way of putting Ms M's case brings it within the ambit of respect for family life under Article 8."

84 At paragraph 88, Lord Walker stated that the case on respect for private life failed for similar reasons:

"There has been no improper intrusion on her private life. She has not been criminalised, threatened, or humiliated. The Tribunal respectfully recorded that she and her partner "were living in a very close loving and monogamous relationship". Her complaint is that the state has calculated her liability to contribute to her children's maintenance under a formula which is different from, and on the particular facts of her case, more onerous than, that which would have been used if she had been in a heterosexual relationship. The link with respect for her private life is in my view very tenuous indeed."

85 In my view, by declining to recognise a same-sex partnership as a marriage in legislation the purpose and the thrust of which is to enhance their rights, the state cannot be said improperly to intrude on or interfere with the private life, of a same-sex couple who are living in a close loving and monogamous relationship as is the position in this case. Nor has the state acted improperly within the sphere of any duty to afford respect to it. The primary proscription of Article 8 is against measures by the state which *interfere* with the respect to the private sphere (for example by criminalising or condemning consensual sexual conduct between two adults).

86 I have already referred to the proper caution exercised by the European Court of Human Rights when considering how far it will impose social and political choices upon Member States by development of the doctrine of positive obligations (see paragraphs 44-46 above). Nor will the "living instrument" doctrine be used to bring within the scope of the Convention controversial issues which are matters of political, social, and economic valuation. The ECtHR will not require Member States to establish particular forms of social and legal institution to recognise particular relationships, especially in areas of social controversy. As made clear in Johnston v Ireland (supra), Article 8 does not impose a positive obligation to establish for unmarried couples a status analogous to that of married couples and, in particular, couples who, like the applicants in that case, "wished to marry but were legally incapable of marrying".

87 In my view, and particularly following the clarification set out in M, in determining whether or not there has been a breach of Article 8 or a failure to guarantee the requirement of respect for private and family life, the court is principally concerned with "de facto" situations rather than "de jure" categories, with practical and intrusive, rather than theoretical and non-intrusive, effects upon the private or family life of the complainant. Article 8 is about non-interference of the state with a person's private life, family, and home. In certain situations it implies or imposes a requirement to take some positive steps, where to do so is a necessary inference from the duty to respect a protected area. However, any necessity to protect the private or family life of childless same-sex couples does not extend to recognising them as married. The obligation to respect private or family life is not apt to bring within the ambit of Article 8 all Government policy choices touching upon their status.

88 The CPA is a measure which is not concerned with the privacy or family life of such couples as such. It was introduced and has effect as a measure to afford equivalent legal rights to same-sex partnerships as are available to opposite partners through marriage. By withholding from same-sex partners the actual title and status of marriage, the Government declined to alter the deep-rooted and almost universal recognition of marriage as a relationship between a man and a woman, but without in any way interfering with or failing to recognise the right of same-sex couples to respect for their private or family life in the sense, or to the extent, that European jurisprudence regards them as requiring protection. Withholding of recognition of their married status does not criminalise, threaten, or prevent the observance by, such couples of an intimate, private life in the same way as a married heterosexual couple and indeed provides them, as so far European jurisprudence does not dictate, with all the material legal rights, advantages (and disadvantages) of those enjoyed by married couples. Not only does English law recognise and not interfere with the right of such couples to live in a very close, loving, and monogamous relationship; it accords them also the benefits of marriage in all but

name.

Article 14

89 Nonetheless, Ms Monaghan argues that, when Articles 8 and 12 are read in combination with Article 14, the failure to accord the status and title of marriage, together with the provision of the CPA which treats a foreign same-sex marriage only as a civil law partnership, there is nonetheless a breach of the non-discrimination guarantee contained in Article 14 sufficient to justify a declaration of incompatibility. She acknowledges that Article 14 is not free standing i.e. it depends upon there being discrimination in the enjoyment of the rights and freedoms set forth elsewhere in the Convention. However she relies upon the fact that Article 14 may apply even if there is no violation of a substantive Convention Article, it can nonetheless be shown that there has been discrimination on any of the grounds (i.e. differences of status) set out in Article 14, if the facts of the case fall *within the ambit* of one or more of the substantive Convention rights. In this respect, and it is not in dispute, besides the express requirement of Article 14 to secure the rights and freedoms set out in the Convention without discrimination on the grounds of sex, the words "or other status" which appear at the end of the Article include sexual orientation: see for example Salgueiro da Silva Mouta v Portugal [201] 31 EHRR 47 at paragraph 28.

90 In M, Lord Nicholls referred to the difficulty presented by the looseness of the expression *ambit* which could itself be interpreted widely or narrowly. He stated:

"15. It is not a self-defining expression, it is not a legal term of art. Of itself it gives no guidance on how "ambit" of a Convention Article is to be identified. The same is true of comparable expressions such as "scope" and the need for the impugned measure to be "linked" to the exercise of a guaranteed right.

14. The approach of the ECtHR is to apply these expressions flexibly. Although each of them is capable of extremely wide application, the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice. Rather the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive Article, the more readily it will be regarded as within the ambit of that Article; and vice versa. In other words the ECtHR makes in each case what in English law is often called a "value judgment"."

91 Lord Bingham stated at paragraph 4:

"It is not difficult, when considering any provision of the Convention including Article 8 ... To identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for."

92 In Wandsworth London Borough Council v Michalak [2003] 1 WLR 617 the Court of Appeal (per Brooke LJ) proposed and treated four questions as being involved in relation to an Article 14 inquiry, to which Baroness Hale, in Ghaidan at paragraph 134 added a

fifth question. They were as follows:--
"(i) Do the facts fall within the ambit of one or more of the Convention rights?"
(ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?
(iii) Were those others in an analogous situation?
(iv) Was the difference in treatment objectively justifiable? i.e. did it have a legitimate aim and bear reasonable relationship of proportionality to that aim?
(v) Was the difference in treatment based on one of more of the grounds proscribed -- whether expressly or by inference -- in Article 14?"
93 It is to be observed however that at paragraph 134 in Ghaidan Baroness Hale added:
"in my view, the Michalak questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided."
94 In R (Carson) v The Secretary of State for Work and Pensions [2005] 2 WLR 1369, the Michalak formulation did not find favour with their Lordships. Lord Nicholls stated at paragraph 3:
"I prefer to keep formulation of the relevant issues in these cases as simple and non-technical as possible. Article 14 does not apply unless the alleged discrimination *is in connection with* a convention right on grounds stated in Article 14. If this prerequisite is satisfied, 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 can 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."(emphasis added)
See also per Lord Hoffman at paras 28-33; per Lord Roger at para 43; per Lord Walker at paras 63-68; and per Lord Carswell at para 97. Particular warnings were sounded in respect of the meaning of "analogous situations" and the formulation and use of comparators in that respect. Having referred to the decisions in Van der Mussele v Belgium (1983) 6 EHRR 163 and Johnston v Ireland (supra), Lord Walker observed:
"68. In these cases (and numerous other cases in which there is even less discussion of the meaning of "analogous situations") the European Court of Human Rights was, without any elaborate analysis or discussion of comparators reaching an overall conclusion as to whether in the enjoyment of Convention rights there had been unfair and unjustifiable discrimination on the grounds of some personal characteristic. This assessment calls for a process of judicial evaluation which must be sensitive to the factual context. Some analogies are close, others are more distant. As Brooke LJ recognised [2003] 1 WLR 617, 625, para 22, the evaluation process may not be assisted by setting

out standard questions "as a series of hurdles, to be surmounted in turn.".
95 On the basis that the Michalak questions are a useful guide to analysing the issues that arise in the instant case, Ms Monaghan has addressed herself to each of those questions. As to (i), Ms Monaghan submits that, even accepting (as I have found) that the refusal to allow same-sex couples to marry does not violate Articles 8 or 12, the facts in this case fall within their ambit. She relies upon and draws an analogy with the case of Goodwin in which the court stated in reference to the position of a post-operative transsexual that: "The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and the law arises which places the transsexual in an anomalous position in which he or she may experience feelings of vulnerability, humiliation, and anxiety".
96 She submits that the position in society whereby a homosexual person who wishes to establish a formally recognised partnership with another homosexual may do so by establishing a civil partnership, but is denied the title and status of marriage, creates a conflict between social reality and the law in which that person may well experience feelings of vulnerability, humiliation and anxiety as the Petitioner and first Respondent say that they feel in their witness statements. So far as the ambit of Article 12 is concerned, she submits that a deprivation of the right to marry is plainly within the ambit of Article 12, and it is not tangential or remote. As stated in Goodwin at paragraph 99: "the exercise of the right to marry gives rise to social, personal, and legal consequences". Similarly, as stated in Van Oosterwijck v Belgium (1981) 3 EHRR 557, Com Rep at paragraph 56, and repeated in Goodwin at paragraph 99, whilst the right to marry is subject to "the domestic legislation, the national law of each of the spouses or the law of the forum", such qualification does not authorise the state "to completely deprive a person or a category of persons of the right to marry".
97 In relation to Article 8 (private life) Ms Monaghan emphasises that recent Strasbourg jurisprudence has confirmed and emphasised that the concept of "private life" is a wide and generous one. As stated in Pretty v UK (2002) 35 EHRR 1 at para 61:
"... the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8. Article 8 also protects the right to personal development and the right to establish and develop relationships with other human beings in the outside world."
98 Ms Monaghan submits that, by failing to allow homosexual persons to marry their partners of choice, and by treating a same-sex marriage entered into overseas as a civil partnership, the law manifests a lack of respect for the most intimate aspect of the Petitioner's private life, namely her sexual orientation and her choice of spouse/partner as a result.
99 So far as Article 8 (family life) is concerned, Ms Monaghan similarly submits that failure to recognise through marriage the Petitioner's family life with the first Respondent, is demonstrative of a lack of respect for it in that it is not accorded the same value as heterosexual marriage. In this connection she relies upon the decision of the

ECtHR in Petrovic v Austria (2001) 33 EHRR 14 as demonstrating that where, (as she submits is the case here), a state, which is not required by the Convention to do so, proceeds to legislate in a particular field, then, if such legislation falls within the sphere of a Convention right Article 14 will apply. In that case, the court held at paragraph 26 that the refusal to grant the applicant a Parental Leave Allowance could not amount to a failure to respect family life, since Article 8 did not impose any positive obligation on states to provide the financial assistance in question. However, it went on to say at paragraph 29 that:

"by granting Parental Leave Allowance states are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It follows that Article 14-taken together with Article 8-is applicable."

The court nonetheless went on to find that there was reasonable justification for the distinction drawn in that:

"42. There still remains a very great disparity between the legal systems of the contracting states in this field. While measures to give fathers an entitlement to parental leave have now been taken by a large number of states, the same is not true of the Parental Leave Allowance, which only a very few states grant to fathers.

43. The Austrian Authorities' refusal to grant the applicant a Parental Leave Allowance has not, therefore, exceeded the margin of appreciation allowed to them. Consequently the difference in treatment complained of was not discriminatory within the meaning of Article 14."

See also the similar reasoning in Stec and others v UK (App. No. 65731/01 and 65900/01, 12 April 2006) para 53.

100 In relation to the second Michalak question, Ms Monaghan submits that, assuming the matter falls within the ambit of the Convention rights in Article 12 and Article 8, there is a plain difference in treatment between same-sex couples and different sex couples. Albeit there are comparable material and financial benefits granted to same-sex couples the "intangible benefit" of marriage is not conferred, namely the benefit of "access to a deeply meaningful institution -- it is about equal participation in the activity, expression, security, and integrity of marriage"

-- see Halpern v Canada (Attorney General) (2002) CanLII 427949 (on S.C.D.C.).

101 Besides relying on the difference in treatment between same-sex couples and different sex couples, Ms Monaghan advances a subsidiary argument which relies upon the difference in treatment between the Petitioner and a British woman domiciled in the UK who contracts an opposite sex marriage in Canada. Whereas the latter marries her partner of choice and is recognised, the other is deprived of an opportunity to marry her partner of choice in the UK and is denied recognition of her lawful Canadian marriage.

102 As to the third Michalak question, Ms Monaghan submits that the Petitioner and the first Respondent are in an "analogous" position to different sex couples in that their factual situation is the same as any other married couple i.e. one of commitment and co-habitation within an exclusive long-standing relationship, involving all the features of marriage save those physical aspects which are inherently unavailable by reason of their gender. What sets them apart is one of the very features which Article 14 protects, namely that of their sexual orientation. In such a case, it is not open to the state to rely upon that very protected status as a reason to argue that the applicant is not in an

analogous situation without justifiable reasons, such reasons requiring to be weighty in any case where differences of treatment are based on sexual orientation; see Karner v Austria (2003) 38 EHRR 528 at para 37 and R (Carson) (supra) per Lord Hoffman at paras 15-17 and per Lord Walker at paras 57-58.

103 In relation to the fourth Michalak question, Ms Monaghan submits that the difference in treatment accorded to same-sex couples is not objectively justifiable in that it does not have a legitimate aim or bear a reasonable relationship of proportionality to that aim. She submits that simply to assert, as Baroness Scotland stated in Parliament (see paragraph 51 above) that the form and content of the Civil Partnership Bill was dictated by the desire of the Government to continue to support marriage and to recognise marriage as the surest foundation for opposite sex couples raising children, is to give a vacuous and insufficient reason because , to add same-sex couples to the ranks of those able to be married is unlikely to discourage heterosexual couples in that respect. Recognising same-sex marriage will not diminish the validity or dignity of opposite sex marriage in anyway. Ms Monaghan submits that the only discernible reason for the refusal to recognise same-sex marriage is that of pre-disposed bias and a negative attitude towards homosexuals, which cannot constitute a legitimate aim: see Smith & Grady v UK (2000) 29 EHRR 493 at para 97; and S.L. v Austria (2003) 37 EHRR 39 at para 44; and Ghaidan (supra) per Baroness Hale at para 143.

104 I will first deal with Ms Monaghan's submission as to whether or not the Article 14 discrimination relied on falls within the ambit of Articles 8 and 12 or "in connection with" the rights therein set out, as Lord Nicholls preferred to put it in Carson (supra) see paragraph 94 above. This has to be considered in relation to each of the Articles in turn. The first task by way of preliminary is to ask: what is the act of discrimination relied on? On the basis of Ms Monaghan's submissions, it is the failure of English law to accord to same-sex partners the title and status of marriage on the grounds of their sex and/or sexual orientation.

105 The next question is whether or not such a failure falls within the ambit of Article 8.

106 To address that question properly, given the broad-ranging character of Article 8, I bear in mind that the ambit or scope of the Article should not be given an artificially extended interpretation so that virtually any social policy measure which has any link with a person's personal life is brought within the Convention's protection of respect for private and family life: see Botta v Italy and M (supra). In both those cases it was decided that, just as there had been no breach of Article 8, so there was no violation of Article 14.

107 Like the House of Lords in M, in relation to the statutory scheme there under consideration, I do not consider that the failure to recognise the status of the Petitioner and the first Respondent as being validly married amounts to any kind of intrusion upon their right to respect for their private life in the sense contemplated by the Convention. Neither has the personal or sexual autonomy of the Petitioner been invaded, nor has she been criminalised, threatened, or humiliated in anyway. So far as the matter is put on the basis of her *family* life, the Convention has yet to recognise a childless same-sex relationship as constituting family life. However, even if that were not so, the withholding of recognition of the relationship between the Petitioner and first Respondent does not impair the love, trust, mutual dependence and unconstrained social intercourse which are the essence of family life and the matter falls outside the ambit of Articles 8 and 14 combined.

108 So far as Article 12 is concerned, the position seems to me less certain. Ms Mountfield's submission is straightforward, namely that, since it is clear that Article 12 of the Convention does not apply to recognition of same--sex relationships at all, but only to the right of a man and a woman to marry, as recognised in the domestic laws of the respective Member States of the Council of Europe, there can be no question, by resort to Article 14, that the State's failure to recognise the Petitioner's Canadian marriage as valid in this country, amounts to a failure to secure the right and freedom to marry set out in Article 12.

109 That proposition has the force of logic. However, as pointed out by Lord Nicholls in M (at paragraph 14), the more directly a discriminatory provision impinges on "the values underlying the particular substantive Article", or its "core values" as described by Lord Bingham (at paragraph 4), the more readily will it be regarded as falling within the ambit of the Article. As I have indicated at paragraph 86 above, Article 8 is concerned with positive measures and "de facto" situations. By way of contrast, Article 12 is concerned with "de jure" rights, questions of status, and restrictions imposed on the right to marry and found a family according to national laws.

110 On that basis it seems to me that a differently focused approach to the question of ambit is appropriate in relation to Article 12 than Article 8. In this connection it seems to me that the question is whether one treats the core value(s) of Article 12 as being concerned only with restrictions placed on the right of opposite sex couples to marry, or more widely as concerning generally the limitations placed upon the rights of an individual to marry the partner of his/her choice. I propose to adopt that broader approach by treating the matter on the basis that, although Parliament had no positive obligation under the Convention to take steps to redress the perceived social disadvantages experienced by same-sex partners as compared with married persons, by embarking on legislation designed to alleviate such social disadvantage and passing the measures contained in the CPA which provided for recognition and treatment of a foreign marriage as a civil partnership only, brought the facts of the Petitioner's situation within the ambit of Article 12.

111 I therefore turn to the overlapping questions embodied in Michalak questions (ii), (iii), and (iv) and in this respect I propose to follow the approach of Lord Nicholls in Carson (see paragraph 94). Having found that the discrimination alleged is within the ambit of Article 12, I turn to consider whether the difference in treatment of which complaint is made can withstand scrutiny.

112 In my view it can. The institution of marriage is afforded a particular status within the framework of the Convention, namely as a union between parties of opposite sex. Challenges to legislative provisions for financial benefits which discriminate on the grounds of marital status have been held in a number of cases (a) not to involve comparable situations and (b) to be justified in any event as not exceeding the margin of appreciation afforded to Governments, see for instance Shackell v UK (App No 45851/99):

"The court accepts that there may well not be an increased social acceptance of stable personal relationships outside the traditional notion of marriage. However, marriage remains an institution which is widely accepted as conferring a particular status on those who enter it."

See also Estevez v Spain (supra), Gomez v Spain (App. No 37784/97) and Zapata v

Spain) (App. No 3465/97). It seems to me that, so far as European jurisprudence is concerned, that remains the case.

113 Ms Mountfield argues that a comparison between the position of same-sex couples living in a permanent relationship and married persons of opposite sex does not involve analogous situations by reason of the obvious difference that a person who is regarded as married by the law of the Convention State is not in an analogous situation to one who is not.

114 Similarly, as to the comparison drawn between the Petitioner as one of a same-sex couple married in Canada with a person who enters into an opposite-sex marriage in Canada and whose marriage is recognised in England, again she submits the analogy is false, or at any rate incomplete; the correct comparators in such an instance are an opposite sex couple who for whatever reason lack the capacity to marry one another as a matter of English law. The differential treatment is not on ground of sexual orientation but simply on the grounds of lack of capacity.

115 I do not think that it is a correct analysis. By reason of its very definition, it is the opposite sex component of marriage which is under scrutiny. It seems clear to me that the reality of the underlying position is that the different treatment is one based on sexual orientation. The question is whether it can withstand scrutiny and this depends on whether it has a legitimate aim and whether the means chosen to achieve that aim are appropriate and not disproportionate in their adverse impact.

Justification

116 In my view the aim is indeed legitimate and in principle is recognised as such in the authorities from which I have quoted at paragraphs 45-47 above. On the question of the proportionality of any discriminatory measure reflecting that aim, in this case the CPA, it is complained by the Petitioner that, in denying her and the first Respondent the name and formal status of marriage and "downgrading" her Canadian marriage to the status of civil partnership, the impact of the measure upon her is one of hurt, humiliation, frustration and outrage. I can understand her feelings in that respect. At the same time, it is certainly not clear that those feelings are shared by a substantial number of same-sex couples content with the status of same-sex partnership.

117 Regrettable as the adverse effects have been upon the Petitioner and those in her situation who share her feelings, they do not persuade me that, as a matter of legislative choice and method, the provisions of the CPA represent an unjustifiable exercise in differentiation in the light of its aims.

118 It is apparent that the majority of people, or at least of governments, not only in England but Europe-wide, regard marriage as 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 nurture in a family unit (or "nuclear family") in which both maternal and paternal influences are available in respect of their nurture and upbringing.

119 The belief that this form of relationship is the one which best encourages stability in a well regulated society is not a disreputable or outmoded notion based upon ideas of exclusivity, marginalisation, disapproval or discrimination against homosexuals or any other persons who by reason of their sexual orientation or for other reasons prefer to form

a same-sex union.
120 If marriage, is by longstanding definition and acceptance, a formal relationship between a man and a woman, primarily (though not exclusively) with the aim of producing and rearing children as I have described it, and if that is the institution contemplated and safeguarded by Article 12, then to accord a same-sex relationship the title and status of marriage would be to fly in the face of the Convention as well as to fail to recognise physical reality.
121 Abiding single sex relationships are in no way inferior, nor does English law suggest that they are by according them recognition under the name of civil partnership. By passage of the CPA, United Kingdom law has moved to recognise the rights of individuals who wish to make a same sex commitment to one another. Parliament has not called partnerships between persons of the same-sex marriage, not because they are considered inferior to the institution of marriage but because, as a matter of objective fact and common understanding, as well as under the present definition of marriage in English law, and by recognition in European jurisprudence, they are indeed different.
122 The position is as follows. With a view (1) to according formal recognition to relationships between same sex couples which have all the features and characteristics of marriage save for the ability to procreate children, and (2) preserving and supporting the concept and institution of marriage as a union between persons of opposite sex or gender, Parliament has taken steps by enacting the CPA to accord to same-sex relationships effectively all the rights, responsibilities, benefits and advantages of civil marriage save the name, and thereby to remove the legal, social and economic disadvantages suffered by homosexuals who wish to join stable long-term relationships. To the extent that by reason of that distinction it discriminates against same-sex partners, such discrimination has a legitimate aim, is reasonable and proportionate, and falls within the margin of appreciation accorded to Convention States.
123 I turn briefly to two further aspects of Ms Monaghan's submissions.

Non-Convention jurisprudence

124 First, Ms Monaghan has placed reliance upon Canadian jurisprudence and in particular the decision of Halpern & Others v A.G. of Canada (2003) 169 OAC 172, a decision of the Court of Appeal for Ontario in relation to which a number of same-sex partners sought a declaration as to whether the exclusion of same-sex couples from the common law definition of marriage was a breach of the Canadian Charter of Rights and Freedoms in a manner which was not justified in a free and democratic society under s.1 of the Charter. The Canadian court found that the existing common law definition of marriage violated the equality rights of the applicants under s.5 (1) of the Charter and declared the existing common law definition of marriage to be invalid to the extent that it refers to "one man and one woman", reformulating it as "the voluntary union for life of *two persons* to the exclusion of all others".
125 The decision was reached on the basis that the justification of marriage as a heterosexual institution largely concerned with procreation of children was not a "pressing and substantial" objective and that the violation of the equality rights guaranteed in the Charter which was involved by excluding same-sex couples from marriage was not rationally connected to that objective and was disproportionate in

effect. The last finding was linked to a finding alia that same-sex couples in Canada did not enjoy access to many Government benefits, by way of contrast with the position under the CPA. Finally, the court was not concerned with, let alone obliged to have regard to, any margin of appreciation accorded to Convention States in relation to these matters.

126 Ms Monaghan has also referred me to the recent decision of the Constitutional Court of South Africa in Minister of Home Affairs v Fourie (Case CCT 60/04), 1 December 2005, in which that court held that the absence of provision in the law for same-sex couples to marry each other amounted to denial of equal protection under the law, and was unfair discrimination by the State against them because of their sexual orientation. The judgment of Sachs J in that case is both moving and impressive. However, the decision of the court was reached on the basis of criteria provided for in a Constitution the provisions and requirements of which were in very different terms from those of the Convention and against a different historical background and social history. Equally, the court was equally unconcerned with, and manifestly disinclined to recognise, any margin of appreciation in relation to the equality rights guaranteed in the broad terms of the Constitutional provision under consideration.

127 The basis of the decision was a section in the Constitution which (a) provided that "everyone is equal before the law and has the right of equal protection and benefit of the law" (s.9 (1)), and (b) expressly prohibited unfair discrimination on grounds which included gender, sex or sexual orientation (s.9 (3)). There was in South Africa no statutory or other provision such as the CPA which recognised, on a basis of broad equivalence, the status of a long term same-sex relationship, upon which the State could rely. Further, the Constitution granted powers to the Constitutional Court to develop the common law, taking into account the interests of justice (s.173) and expressly provided that, when applying a provision of the Constitution to a natural or juristic person, the court, in order to give effect to rights under the Constitution "must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right" (s.8 (3)). As I have already indicated, no such obligation lies on the English court in a situation where statute law is plain and is inconsistent with any such development.

The Common Law

128 Second, I turn briefly to Ms Monaghan's argument that the court should develop the common law so as to recognise the Petitioner's Canadian marriage as a marriage in English law. I reject that as an appropriate or effective exercise given that the unambiguous statutory wording of s.11(c) of the MCA reflects, and no doubt has its statutory origin in, the common law rule and to do as Ms Monaghan suggests would not only be inconsistent with statute; it would not advance her cause.

129 Ms Monaghan also invited me to ignore or modify the requirement of private international law, administered as part of the common law, that legal capacity to marry be judged according to the law of the parties' domicile on the grounds that application of the ordinary rules would lead to non-recognition of her same-sex partnership as a valid marriage. Again, as it seems to me, this would be an inappropriate and ineffective exercise. I have already made clear that I do not consider that the provisions of English law are incompatible with the Convention. In addition, however, to accept Ms

Monaghan's suggestion would run counter to public policy, as expressed in the provisions of the CPA which require that a foreign same-sex marriage such as the Petitioner's be treated as a civil partnership.

130 Finally, apart from the insurmountable hurdle presented by s.11(c) to recognition of a same-sex marriage as valid in English law, there is abundant authority that an English court will decline to recognise or apply what might otherwise be an appropriate foreign rule of law, when to do so would be against English public policy: Vervaeke v Smith [1983] AC 145 at 164C. As already indicated, English public policy in the matter is demonstrated by s.11(c) of the MCA and the relevant provisions of the CPA.

Conclusion

131 The petition of the Petitioner will be dismissed.

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