

**OPINIONS**  
**OF THE LORDS OF APPEAL**  
**FOR JUDGMENT IN THE CAUSE**

**In re P and others (AP) (Appellants) (Northern Ireland)**

**Appellate Committee**

**Lord Hoffmann**  
**Lord Hope of Craighead**  
**Lord Walker of Gestingthorpe**  
**Baroness Hale of Richmond**  
**Lord Mance**

**Counsel**

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Cathy Hughes

*First Respondents:*  
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(Instructed by Emmet J Kelly & Co)

(Instructed by Departmental Solicitors Office)

*Second Respondents:*  
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**WEDNESDAY 18 JUNE 2008**



## HOUSE OF LORDS

### OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

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**[2008] UKHL 38**

#### **LORD HOFFMANN**

My Lords,

1. The question in this case is whether it is consistent with Convention rights as defined in section 1(1) of the Human Rights Act 1998 for a couple to be excluded from consideration as adoptive parents of a child on the ground only that they are not married. The woman is the natural mother of the child. The man is not the father but he and the woman have been living together for some years and treat the child as a member of the family. There is some evidence before the House about the nature of their relationship but there have been no findings by the court because the application has been rejected *in limine* on the grounds that they are not married to each other.

2. The legal obstacle to their adoption application is article 14 of the Adoption (Northern Ireland) Order 1987 (SI 1987/2203(NI 22)):

- (1) An adoption order shall not be made on the application of more than one person except in the circumstances specified in paragraph[s] (2) ...
- (2) An adoption order may be made on the application of a married couple where both the husband and the wife have attained the age of 21 years.

3. On the other hand, section 6(1) of the 1998 Act provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right and the Family Division of the High Court is for this purpose a public authority. If the 1987 Order were primary legislation, section 6(2) would require the court nevertheless to give

effect to it. But the Order is not primary legislation as defined in section 21(1) of the 1998 Act and is therefore overridden by Convention rights.

4. The appellants rely upon article 14, which provides that the—

“enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

5. The appellants say that marriage (or its absence) is a status and that article 14 discriminates them in respect of the right set forth in article 8, namely, respect for their private and family life. The Crown, which has been joined as a respondent to the application, submits that being unmarried is not a status within the meaning of article 14 of the Convention. If that is wrong, the Crown accepts that the right to adopt a child falls within the ambit of article 8, but denies that the 1987 Order is discriminatory. It says that there are relevant and material differences between married and unmarried couples which justify the distinction.

6. In the Family Division, Gillen J accepted that being unmarried was a status but said that the difference in treatment could be justified as being in the best interests of children. In the Court of Appeal, the Lord Chief Justice did not think that being unmarried was a status because unmarried people were a formless group which might vary widely in their relevant characteristics. On the assumption that it fell within article 14, he agreed with the judge that the positions of married and unmarried couples were sufficiently different to justify the discrimination. Lord Justice Girvan did not deal with the status question but agreed with the Lord Chief Justice on justification and Lord Justice Higgins agreed with the Lord Chief Justice on both points.

7. It is clear that being married is a status. In *Von Lorang v Administrator of Austrian Property* [1927] AC 641, 653 Viscount Haldane said:

“...[T]he marriage gives the husband and wife a new legal position from which flow both rights and obligations with

regard to the rest of the public. The status so acquired may vary according to the laws of different communities.”

8. If being married is a status, it must follow that not being married is a status. If you claim that you are no longer or never have been married to someone, you may apply for a “declaration as to marital status” under article 31 of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 (SI 1989/677(NI 4)). It is true that in respect of everything except not being married, unmarried people are a somewhat formless group. But, then, so are people who are not of noble birth, and yet birth is one of the grounds upon which article 14 expressly forbids discrimination. I therefore have no difficulty with the concept of being unmarried as a status within the meaning of article 14.

9. The European Court of Justice does not seem to have had any difficulty either. In *PM v United Kingdom* (2005) 18 BHRC 668 the applicant complained that he was not allowed to deduct from his taxable income the payments he made for the maintenance of his daughter solely because he had not been married to the mother. The Court said:

“27... This applicant differs from a married father only as regards the issue of marital status and may, for the purposes of this application, claim to be in an relevantly similar position.

28. The justification for the difference in treatment relied on by the Government is the special regime of marriage which confers specific rights and obligations on those who choose to join it. The Court recalls that it has in some cases found that differences in treatment on the basis of marital status has had objective and reasonable justification... It may be noted however that as a general rule unmarried fathers, who have established family life with their children, can claim equal rights of contact and custody with married fathers.... In the present case, the applicant has been acknowledged as the father and has acted in that role. Given that he has financial obligations towards his daughter, which he has duly fulfilled, the Court perceives no reason for treating him differently from a married father, now divorced and separated from the mother, as regards the tax deductibility of those payments. The purpose of the tax deductions was purportedly to render it easier for married fathers to support a new family; it is not readily apparent why unmarried fathers,

who undertook similar new relationships, would not have similar financial commitments equally requiring relief.

29. The Court concludes therefore that there has been a violation of Article 14 of the Convention in conjunction with Article 1 of the first Protocol in this case.”

10. The question, therefore, is whether unequal treatment can be justified. For this purpose, it is important to be precise about the way in which the distinction between married and unmarried couples operates. No couple, whether married or not, has a right to adopt a child. Article 9 of the 1987 Order says that —

“In deciding on any course of action in relation to the adoption of a child, a court or adoption agency shall regard the welfare of the child as the most important consideration and shall —

- (a) have regard to all the circumstances, full consideration being given to—
  - (i) the need to be satisfied that adoption, or adoption by a particular person or persons, will be in the best interests of the child; and
  - (ii) the need to safeguard and promote the welfare of the child throughout his childhood; and
  - (iii) the importance of providing the child with a stable and harmonious home; and
- (b) so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.”

11. Eligibility to *apply* for an adoption order is therefore only the first step on the road to adoption. The applicants must then be thoroughly scrutinised to satisfy the court that adoption by them is in the interests of the child and, among many other things, that they will be able to provide the child with a stable and harmonious home. But the effect of article 14 is that even if the court considers that an applicant couple pass all these tests – that adoption by them is plainly in the best interests of the child, that the child wishes to be adopted, that their relationship is loving, stable and harmonious – their virtues else, be they

as pure as grace, as infinite as man may undergo — nevertheless, the court is bound to refuse the order and take a course which, ex hypothesi, is *not* in the best interests of the child on the sole ground that the applicants are not married.

12. The argument for the Crown is that although there may be some hard or anomalous cases in which an impeccable couple wishes to adopt a child but has good reason for not wishing to marry, there are in general rational grounds for distinguishing between married and unmarried couples as a class. Statistics show that married couples, who have accepted a legal commitment to each other, tend to have more stable relationships than unmarried couples, whose relationships may vary from quasi-marital to ephemeral. So, for example, Gillen J said, in para 23, that a difference in treatment had a legitimate aim, namely, the best interests of “children” (sc. children generally) and that the interests of the applicants must be balanced against the interests of “the community as a whole”. The Lord Chief Justice said, in para 38, that confining eligibility to married couples “has the obvious purpose of securing the familial stability that an adoptive child needs”. Girvan LJ said, in para 26, that “drawing the line when [an unmarried] relationship should be functionally equated to a marriage calls for a policy decision”. The 1987 Order “points to the national authorities’ conclusions that a married relationship represents the *type* of stable relationship ... which the legislation considers necessary for the adoptive relationship” (my emphasis) (para 28).

13. I would agree that, at the macro level, these are good arguments. The state is entitled to take the view that marriage is a very important institution and that in general it is better for children to be brought up by parents who are married to each other than by those who are not. If, therefore, it was rational to adopt a “bright line rule” to determine what class of people should adopt children, there would be much to be said for article 14. There is ample authority for the proposition that, for administrative or other reasons, social legislation may require such bright lines to be drawn. A frequently cited passage is from the judgment of the European Court of Human Rights in *James v United Kingdom* (1986) 8 EHRR 123, which concerned the provisions of the Leasehold Reform Act 1967 allowing tenants under long leases of houses below a given rateable value to buy the freehold at a favourable price. The Court said at paragraph 68:

“The applicants contended that the operation of the leasehold reform legislation is indiscriminate since it does

not provide any machinery whereby the landlord can seek an independent consideration, in any particular case, of either the justification for enfranchisement or the principles on which the compensation is to be calculated, once only it is established that the tenancy is within the ambit of the legislation. They pointed to evident differences between leasehold tenants of modest housing in South Wales and the better off, middle-class tenants on their Estate in Belgravia, who on the whole could not be classified as needy or deserving of protection. In their submission, in order to avoid injustice for the landlord as well as the tenant, the legislation should have provided for judicial review going into the details and reasonableness of each proposed enfranchisement.

Such a system may have been possible, and indeed a proposal to this effect was made during the debates on the draft legislation. However, Parliament chose instead to lay down broad and general categories within which the right of enfranchisement was to arise. The reason for this choice, according to the Government, was to avoid the uncertainty, litigation, expense and delay that would inevitably be caused for both tenants and landlords under a scheme of individual examination of each of many thousands of cases. Expropriation legislation of wide sweep, in particular if it implements a programme of social and economic reform, is hardly capable of doing entire justice in the diverse circumstances of the very large number of different individuals concerned.

It is in the first place for Parliament to assess the advantages and disadvantages involved in the various legislative alternatives available. In view of the fact that the legislation was estimated to be likely to affect 98 to 99 per cent of the one and a quarter million dwellinghouses held on long leases in England and Wales, the system chosen by Parliament cannot in itself be dismissed as irrational or inappropriate.”

14. Similarly in *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29; [2005] 1 WLR 681, para 16, I said of widows’ pensions:

“Its justification...did not depend upon the greater need of any particular widow but upon a perception that older widows as a class were likely to be needier than older widowers as a class or, for that matter, younger widows as a class. No doubt means testing would have been more discriminating but the use of more complicated criteria increases the expense of administration and reduces take-up by those entitled.”

15. Likewise, in *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37; [2006] 1 AC 173, an applicant complained that because she was just under 25, she was paid job-seekers’ allowance at a lower rate than someone who had attained that age, even though their circumstances might be identical. I said at paragraph 41:

“Mr Gill emphasised that the twenty-fifth birthday was a very arbitrary line. There could be no relevant difference between a person the day before and the day after his or her birthday. That is true, but a line must be drawn somewhere. All that is necessary is that it should reflect a difference between the substantial majority of the people on either side of the line. If one wants to analyse the question pedantically, a person one day under 25 is in an analogous, indeed virtually identical, situation to a person aged 25 but there is an objective justification for such discrimination, namely the need for legal certainty and a workable rule.”

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

17. The South African Constitutional Court made a similar point in *Du Toit and Vos v Minister for Welfare and Population Development* (2002) 13 BHRC 187, paras 21-22, where the prospective adoptive parents were a same-sex couple:

“In their current form the impugned provisions exclude from their ambit potential joint adoptive parents who are unmarried, but who are partners in permanent same-sex life partnerships and who would otherwise meet the criteria set out in section 18 of the Child Care Act... Their exclusion surely defeats the very essence and social purpose of adoption which is to provide the stability, commitment, affection and support important to a child’s development, which can be offered by suitably qualified persons... Excluding partners in same sex life partnerships from adopting children jointly where they would otherwise be suitable to do so is in conflict with the principle [of the paramouncy of the interests of the child]... It is clear from the evidence in this case that even though persons such as the applicants are suitable to adopt children jointly and provide them with family care, they cannot do so. The impugned provisions ... thus deprive children of the possibility of a loving and stable family life... The provisions of the Child Care Act thus fail to accord paramouncy to the best interests of the children...”

18. It is one thing to say that, in general terms, married couples are more likely to be suitable adoptive parents than unmarried ones. It is altogether another to say that one may rationally assume that no unmarried couple can be suitable adoptive parents. Such an irrebuttable presumption defies everyday experience. The Crown suggested that, as they could easily marry if they chose, the very fact that they declined to do so showed that they could not be suitable adoptive parents. I would agree that the fact that a couple do not wish to undertake the obligations of marriage is a factor to be considered by the court in assessing the likely stability of their relationship and its impact upon the long term welfare of the child. Once again, however, I do not see how this can be rationally elevated to an irrebuttable presumption of unsuitability.

19. What are the “interests of the community as a whole” of which Gillen J spoke? He was right to say that a proposal a year or two ago to

amend the law by removing the requirement of marriage generated a great deal of passion. People were concerned that it would “send a signal” that the institution of marriage was undervalued, or encourage people not to marry on the ground that being unmarried would be no obstacle to adopting children. But the question for the court is whether these concerns have any rational basis, and, even more important, whether it is right to take them into account in a case in which the law gives priority to the interests of the individual child. In my opinion, neither of these questions can be given an affirmative answer.

20. The judge and the Court of Appeal both emphasised that the question of whether unmarried couples should be allowed to adopt raised a question of social policy and that social policy was in principle a matter for the legislature. That is true in the sense that where questions of social policy admit of more than one rational choice, the courts will ordinarily regard that choice as being a matter for Parliament: compare the cases of *James v United Kingdom* (1986) 8 EHRR 123, *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 681 and *R (Carson) v Secretary of State for Work and Pensions* [2006] 1 AC 173, to which I have already referred. But that does not mean that Parliament is entitled to discriminate in any case which can be described as social policy. The discrimination must at least have a rational basis. In this case, it seems to me to be based upon a straightforward fallacy, namely, that a reasonable generalisation can be turned into an irrebuttable presumption for individual cases.

21. The next question is whether your Lordships’ conclusion should be affected by the jurisprudence of the European Court of Human Rights, which section 2(1) of the 1998 Act says should be taken into account. In *Fretté v France* (2002) 38 EHRR 438 the applicant was a French homosexual who wished to be considered as an adoptive parent. French procedure required, first, that the prospective adoptive parent be authorised by an administrative court as a suitable person and then, secondly, that a family court decide whether the adoption of a particular child by that person would be in the interests of the child. French law allows adoption by individuals but the applicant was rejected at the first stage on the ground that he was a homosexual.

22. The Court decided by a majority of 4 to 3 that it was within the margin of appreciation allowed to Member States of the Council of Europe to discriminate against homosexuals as applicants to be adoptive parents. The majority said:

“40. ...[T]he Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States...

41. It is indisputable that there is no common ground on the question. Although most of the Contracting States do not expressly prohibit homosexuals from adopting where single persons may adopt, it is not possible to find in the legal and social orders of the Contracting States uniform principles on these social issues on which opinions within a democratic society may reasonably differ widely. The Court considers it quite natural that the national authorities, whose duty it is in a democratic society also to consider, within the limits of their jurisdiction, the interests of society as a whole, should enjoy a wide margin of appreciation when they are asked to make rulings on such matters. By reason of their direct and continuous contact with the vital forces of their countries, the national authorities are in principle better placed than an international court to evaluate local needs and conditions. Since the delicate issues raised in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State.”

23. In a dissenting judgment, Sir Nicolas Bratza and two other judges said:

“...[O]n the question of proportionality, we might conceivably accept the Government's view that some margin of appreciation should be afforded to States in the sensitive area of adoption by homosexuals. It is not for the Court to take decisions (or pass moral judgment) instead of States in an area which is also a subject of controversy

in many Council of Europe member States, especially as the views of the French administrative courts also seem to be divided. Neither is it for the Court to express preference for any type of family model. On the other hand, the reference in the present judgment to the lack of ‘common ground’ in the contracting States or ‘uniform principles’ on adoption by homosexuals..., which paves the way for States to be given total discretion, seems to us to be irrelevant, at variance with the Court's case-law relating to Article 14 of the Convention, and when couched in such general terms, liable to take the protection of fundamental rights backwards.

It is the Court's task to secure the rights guaranteed by the Convention. It must supervise the conditions in which Article 14 of the Convention is applied and consider therefore whether there was a reasonable, proportionate relationship in the instant case between the methods used – the total prohibition of adoption by homosexual parents – and the aim pursued – to protect children. The *Conseil d'Etat's* judgment was a landmark decision but it failed to carry out a detailed, substantive assessment of proportionality and took no account of the situation of the persons concerned. The denial was *absolute* and it was issued without any other explanation than the applicant's choice of lifestyle, seen in general and abstract terms and thus in itself taking the form of an irrebuttable presumption of an impediment to any plan to adopt whatsoever. This position fundamentally precludes any real consideration of the interests at stake and the possibility of finding any practical way of reconciling them.”

24. The majority judgment in *Fretté* seemed to suggest that in areas of life which involve “delicate issues” of sexual relationships, in which public opinion in many Member States showed strong and vocal prejudices and passions, the European Court would be reluctant to intervene. Instead, it would treat such decisions, however irrational, as falling within the national margin of appreciation.

25. Very recently, however, the Court appears to have changed course. *E.B. v France* Application No 43546/02 (unreported), 22 January 2008, like *Fretté*, concerned an adoption application by a homosexual; this time a woman. Her application was rejected by the

French administrative court on grounds which the European Court treated as having been based substantially upon her sexual orientation. It held that this constituted discrimination contrary to article 14:

“91. ...Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8...

93. In the Court's opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention...

96. ...the Court cannot but observe that, in rejecting the applicant's application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention.”

26. Although the majority did not expressly say so, the effect of the decision was, as Judge Costa pointed out in his dissent (at para 3) to overrule *Fretté's* case. The margin of appreciation has been narrowed.

27. It therefore seems to me not at all unlikely that if the issue in this case were to go to Strasbourg, the Court would hold that discrimination against a couple who wish to adopt a child on the ground that they are not married would violate article 14. That appears to have been the opinion of the Joint Committee on Human Rights of the United Kingdom Parliament in its 24<sup>th</sup> Report of Session 2001-02 (HL Paper 177; HC 979) on the Adoption and Children Bill, which had been amended in the House of Lords to exclude unmarried couples from becoming adoptive parents in the same way as Article 14 of the 1987 Order. The Committee said, in para 24, that the *Fretté* case—

“... provides no support for the view...that it could legitimately be regarded as necessary and proportionate to the aim of protecting the best interests of the child to prevent all unmarried couples, including mixed-sex

couples, from being eligible to adopt, *regardless of the merits of the individual case* (my emphasis).”

28. The same view was expressed by Dr Ursula Kilkelly of the University of Cork, author of *The Child and the European Convention on Human Rights* (1999), who was commissioned by the Northern Ireland Department of Health and Social Services and Public Safety to write a report on whether the 1987 Order was consistent with Convention Rights. She said:

“According to the European Court of Human Rights, discrimination on the grounds of marital status is particularly difficult to justify. Thus, the current provisions of the 1987 Order, which exclude unmarried couples from adoption, would appear *prima facie* to be incompatible with the Convention insofar as they constitute arbitrary discrimination on the grounds of marital status.”

29. I therefore do not think that your Lordships should be inhibited from declaring that article 14 of the 1987 Order is unlawful discrimination, contrary to articles 8 and 14 of the Convention, by the thought that you might be going further than the Strasbourg court. But what if you were? Say the Strasbourg court were to revert to its position in *Fretté* and say that these are delicate questions, capable of arousing religious sensibilities in many Member States, and should therefore be left to the national “margin of appreciation”?

30. My Lords, in my view this should make no difference. It is true that in a well known passage in *R (Ullah) v Special Adjudicator* [2004] UKHL 26; [2004] 2 AC 323, 350, Lord Bingham of Cornhill said:

“20. In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, para 26. This reflects the fact that the Convention is an international instrument, the

correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”

31. These remarks were not, however, made in the context of a case in which the Strasbourg court has declared a question to be within the national margin of appreciation. That means that the question is one for the national authorities to decide for themselves and it follows that different Member States may well give different answers.

32. It must be remembered that the Strasbourg Court is an international court, deciding whether a Member State, as a state, has complied with its duty in international law to accord to secure to everyone within its jurisdiction the rights and freedoms guaranteed by the Convention. Like all international tribunals, it is not concerned with the separation of powers within the Member State. When it says that a question is within the margin of appreciation of a Member State, it is not saying that the decision must be made by the legislature, the executive or the judiciary. That is a matter for the Member State.

33. As this House affirmed in *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807, “Convention rights” within the meaning of the 1998 Act are domestic and not international rights. They are applicable in the domestic law of the United Kingdom and it is the duty of the courts to interpret them like any other statute. When section 6(1) says that it is unlawful for a public authority to act incompatibly with Convention rights, that means the domestic rights set out in the Schedule to the Act and reproducing the language of the international Convention.

34. In the interpretation of these domestic rights, the courts must “take into account” the decisions of the Strasbourg court. This language makes it clear that the United Kingdom courts are not bound by such decisions; their first duty is to give effect to the domestic statute according to what they consider to be its proper meaning, even if its provisions are in the same language as the international instrument which is interpreted in Strasbourg.

35. Nevertheless, as Lord Bingham indicated, there are good reasons why we should follow the interpretation adopted in Strasbourg. The best reason is the old rule of construction that when legislation is based upon an international treaty, the courts will try to construe the legislation in a way which does not put the United Kingdom in breach of its international obligations. If Strasbourg has decided that the international Convention confers a right, it would be unusual for a United Kingdom court to come to the conclusion that domestic Convention rights did not. Unless the Strasbourg court could be persuaded that it had been wrong (which has occasionally happened) the effect would be to result in a finding that the United Kingdom would be in breach of the Convention. Thus section 2(1) of the 1998 Act allows for the possibility of a dialogue between Strasbourg and the courts of the United Kingdom over the meaning of an article of the Convention but makes this likely to be a rare occurrence.

36. Other reasons for following Strasbourg are ordinary respect for the decision of a foreign court on the same point and the general desirability of a uniform interpretation of the Convention in all Member States. But none of these considerations can apply in a case in which Strasbourg has deliberately declined to lay down an interpretation for all Member States, as it does when it says that the question is within the margin of appreciation.

37. In such a case, it is for the court in the United Kingdom to interpret articles 8 and 14 and to apply the division between the decision-making powers of courts and Parliament in the way which appears appropriate for the United Kingdom. The margin of appreciation is there for division between the three branches of government according to our principles of the separation of powers. There is no principle by which it is automatically appropriated by the legislative branch.

38. It follows, my Lords, that the House is free to give, in the interpretation of the 1998 Act, what it considers to be a principled and

rational interpretation to the concept of discrimination on grounds of marital status. For the reasons I have given earlier, I would declare that notwithstanding article 14 of the Order, the appellants are entitled to apply to adopt the child. I say nothing about the conditions which their relationship should satisfy in order to justify the court in making an adoption order, since this is a matter for the court when it considers the interests of the child under article 9. Nor do I say that the fact that they are not married may not be relevant to that question. The House should in my opinion say only that it is unlawful for the Family Division to reject the applicants as prospective adoptive parents on the ground only that they are not married to each other.

### **LORD HOPE OF CRAIGHEAD**

My Lords,

39. Until comparatively recently the three jurisdictions in the United Kingdom were at one in restricting eligibility to be considered as adoptive parents to married couples or single people. That was the position in England and Wales until the law was reformed by section 50 of the Adoption and Children Act 2002, which came into force on 30 December 2005. It was the position in Scotland too until the law there was reformed by section 29 of the Adoption and Children (Scotland) Act 2007. When that Act comes fully into force the position will be that everywhere in Great Britain couples of every description, including same sex couples who are not civil partners of each other who are in an enduring family relationship, will be eligible as potential adopters.

40. In Northern Ireland the position remains unchanged. Only married couples and single people who are not married or civil partners are eligible: Adoption (Northern Ireland) Order 1987 (SI 1987/2203 (NI 22)), article 14 and article 15 as amended by section 203(4) of the Civil Partnership Act 2004. It is to be noted that, while two people who are civil partners of each other are eligible as potential adopters in England and Wales and in Scotland, this is not the case in Northern Ireland. This is because the 2004 Act did not contain a provision, such as section 79(12) in relation to England and Wales, which extended the provisions of article 14 to civil partners. In fact perhaps due to an oversight, section 203(4) of the 2004 Act worked in the reverse direction because it excluded all civil partners, whether singly or as a couple, from eligibility.

41. The appellants are a couple who are unmarried. They have been living together for more than ten years and wish to adopt a ten year old child of whom X is the natural mother and Y is her male partner. They invited the court to declare that the provisions of articles 14 and 15 should not be applied to them and that they are eligible to be considered as adoptive parents regardless of the fact that they are unmarried. As the question of eligibility only is in issue no other facts were made known to the court. So the case raises a short but highly sensitive issue of principle. It by no means follows that just because the law has now been changed in England and Wales by an Act of the United Kingdom Parliament and in Scotland by an Act of the Scottish Parliament it should be changed in Northern Ireland too. Nor, indeed, does it all follow that it should be changed by judicial decision rather than by the democratically elected Northern Ireland Assembly which now has responsibility for reforming the law on this subject, as the law of adoption is within its legislative competence: Northern Ireland Act 1998, section 6(1).

42. The reform did not have an easy passage in England and Wales. In 1993 it was stated on behalf of, among others, the Welsh Office and the Lord Chancellor's Department that the government did not intend to change the law which allowed adoption applications from married couples or single individuals: *Adoption: The Future* (November 1993, Cm 2288), para 4.39. That was how matters stood when the Adoption and Children Bill was introduced in the House Commons. But at third reading a free vote was allowed on an amendment which extended eligibility to unmarried couples, including those of the same sex. The amendment was controversial. It was reversed after a vigorous debate in the House of Lords by a majority against it of 34, re-instated in the House of Commons and finally agreed to in the House of Lords by a majority in favour of 31: Hansard, HL Debates, 5 November 2002, vol 640, cols 569, 621. Section 50 of the 2002 Act read with section 144(4) of that Act, as amended by section 79(12) of the Civil Partnership Act 2004, provides that couples who are unmarried as well as a married couple and two people who are civil partners of each other may apply. The expression "couples" in the case of those who are unmarried or not civil partners of each other means two people whether of different sexes or the same sex living as partners in an enduring family relationship: section 144(4).

43. The Scottish Bill had a less troubled passage through the legislature than its English and Welsh counterpart. The Adoption and Children (Scotland) Act 2007 is not yet fully in force: see the Adoption

and Children (Scotland) Act 2007 Commencement Order No 1 (SSI 2008/130). This is because much of the way it will work in practice depends on regulations, orders and court rules that have yet to be made. But section 29 of the 2007 Act provides that an adoption order may be made on the application of a couple if it is a relevant couple. The expression “relevant couple” includes persons who are living together as if husband and wife or civil partners in an enduring family relationship. This change in the law was the product of the work of the Adoption Policy Review Group, which was established by the Scottish Executive in April 2001.

44. In her commentary on section 29 of the 2007 Act in *Current Law Statutes* the Group’s independent legal adviser, Alexandra Plumtree, states that this section was the only provision which attracted any real publicity during the progress of the Bill. But, as she points out, it was not controversial for social welfare or legal practitioners. Unmarried couples, including same sex ones, had been involved in adopting children for many years, even though only one of them could apply to the court for an adoption order. It had long been the practice for adoption agencies in these cases to assess the suitability of both members of the couple, leaving it to the couple to decide which one of them was to be the adopter: see *T, Petitioner* 1997 SLT 724 where the couple were of the same sex. The Adoption Policy Review Group recommended in its Phase II Report, *Adoption: better choices for our children*, presented on 6 June 2005, that joint adoption should be extended to all unmarried couples of the same and opposite sex, as this could make a contribution to extending the pool of adoptive families and because it was in favour of the law being substantially similar north and south of the border: paras 3.32-3.43. In its response which was also presented in June 2005, *Secure and safe homes for our most vulnerable children*, the Scottish Executive supported this recommendation. It said that it believed that the most important consideration was that the court could make decisions in the best interests of the child, and was not constrained by the status of the relationship between the adults.

45. The strength of feeling on this issue in Northern Ireland is plain from the series of affidavits by Brenda Conlon, a civil servant in the Department of Health, Social Services and Public Safety referred to by my noble and learned friend Lord Walker of Gestingthorpe. The legislative power to amend the 1987 Order, which was made under section 1(3) of and Schedule 1, para 1(1)(b) to the Northern Ireland Act 1974, now lies with the Northern Ireland Assembly. In July 2006 the Minister for Health, Social Services and Public Safety issued for consultation “Adopting the Future”, a strategy document setting out a

proposed new approach to adoption in Northern Ireland. This initiative was said to have been driven by significant changes since the enactment of the 1987 Order in the number and profile of children needing adoption and in the wider legislative and social contexts which govern the delivery of children's services. But, as Ms Conlon recognised in her fourth affidavit of 1 May 2007, the vast majority of responses were concerned with one issue, which was the proposal to extend joint adoption to civil partners and unmarried couples. Of these 95% were opposed to the proposal. Among the reasons given were that parenting by married couples was proven to provide the best outcomes for children and should be encouraged and that homosexuals were not suited for parenting a child. A striking feature of these responses is the lack of support for this proposal among the political parties in Northern Ireland.

46. The gulf which appears to exist between those in the Department who are seeking to promote this measure and those who responded to the consultation is not dissimilar, except perhaps in scale, from that which emerged when the corresponding amendments were being proposed at Westminster and at Holyrood. The consultation process has shown that it cannot be taken for granted that a similar measure would receive the approval of the Northern Ireland Assembly. The Assembly can, if it wishes, decline to legislate. But it must be recognised that, if it decides to do so, it will be outside its competence to legislate in a way that is incompatible with any of the Convention rights: Northern Ireland Act 1998, section 6(2)(c). Then there are the courts. They have a vital part to play in this process. In the changed landscape that devolution has created, Parliament has decided that it is for the courts to adjudicate on issues of compatibility arising from Acts of the Assembly and the exercise of functions by the executive authorities: see section 79 of and Schedule 10 to the 1998 Act. The Family Division is a public authority. So it must act compatibly with the Convention rights, and the courts must ensure that it does so.

47. In the light of this background it is clear that the choices that would have to be made, if a measure about eligibility for adoption were to be put before the Assembly, would be choices on an aspect of social policy. I think that it is clear too that these are choices about which opinions may reasonably differ in a modern democratic society. The choice is a particularly sensitive one because it is plain that it would not be possible, compatibly with articles 8 and 14 of the Convention, for the Assembly to extend eligibility to unmarried couples of the opposite sex without extending it to same sex unmarried couples also: see *EB v France*, application no 43546/02, 22 January 2008. In that case the

Strasbourg court said that where a State had gone beyond its obligations under article 8 in creating a right to adopt it could not, in the application of that right, take discriminatory measures within the meaning of article 14: para 49. My first instinct therefore was to regard the issue of principle as one that ought to be taken by the legislature and not by the courts, for the reasons that I gave in *R v Director of Public Prosecutions, ex p Kebilene* [2000] 2 AC 326, 381.

48. The Court of Appeal adopted the approach which I suggested in *Kebilene*. But I have come to the view that it is not determinative in this case. It is, of course, now well settled that the best guide as to whether the courts should deal with the issue is whether it lies within the field of social or economic policy on the one hand or of the constitutional responsibility which resides especially with them on the other: see, for example, *R (Pro Life Alliance) v British Broadcasting Corporation* [2003] UKHL 23; [2004] 1 AC 185, para 136, per Lord Walker of Gestingthorpe. The fact that the issue is a political issue too adds weight to the argument that, because it lies in the area of social policy, it is best left to the judgment of the legislature. But the reason why I differ from the Court of Appeal's approach is that it lies in the latter area as well. Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests.

49. The appellants' case is that articles 14 and 15 of the 1987 Order contravene their rights to respect for family life under article 8 taken in conjunction with article 14 of the Convention and that they should not be applied by the Court when it is considering whether they are eligible to be considered as adoptive parents as they are discriminatory. The Strasbourg court said in *EB v France*, para 41, that the provisions of article 8 do not guarantee either the right to found a family or the right to adopt. But, as French law allowed adoption by individuals and the applicant had been discriminated against because she was denied eligibility on the ground of her sexual orientation, it was held that article 14, taken in conjunction with article 8, was applicable: para 51. It is the fact that they are being discriminated against by being denied the eligibility that the law gives to married couples that lies at the heart of the appellant's case. In the powerful argument which he advanced on behalf of the child Mr Lavery QC accepted that article 8 did not confer a right to adopt on the appellants. But he submitted that there was a

difference between a right to adopt and a right to be adopted and that, even if article 8 was not of direct application, article 8 in conjunction with article 14 was applicable in the child's case as well as that of the appellants. The child too was being discriminated against.

50. How far then has the Strasbourg court gone in spelling out of article 8 taken with article 14 a right for unmarried couples not to be discriminated against as regards eligibility for adoption? Would it, as my noble and learned friend Baroness Hale of Richmond suggests at the outset of her opinion, regard this matter as within the margin of appreciation allowed to member states? If it would, we would indeed be presented with a dilemma. If so, I would be inclined to resolve it in favour of exercising the judgment which that margin of appreciation permits by removing the discrimination against unmarried couples. As Lord Bingham of Cornhill observed in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, in the passage from para 20 which my noble and learned friend Lord Hoffmann has quoted, the House is required by section 2(1) of the Human Rights Act 1998 when it is considering whether any article of the European Convention on Human Rights is engaged by anything done by a public authority to take into account any relevant Strasbourg case law. He said that 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." Not, it should be noted, "certainly no more". The Strasbourg jurisprudence is not to be treated as a straitjacket from which there is no escape. But I consider, in agreement with Lord Hoffmann and my noble and learned friend Lord Mance, that the dilemma is less acute than Baroness Hale's opening remarks might suggest.

51. In *Fretté v France*, application no 36515/97, 26 February 2002, a single homosexual man complained that his application to adopt a child had been rejected because of his sexual orientation and that this violated his rights under article 8 and 14. The court held by a majority of four to three that, taking account of the broad margin of appreciation to be left to States in this area and the need to protect children's best interests, the refusal to authorise did not infringe the principle of proportionality. In *EB v France*, which was decided five years later by the Grand Chamber, the decision on an application by a single homosexual woman, again by a majority (ten to seven) went the other way. Sir Nicholas Bratza was one of the minority in *Fretté* and one of the majority in *EB*.

52. In *Fretté* the Strasbourg court said that the Convention did not guarantee the right to adopt as such, and that the right to respect for

family life presupposed the existence of a family and did not safeguard the mere desire to found a family: para 32. In its dissenting opinion the minority said that they had no difficulty in accepting the Commission's consistently expressed opinion that article 8 of the Convention did not guarantee a right to adoption as such, and that the rejection of the applicant's application for authorisation to adopt did not entail a direct interference with his rights guaranteed by article 8 of the Convention. Neither did it entail the breach of any form of positive obligation on the State to guarantee the applicant the right to respect for his private or family life: O-II 1. These points were repeated by the majority in *EB*, para 41. But in para 46 the Court pointed out that it was not called upon to rule whether the right to adopt, having regard to developments in the legislation in Europe and the fact that the Convention is a living instrument which must be interpreted in the light of present-day conditions, should or should not fall within the ambit of article 8 of the Convention taken alone. It was careful to point out in para 49 that that case did not concern adoption by a couple or by the same-sex partner of a biological parent, but solely adoption by a single person. That was the context for its comment that the State could not, in the application of the right that it had granted to single persons, take discriminatory measures within the meaning of article 14.

53. No case has yet reached Strasbourg on the issue of discrimination that this case raises. But I agree with Lord Hoffmann that it seems now to be not at all unlikely that if the issue in this case were to go to the Strasbourg the court would hold that the discrimination of which the appellants complain violates article 14. The decision in *EB*, read together with the opinion of the minority in *Fretté* to which it, in effect, gives its approval points strongly in favour of the view that discrimination on the grounds of marital status in this area of the law is not acceptable. By marital status I mean the condition of people who are in an enduring family relationship but are not married to each other as well as those who are married. In *EB*, para 91 the court drew attention to previous cases in which it had stated that, for the purposes of article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a legitimate aim or that there is no reasonable proportionality between the means employed and the aim sought to be realised. In para 95 it drew attention to the fact that undoubted personal qualities and an aptitude for bringing up children were key notions in the relevant international instruments including the draft European Convention on the Adoption of Children. I read that part of its decision as indicating that the consequences for the child cannot be left out of account in determining whether a discriminatory measure that affects children can be objectively justified and is proportionate.

54. So read, *EB* is consistent with the point made by the South African Constitutional Court in the case of *Du Toit and Vos v Minister for Welfare and Population Development* (2002) 13 BHRC 187 referred to by Lord Hoffmann. It is consistent with authority in Scotland too. In *T, Petitioner* 1997 SLT 724, 732B-C, the First Division of the Court of Session said:

“There can be no more fundamental principle in adoption cases than that it is the duty of the court to safeguard and promote the interests of the child. Issues relating to the sexual orientation, lifestyle, race, religion or other characteristics of the parties involved must of course be taken into account as part of the circumstances. But they cannot be allowed to prevail over what is in the best interests of the child.”

As Mr Lavery put in his written case for the child, where children are involved in any matter their rights are almost universally recognised as paramount. The aim sought to be realised in regulating eligibility for adoption is how best to safeguard the interests of the child. Eligibility simply opens the door to the careful and exacting process that must follow before a recommendation is made. The interests of the child require that this door be opened as widely as reasonably possible. Otherwise there will be a risk of excluding from assessment couples whose personal qualities and aptitude for child rearing are beyond question. To exclude couples who are in an enduring family relationship from this process at the outset simply on the ground that they are not married to each other would be to allow considerations favouring marriage to prevail over the best interests of the child. I do not think that this can be said to be either objectively justified or proportionate. From this it must follow that the appellants’ exclusion from eligibility would be incompatible with their Convention rights as it would be discriminatory.

55. I am not persuaded that extending eligibility to the appellants would give rise to practical difficulties of a kind that would make intervention by the courts inappropriate. All we would be saying is that they were to be treated, for the purposes of eligibility for adoption, as if they were married to each other. The assessment of their suitability as a couple is an entirely different matter. The facts must be examined as they are. Regard must be had to all the circumstances in deciding on any course of action, as article 9 of the 1987 Order makes clear. A

major revision of the law of adoption, such as that which has taken place in Great Britain, would no doubt require much additional work to be done by way of subordinate legislation and departmental guidance. But I do not see this as being made necessary by the decision about eligibility which we are being asked to make in this case. In *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] 2 AC 467 the House declined to recognise the acquired gender of a transsexual person for the purposes of the right to marry. But this would have represented a major change in the law with far-reaching ramifications, not the least of which was where the line was to be drawn to mark the transition from one sex to another, as Lord Nicholls of Birkenhead pointed out in paras 37-41. In my opinion the problems that would have followed from it were of a wholly different order from those which would follow from a decision that the appellants are eligible to be considered as the child's adoptive parents although they are unmarried.

56. For these reasons, and in agreement with Lord Hoffmann and Lord Mance whose opinions I have had the advantage of reading in draft and very largely too with what Baroness Hale says in her opinion, I would allow the appeal and hold that it is unlawful for the Family Division of the High Court of Justice in Northern Ireland to reject the appellants as prospective adoptive parents on the ground only that they are not married to each other.

## **LORD WALKER OF GESTINGTHORPE**

My Lords,

### *The legislative background*

57. This appeal raises important human rights issues concerning the adoption of children. These issues arise in the context of the special constitutional position of Northern Ireland, and perceived differences between social attitudes in Northern Ireland and the rest of the United Kingdom. Brenda Conlon, a principal in the Child Policy Directorate of the Northern Ireland Department of Health and Social Services and Public Safety (“the Department”), has deposed in her first affidavit in this matter:

“The problems that face society in Northern Ireland are not always precisely the same as those that affect Great Britain. Equally social attitudes and social norms in Northern Ireland do not always match those in Great Britain.”

Ms Conlon has sworn five affidavits in this matter, the first on 13 October 2004 and the most recent on 11 April 2008. Her affidavits and their exhibits have provided your Lordships with a lot of helpful background material, untendentiously presented. Her affidavits and their exhibits also cover developments which have taken place during the course of the litigation.

58. Whether differing social attitudes within parts of the United Kingdom should be reflected by different levels of protection for human rights is a large and difficult topic to which I shall have to return. But I think it may be helpful in the long run, even if it involves a fair amount of past history, to sketch the development of the law of adoption in the United Kingdom, and to cross-reference it to the changing pattern of legislative independence in Northern Ireland. This last topic is all too well known to the people of Northern Ireland, but it is necessary to go into it in a little detail in order to understand the definitions of “primary legislation” and “subordinate legislation” in section 21(1) of the Human Rights Act 1998.

59. Formal adoption was unknown in the United Kingdom until the Adoption Act 1926, which did not extend to Scotland or Northern Ireland. Only a married couple (“two spouses jointly”) could obtain an order for a child’s adoption by more than one person. The same principle was followed in the first statute authorising adoption in Northern Ireland, the Adoption of Children Act (Northern Ireland) 1929.

60. That statute was passed at a time when laws were made for Northern Ireland, except in relation to reserved matters, by the Parliament of Northern Ireland established by the Government of Ireland Act 1920. That Act never came into force in relation to the south, but it established the Parliament of Northern Ireland, which legislated on matters within its competence until it was first prorogued in 1972 (by the Northern Ireland (Temporary Provisions) Act 1972) and then abolished in 1973 (by the Northern Ireland Constitution Act 1973). The 1972 Act vested the legislative powers of the Parliament of Northern Ireland in Her Majesty in Council (section 1(3) and Schedule, para 4). The same pattern was repeated with the Northern Ireland

Assembly established by the Northern Ireland Constitution Act 1973, which was prorogued in 1974 and dissolved in 1975 under the Northern Ireland Act 1974. That Act again vested legislative powers in Her Majesty in Council (section 1(3) and Schedule, para 1). That was the statutory basis of the Adoption (Northern Ireland) Order 1987 (“the Adoption Order”), article 14 of which is at the heart of this appeal.

61. Direct rule from Westminster continued, with some brief intermissions which proved to be false dawns, until 2007. The Northern Ireland Act 1998 repealed the Northern Ireland (Temporary Provisions) Act 1972 and the Northern Ireland Act 1974 but provided (section 95(1)) for the continuing operation of Orders in Council made under those and similar statutes. That is how the Adoption Order has survived the repeal of its enabling statute. The Northern Ireland Assembly established by the Northern Ireland Act 1998 was briefly suspended on two occasions in 2001, and was then suspended for a much longer period, from 14 October 2002 until devolved government was restored on 8 May 2007, after a transitional period provided for in the Northern Ireland Act 2006. The Civil Partnership Act 2004, which extends to Northern Ireland (and to which I shall return shortly), was enacted during a period of direct rule.

62. During the last quarter of the last century the law of adoption was frequently considered, both by departmental and inter-departmental committees and by the Westminster Parliament. The Adoption Act 1976 (which extended to England and Wales only) consolidated changes made between 1958 and 1975. None of these changes affected the principle of joint adoption being permitted only by a married couple. Official consultation papers and White Papers reflect many other more pressing concerns, including recognising the paramount interest of the child available for adoption; questioning of the assumption that the child’s interests always required complete severance of ties with the birth mother and her family; better regulation of adoption agencies; the earlier involvement of courts in the adoption process; and provisions concerned with international aspects of adoption. These concerns appear, for instance, from the White Paper *Adoption: The Future* (November 1993, Cm 2288) and a Cabinet Office consultation paper on adoption *Prime Minister’s Review: Adoption (Performance and Innovation Unit, July 2000)*.

63. The international dimension was (in very brief summary) covered by the European Convention on the Adoption of Children 1967 and the 1993 Hague Convention on Protection of Children and Co-operation in

Respect of Intercountry Adoption. Article 6(1) of the 1967 Convention followed the principle of joint adoption only by married couples. It was necessary for the United Kingdom to make a partial denunciation of the 1967 Convention in order to enable the enactment of section 50 of the Adoption and Children Act 2002 (which, with an immaterial exception, extends to England and Wales only).

64. Section 50 (adoption by couple) of that Act provides:

“(1) An adoption order may be made on the application of a couple where both of them have attained the age of 21 years.

(2) An adoption order may be made on the application of a couple where—

(a) one of the couple is the mother or the father of the person to be adopted and has attained the age of 18 years, and

(b) the other had attained the age of 21 years.”

Section 144(4), as amended by section 79 of the Civil Partnership Act 2004, defines a couple:

“In this Act, a couple means—

(a) a married couple, or

(aa) two people who are civil partners of each other  
or

(b) two people (whether of different sexes or the same sex) living as partners in an enduring family relationship.”

Section 144(5) and (6) exclude closely-related persons from the scope of section 144(4).

65. These provisions were not included in the Bill as originally drafted (and published with a consultative document as long ago as March 1996). Nor were the provisions included in the Bill as originally introduced into Parliament. The substance of the amendment originated as an opposition amendment at the Third Reading in the House of

Commons, and re-emerged as a group of government amendments on which the majority party permitted a free vote.

66. These provisions came into force in England and Wales in 2005. Similar provisions have been enacted in Scotland but have not yet come into force. There is a new draft European Convention on the Adoption of Children (very recently presented to the Committee of Ministers of the Council of Europe) which contains as article 7 (conditions for adoption) the following:

“1. The law shall permit a child to be adopted:

(a) by two persons of different sex

(i) who are married to each other, or

(ii) where such an institution exists, have entered into a registered partnership together;

(b) by one person.

2. States are free to extend the scope of this Convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different-sex couples and same-sex couples who are living together in a stable relationship.”

So the general position throughout the Council of Europe appears to be in a transitional state. The same seems to be true under the jurisprudence of the European Court of Human Rights, as appears from the recent decisions in *Fretté v France* (2002) 38 EHRR 438 and *EB v France* (22 January 2008) discussed in the opinion of my noble and learned friend Lord Hoffmann.

67. Meanwhile the position in Northern Ireland continues (subject to the issues raised in this appeal) to be governed by article 14 of the Adoption Order (adoption by married couple):

“(1) An Adoption Order shall not be made on the application of more than one person except in the circumstances specified in paragraphs (2) and (3).

(2) An Adoption Order may be made on the application of a married couple where both the husband and the wife have attained the age of 21 years.

(3) An Adoption Order may be made on the application of a married couple where—

- (a) the husband or the wife—
  - (i) is the father or mother of the child; and
  - (ii) has attained the age of 18 years; and
- (b) his or her spouse has attained the age of 21 years.

(4) An Adoption Order shall not be made on the application of a married couple unless at least one of them is domiciled in a part of the United Kingdom, or in any of the Channel Islands or in the Isle of Man.”

68. In 2004 the Westminster Parliament enacted the Civil Partnership Act 2004. It is a massive piece of legislation which not only provides for the recognition of civil partnerships between same-sex couples, but also provides in great detail for their consequences in the fields of social security, property law, succession, and many other fields. It extends to England and Wales (Part 2), Scotland (Part 3) and Northern Ireland (Part 4)—in each case taken together with Part 1 (consisting of a single section 1 which defines civil partnership). The Act has, it seems to me, important indirect implications for the issue before your Lordships. Discrimination between a married couple and the partners in a civil partnership could be justified only by “particularly convincing and weighty reasons . . . regarding rights falling within article 8” (*EB v France*, para 91). Traditionally religious and social attitudes have been even less tolerant towards male and female homosexuality than towards relationships between unmarried heterosexual cohabitants. Yet paradoxically discrimination between a married couple and unmarried cohabitants may be easier to justify, under Strasbourg jurisprudence, than discrimination against a same-sex couple in a civil partnership (that at any rate is the submission made by the Department).

69. I should perhaps add, for completeness on this point, that article 15 of the Adoption Order (adoption by one person) was amended by section 203(4) of the Civil Partnership Act 2004 so as to prevent adoption by one only of the partners in a civil partnership (supplementing the prohibition on adoption by one only of a married couple). Yet there is no corresponding amendment to article 14 (adoption by a married couple). Leading counsel for the Department told your Lordships that there had been a mistake, but the point was not further explained. It is not directly relevant to the outcome of this appeal, but it will, it seems, be a point to be considered by the Northern Ireland Assembly at some time in the near future.

## *Human Rights Act 1998*

70. I have referred to the definitions of “primary legislation” and “subordinate legislation” in section 21(1) of the Human Rights Act 1998. A limited class of Orders in Council affecting Northern Ireland are classified as primary legislation (see para (f)(ii) of that definition) but other Orders in Council affecting Northern Ireland count as subordinate legislation (see para (a)(ii) of that definition) even if their content is comparable to that of primary legislation. The Adoption Order falls within the residual class and is to be classified as subordinate legislation. The interpretative obligation in section 3 of the Human Rights Act 1998 applies to both primary and subordinate legislation, whenever enacted. But it has not been suggested to your Lordships that section 3 can be applied so as to alter the plain language of article 14 of the Adoption Order.

71. Nor has it been argued that the repeal of the Northern Ireland Act 1974 (under which the Adoption Order was made), coupled with section 95(1) of the Northern Ireland Act 1998, has had the effect of turning the Adoption Order into primary legislation, or brought it within the scope of section 6(2)(b) of the Human Rights Act 1998. Section 6(2)(b) disapplies section 6(1) where

“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 [public] authority was acting so as to give effect to or enforce those provisions.”

## *Adoption in Northern Ireland*

72. In her first affidavit Ms Conlon, after the general observations that I have already referred to, deposed that there was what she called a “chronic shortage” of prospective adopters in England and Wales, with about five thousand children awaiting adoption in 2001. There was, she deposed, no such shortage in Northern Ireland. Statistics show that the traditional model of family life is strong in Northern Ireland, with fewer broken marriages and fewer children born out of wedlock. These considerations were given weight in the courts below, especially by Gillen J (in para 23 of his judgment).

73. A more detailed and rather different account of the need for adoption in Northern Ireland has emerged from the later evidence sworn by Ms Conlon in the course of this litigation (third affidavit, 1 December 2006; fourth affidavit, 1 May 2007; fifth affidavit, 11 April 2008). Her third affidavit exhibited a consultation paper, 'Adopting the Future' issued by the Department in July 2006 (under the transitional constitutional arrangements set up by the Northern Ireland Act 2006). The consultation paper is an impressively thorough document. Under the heading 'Eligibility to Adopt' it made the following observations:

“3.36 The current eligibility criteria are problematic for the following reasons. Like other aspects of the Adoption Order, they do not necessarily reflect contemporary society and may unnecessarily restrict opportunities for children to find permanent, loving families to support them throughout their childhood and into adult life. The marriage requirement for joint adoption applications does not reflect the reality of modern life where many people in long-term relationships cannot or simply do not wish to marry.”

There is then some discussion of adoption by one only of a couple, followed by:

“3.38 It is important to remember, however, that adoption is primarily a service for children. There is therefore no right for any person to adopt a child. A person's *eligibility* to adopt under the law is only the most basic consideration for adoption agencies. The much more crucial test is the *suitability* of the prospective adopter to adopt a child.”

There is then discussion of the need for very careful assessment of prospective adopters, followed by:

“3.39 . . . Many prospective adopters approach adoption wishing to adopt a healthy baby. However, as outlined in the previous chapter, there are very few *healthy babies* who need adoption in Northern Ireland today. Indeed, it is a global phenomenon that the demand for the type of children usually sought by adopters does in fact exceed the availability of such children.”

74. In her fourth affidavit Ms Conlon reports on the very full response to the consultation. There were over sixty responses from organisations of different types, and over one thousand from individuals. 95% of the respondents were opposed to the proposal to extend adoption to civil partners and others. The Department had carefully considered the responses, commenting,

“We are aware that material was circulated in some circles, providing advice on how to respond to the consultation. This material stressed that it was not necessary to read the consultation document and the Department is concerned that, without having done so, many respondents may not have fully understood the nature of the reform being proposed. It is clear that most of the objections outlined are concerned with the ability of unmarried heterosexual or homosexual couples to parent a child. We have tried to clarify, however, that people in unmarried couples (same sex or otherwise) can already adopt in Northern Ireland but that only one partner in the relationship can become the legal parent. The other obtains parental responsibility through a less permanent legal order. The change proposed, therefore, is not to enable people in unmarried relationships to adopt where they previously could not.

Children can and have been placed with single adopters in unmarried relationships, where agencies have considered that to be in the child’s best interests, under the existing legislation. We do not believe that where children would otherwise be placed in these circumstances, the law should deny them two legal parents.

The Department therefore intends to proceed to amend the legislation as proposed. The key features of the policy will be that:

- \*The welfare of children will be the determining consideration for any agency;
- \*Assessment will be the major factor in determining the suitability of any applicant; and
- \*There will continue to be no right for any person to adopt.”

75. In the last paragraph of her fourth affidavit Ms Conlon deposed:

“I would respectfully point out that the current policy may be subject to change on the restoration of the local Assembly. It will require the approval of the incoming Minister and the Executive. If legislation is sanctioned, the legislative programme will also be determined by the Executive. Any new legislation will require the development of a significant raft of subordinate legislation and extensive guidance before it can be brought fully into operation. For these reasons it is not possible to offer any realistic or reliable timetable for the implementation of the necessary legislation in this regard.”

76. Ms Conlon’s fifth affidavit gives a candid account of events since the restoration of devolved government on 8 May 2007. On that day the new Minister in charge of the Department received a ‘first-day briefing’, followed by other consultations and discussions within the Department. A policy paper dated 27 June 2007 puts even more clearly the points made in para 3.39 of ‘Adopting the Future’:

*“Profile of Children*

6. The majority of children needing adoption today are no longer healthy babies, ‘given up’ for adoption by parents with whom they will have no contact. They are more usually slightly older children in the care system, often with health or emotional difficulties incurred through a background of abuse or neglect. They generally know their birth families and it is important in many cases that they continue to have some degree of contact with them. As mentioned earlier, the life outcomes for children who spend long periods in care are extremely poor compared to their peers outside the care system. Despite the evidence to suggest the success of adoption in providing secure families for children, the numbers of children adopted from care remain low.

*Profile of Adopters/Support*

7. Whilst the profile of children has changed, the wishes and expectations of the traditional profile of adopters has

not, with the result that increasing numbers of prospective adopters in Northern Ireland are choosing to adopt a child from abroad, where there are healthy babies with limited likelihood of contact with birth families. The implications of this are twofold:

\*Firstly, we need to ensure that the opportunities for Northern Ireland's children to find permanent families to support them into adult life are not unnecessarily restricted; and

\*Secondly, both adopted children and their new families need significant levels of support if these new families, created by the state, are to succeed.

#### *Adoption by Unmarried Couples*

8. In view of the necessarily rigorous assessment process to which every person who wishes to adopt is subject, there are very few criteria set out in law which would automatically preclude people from adopting a child. A person's *eligibility* to adopt under the law is only the most basic consideration for adoption agencies. The much more crucial test is the *suitability* of the prospective adopter to adopt a child. Despite this, the law does require that where a couple wish to *jointly* adopt a child, they must be married."

77. At the end of her fifth affidavit Ms Conlon deposes that the Minister is aware of the appeal now before your Lordships, that he has made no final decisions on the detail of the reform of adoption legislation in Northern Ireland, and there may be a further public consultation exercise relating to the final form and content of new legislation.

78. In short the position, as it appears from Ms Conlon's unchallenged evidence, is that the Government of Northern Ireland intends to introduce new legislation on adoption; that there has been extensive consultation on a number of proposals, including permitting joint adoption by unmarried couples; that the Department's stated policy is to proceed with that proposal, despite the adverse reaction to the consultation; but that no final decisions have been taken by the Minister

as to the measures to be put before the Assembly for debate and decision.

*"No more, but certainly no less"*

79. My Lords, I have had the great advantage of reading in draft the opinions of my noble and learned friends, Lord Hoffmann and Lord Hope of Craighead. There is much in their opinions with which I fully agree, but I respectfully differ from their conclusions. In particular, I agree with all that Lord Hoffmann says about the reasoning of the Court of Appeal, which concluded that the issue of discrimination under article 14 of the European Convention on Human Rights did not arise at all, or (if it did arise) was to be regarded as justifiable. I agree with Lord Hoffmann that opposition to the proposed change in Northern Ireland's adoption law seems to be based on the fallacy of turning a reasonable generalisation into an irrebuttable presumption. I agree as to the importance of the guidance given by Lord Bingham of Cornhill in *R (Ullah) v Special Adjudicator* [2004] 2 AC 323, para 20:

“The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less.”

The full quotation is set out in para 30 of Lord Hoffmann's opinion. I read the guidance as having a rather wider application.

80. I respectfully agree, though not without some reservations, with Lord Hope's view that just because the law has now changed in England and Wales and in Scotland, it does not follow that the law must be changed in Northern Ireland also. It may be said that those parts of the United Kingdom have moved ahead of many other European countries (as appears from the need for denunciation of the 1967 Convention in order to make this change in domestic law). In principle the content of human rights should (almost by definition) be the same world-wide, and if there were to be significant long-term differences in the protection afforded to human rights in communities in different parts of the United Kingdom it would, I think, be a cause for serious concern. Nevertheless religious and social differences between different regions and localities may be relevant to the sort of balancing exercise which the Human Rights Act 1998 calls for (that is illustrated, on a very small scale, by the decision of this House in *Belfast City Council v Miss Behavin' Limited* [2007] UKHL 19; [2007] 1 WLR 1420). So long as the position in the

Council of Europe is still regulated by the 1967 Convention I do not consider that it could be said that Northern Ireland is obviously too far behind.

81. The preparation and consideration of complex legislation, challenging deep-seated social attitudes, does take time (see the remarks of Lord Nicholls of Birkenhead in *Bellinger v Bellinger (Lord Chancellor intervening)* [2003] UKHL 21; [2003] 2 AC 467, paras 42-49, and also some remarks of my own in *M v Secretary of State for Work and Pensions* [2006] UKHL 11; [2006] 2 AC 91, paras 91-96). *Bellinger v Bellinger* was of course an extreme case, as it raised the very difficult issue of the definition of gender reassignment. But the definition of “different-sex couples and same-sex couples who are living together in a stable relationship” (article 7(2) of the new draft European Convention on the Adoption of Children) is not without difficulties (compare section 144(4) to (6) of the Adoption and Children Act 2002 and the recent decision of the Strasbourg Court in *Burden v United Kingdom* Application No 13378/05, 29 April 2008, [2008] ECHR 357). The Government of Northern Ireland is barely one year past the resumption of devolved government under the Northern Ireland Act 1998. It would be unrealistic to suppose that the proposal to change the law about joint adoptions will not be subject to a great deal of controversy in the Assembly. But it would be premature, I suggest, for your Lordships to assume that it would fail.

82. In my opinion, in respectful disagreement with Lord Hoffmann and Lord Hope, and echoing Lord Nicholls in *Bellinger* at para 49, the change in the law sought by the appellants

“must be a matter for deliberation and decision by Parliament when the forthcoming Bill is introduced.”

I reach this conclusion for three reasons. First, it is far from clear that the Strasbourg Court would hold that the Adoption Order infringes the European Convention on Human Rights. So long as the 1967 Convention remains in force the Court would be more likely, in my opinion, to reach the opposite conclusion. Second, the decision to be made is one that ought to be made by a democratically-elected legislature. Third, your Lordships’ House can deal with this matter only by the blunt instrument of a declaration as to the position of the Family Division under section 6(1) of the Human Rights Act 1998. This would, I think, put the Family Division, and the other officials and agencies

involved in the adoption process, in a difficult position. Ms Conlon's fourth and fifth affidavits refer to the amount of work (involving subordinate legislation and departmental guidance) which would be necessary to give full effect to the legislative change. That is one of the reasons why it is likely to take some time. If instead your Lordships make the order which Lord Hoffmann proposes, judges, lawyers, officials and agencies would be faced with a very abrupt change in the law. No doubt they would all do their best to cope with that new situation but I suspect that there would be many practical difficulties.

83. For my part I would therefore dismiss this appeal. But I would do so with a warning that if within two or three years a clear consensus on this point emerges within the Council of Europe and in the jurisprudence of the Strasbourg Court, and if the Northern Ireland Assembly does not legislate in line with that consensus, the issue would most probably have to be reconsidered by the new Supreme Court of the United Kingdom, and the outcome would probably be different.

## **BARONESS HALE OF RICHMOND**

My Lords,

84. This case raises an issue of fundamental importance in the operation of the Human Rights Act 1998. How should the courts of this country respond where a provision in subordinate legislation is said to be incompatible with the Convention rights, but the European Court of Human Rights in Strasbourg might well regard the matter as within the margin of appreciation allowed to member states? Should the courts form their own view of the content of the Convention rights or should they leave it to the legislators? Are the "Convention rights" for the purpose of section 1(1) of the 1998 Act, the rights as defined by Strasbourg but given effect in UK law, or are they the rights defined by United Kingdom law within the parameters defined by Strasbourg?

### *Adoption law and practice*

85. The issue happens to arise in the context of the continued exclusion of unmarried couples from jointly adopting in Northern Ireland. A sketch of the background from a family law point of view

may therefore be helpful. Adoption is the most serious and far-reaching order known to family law. The Adoption (Northern Ireland) Order 1987 is modelled on the Adoption Act 1976 of England and Wales, under which an adoption order achieved an almost “total legal transplant” of a child from one family to another. Article 40(1) and (2) of the 1987 Order provides that:

“(1) An adopted child shall be treated in law –

(a) where the adopters are a married couple, as if he had been born as a child of the marriage (whether or not he was in fact born after the marriage was solemnised);

(b) in any other case, as if he had been born to the adopter in wedlock...

(2) An adopted child shall . . . be treated in law as if he were not the child of any person other than the adopters or adopter.”

Thus an adoption order does far more than deprive the birth parents of their parental responsibility for bringing up the child and confer it upon her adoptive parents (provided for in article 12). It severs, irrevocably and for all time, the legal relationship between a child and her family of birth. It creates, irrevocably and for all time (unless the child is later adopted again into another family), a new legal relationship, not only between the child and her adoptive parents, but between the child and each of her adoptive parent’s families. Their parents become her grandparents, their brothers and sisters her uncles and aunts. References to a parent, child or any other relationship in a statute or legal instrument (such as a will) automatically include an adoptive relationship unless it is specifically excluded.

86. That is why the law takes the making of an adoption order so seriously. Only a Health and Social Services Trust or Board, or a registered adoption society, may arrange adoptions (article 11). Their work in choosing potential adopters, approving a child for adoption, matching a particular child to a particular adopter or adopters is closely regulated by the Adoption Agencies Regulations (Northern Ireland) 1989 (SR 1989 No 253) (made under article 10). The child must spend a probationary period of at least 13 weeks with the prospective adopters before the order is made (article 13). The agency, or if the child was not placed through an agency, the local Board or Trust must report to the court on the suitability of the prospective adopters and any other matters relevant to the operation of article 9 (articles 22 and 24).

87. Article 9 has already been quoted in full by my noble and learned friend Lord Hoffmann (para 10). It requires both courts and adoption agencies to “regard the welfare of the child as the most important consideration” in all their decisions. They must be satisfied, not only that adoption, but also that adoption by the particular prospective adopter or adopters “will be in the best interests of the child”. They must give full consideration to “the need to safeguard and promote the welfare of the child throughout his childhood” and “the importance of providing the child with a stable and harmonious home”. They must also “so far as practicable, first ascertain the wishes and feelings of the child regarding the decision and give due consideration to them, having regard to his age and understanding.”

88. The court must also appoint a guardian ad litem for the child, who has the duty of safeguarding the interests of the child in the manner prescribed by the Adoption Rules (article 66; see Order 84 of the Rules of the Supreme Court (Northern Ireland) 1980, rules 18(1) and 6(3)-(6)). Parental agreement, either to the adoption order itself or to an order freeing the child for adoption, is required unless it can be dispensed with (articles 16 to 18).

89. Broadly speaking, there are three different types of adoption. First is the traditional model, of a young unmarried mother giving up her healthy new born baby, reluctantly but voluntarily, to a married couple who are unable to have children of their own. The “total legal transplant” concept was developed mainly with this kind of adoption in mind. But in England and Wales, the traditional model has largely disappeared. Very few unmarried mothers wish to give up their babies for adoption. Couples who only want to adopt a healthy young baby often have to go abroad to find one. Inter-country adoption has to some extent taken over this traditional “children for families” role.

90. Second is adoption by step-parents, after the relationship (if any) between the birth parents has ended. At one stage this was seen by many as the sensible solution when an unmarried, widowed or divorced mother married. Hence the numbers grew as the divorce rate grew. But it became increasingly unpopular with the adoption professionals, who saw it as denying and distorting the birth family relationships. Often, it was felt, the motive was to cut a divorced father out of his children’s lives. The *Report of the Departmental Committee on the Adoption of Children*, chaired by Sir William Houghton (1972, Cmnd 5107) recommended that the courts be obliged to consider alternatives to

adoption where step-parents applied. The 1987 Order contained such a provision until it was repealed under the Children (Northern Ireland) Order 1995 (SI 1995/755 (NI 2)). The numbers of step-parent adoptions, especially following divorce, have certainly decreased but there remain circumstances in which they may be the best solution for the child. In England and Wales, the Adoption and Children Act 2002 has provided a way in which step-parents can share parental responsibility with the birth parents without displacing either of them. It has also provided a new model of adoption, in which the parent to whom the step-parent is married remains a birth parent, while the step-parent becomes an adoptive parent, replacing the other birth parent.

91. While the first two types of adoption have been decreasing in numbers, a third has been increasing. This is the adoption of children who are being looked after by local authorities, because their birth parents are unable to look after them properly, and who are desperately in need of a new “family for life”. Because of the shortcomings of a life spent in local authority care, a move to find “permanency” for these children developed during the 1970s. While previously only healthy white babies had been thought adoptable, it was now recognised that no child was unadoptable. These children were not new born. Some were of mixed race or from ethnic backgrounds where adoption was rare or unknown. Many had histories, sometimes very tragic histories, which left them with very special needs. Some had disabilities with which their parents were unable to cope. Prospective adopters who were looking for a healthy white baby, to take the place of the one they were unable to have themselves, were much less likely to want an older child with special needs. A rather different sort of adoptive family was required, perhaps a couple who had successfully brought up their own children, perhaps a couple who had been fostering the child, perhaps a single person who could give the child the one to one attention she required. Apart from the particular parenting problems these children might present, there might also be the stress of a contested adoption if the birth parents did not agree and a need for continued contact of some sort between the child and her birth family.

92. It was against this changing social background that the law of adoption in England and Wales was radically overhauled by the Adoption and Children Act 2002. The process began with the *Review of Adoption Law: Report to Ministers of an Interdepartmental Working Group*, published by the Department of Health and Welsh Office as a Consultation Document in 1992. As with the review of child care law which had led to the Children Act 1989, this was a collaboration between the family law team at the Law Commission and the relevant

government departments. It was followed by a white paper, *Adoption: The Future*, Cm 2288, in 1993; then by a draft Bill, *Adoption – A Service for Children*, published for consultation in 1996. The 1997 general election intervened.

93. But interest revived in 2000 when the Prime Minister led a review, specifically in order to encourage the greater use of adoption by local authorities for the children they were looking after. It was felt that the greater emphasis on promoting permanence through family reunification or kinship care, resulting from the Children Act 1989, had distracted professional attention from finding adoptive homes for the children for whom family care would not be possible. The Performance and Innovation Unit published a report for consultation in July 2000, followed by a white paper, *Adoption: A New Approach*, Cm 5017, in December 2000. The emphasis was all upon finding safe, secure and permanent new families for children looked after by local authorities, mainly through changes in policy and practice; but the white paper also contained a commitment to changing the law. The Bill which became the 2002 Act was similar in structure to the Bill which had been published in 1996.

#### *The debate about unmarried adopters*

94. The Bill, and all the preceding reviews, would have retained the then existing law, which provided for only two kinds of adoption: a joint adoption by a married couple, both of whom thereafter became the child's parents, and a sole adoption by a single (or effectively single) person, who thereafter became the child's only parent. The reasons were given in the 1992 *Review*:

“26.10 . . . unmarried parents do not have the same legal obligations to one another as a married couple have. Should the relationship break down, the caring parent may therefore be less financially secure than if they were married. Furthermore, one of the special features of adoption is that it transfers a child from one family to another and gives the child a legal relationship with all members of the new family, including grandparents, aunts and uncles. However great the commitment of unmarried adoptive parents to a child might be, it is open to question how far their wider families would be willing to accept that child as part of their family.

26.11 It is also important to bear in mind Article 6(1) of the European Adoption Convention [1967] which prohibits adoption by unmarried couples. Although some unmarried couples might be suitable adoptive parents for a child, we feel that the security and stability which adopted children need are still more likely to be provided by parents who have made a publicly recognised commitment to their relationship and who have legal responsibilities towards each other.”

At the same time, as the *Review* recognised,

“26.13 We do not propose any changes to the law relating to single applicants, including lesbians and gay men. There are examples of extremely successful adoptions, particularly of older children and children with disabilities, by single adopters. Some children are only able to settle in single parent households, as a result of experiences in their early lives.

26.14 Some agencies may place a child with a single applicant who is living with a partner. As a matter of practice, to safeguard the child, they also assess the suitability of the partner. We have suggested above that an unmarried couple should not be allowed to adopt jointly . . . We do not feel that this is necessarily incompatible with allowing a single person who has a partner to adopt.”

95. Similar sentiments were expressed in the 1993 white paper, which emphasised that adoption by single people should be seen as exceptional (para 4.38) and endorsed “the general preference of authorities, adoption agencies and their staffs for adoption by married couples” (para 4.40). In the 2000 review and white paper, despite the emphasis on finding families for children rather than children for families, and on a “non-judgmental” approach to assessing suitability to adopt, there was no discussion of broadening the eligibility criteria. In none of these documents was there any discussion of the European Convention on Human Rights.

96. An Adoption and Children Bill went through most of its stages in the Commons in 2001 but was lost when Parliament was dissolved for the 2001 General Election. The same Bill was introduced in the 2001 – 2002 session. It retained the existing eligibility criteria, which the Minister had described at its first second reading in the House of Commons as “absolutely right” (*Hansard (HC Debates)*, 26 Mar 2001,

Vol 365, col 709). But at the next second reading (*Hansard (HC Debates)*, 29 October 2001, Vol 373,) several back bench members flagged their intention to support amendments which would allow unmarried couples, whether of the same or opposite sexes, to adopt jointly. They had the support of BAAF, the umbrella group to which most, if not all, British Agencies for Adoption and Fostering belong. The Government allowed a free vote and the amendments were passed at the report stage in the Commons (*Hansard (HC Debates)*, 16 May 2002, Vol 385, cols 967 – 1006).

97. The arguments were simple. Unmarried couples were already in practice allowed to adopt; but only one of them could do so legally, thus reducing the other to second class status and depriving the child of the benefit of two legal parents. At the same time, unmarried couples were deterred from coming forward to adopt. There were children looked after by local authorities whose unmarried foster parents would like to adopt them. There was a shortage of people who were willing to adopt some kinds of children who really needed it, in particular older boys. The Bill required adoption agencies and courts to make the welfare of the child throughout her life their paramount consideration. But this restriction meant that, in a very few cases, they were unable to do what was best for the child.

98. In the report stage in the House of Lords, the Bill was restored to its original position. The arguments were much the same as those in the 1992 *Review* and 1993 white paper. There was also some concern about adoption by same sex couples (*Hansard (HL Debates)*, 16 October 2002, Vol 639, cols 864 to 910). On 28 October 2002, the Joint Committee on Human Rights published its 24<sup>th</sup> Report of the session 2001-02, *Adoption and Children Bill: as amended by the House of Lords on Report*, HL Paper 177. This expressed the view that “a blanket ban on unmarried couples becoming eligible to adopt children would amount to unjustifiable discrimination on the ground of marital status, violating article 14 combined with article 8” (para 25). On 4 November 2002, the Commons declined to accept the Lords’ amendments and on 5<sup>th</sup> November, the Lords voted by a majority of 31 not to insist on them.

99. My noble and learned friend, Lord Hope of Craighead, has described how legislation to the same effect has now been enacted in Scotland and will presumably be brought into force in due course (it took three years for the necessary new regulations, rules and other arrangements to be made before the 2002 Act could be implemented).

100. Both Lord Hope and Lord Walker of Gestingthorpe have described developments in Northern Ireland. In short, the Department of Health and Social Services and Public Safety has been reviewing adoption law for as long as these proceedings have been going on. As part of this process, a report was commissioned from Dr Ursula Kilkelly, auditing the compatibility of the 1987 Order with the international standards set out in the United Nations Convention on the Rights of the Child 1989 and the European Convention on Human Rights. On eligibility to adopt, she pointed out that under both Conventions, the child's best interests had to be paramount in the adoption process. After considering the controversial case of *Fretté v France* (2002) 38 EHRR 438, which had not yet been overtaken by *EB v France*, App No 43546/02, 22 January 2008, she commented:

“What is clear, however, is that in accordance with the second requirement of article 14 – that of proportionality - excluding an entire category of persons in a blanket manner may not be Convention compliant. Thus, while it may be legitimate to devise criteria to determine the suitability of those seeking to become adoptive parents, at the same time, a weighty argument (supported by the principle of proportionality) can be made for the application of a case by case approach to ensure that the child's best interests are properly met in each individual situation.”

101. In December 2005, the Civil Partnership Act 2004 was brought into force, enabling same sex couples throughout the United Kingdom to enter into a registered partnership bringing with it almost all the legal consequences of marriage. It did not amend article 14 of the 1987 Order to allow registered civil partners jointly to adopt, although it did amend article 15 to exclude a civil partner from making a sole application. This must have been a mistake. It means that registered civil partners have been totally excluded from adopting. It is difficult to see how this could survive a challenge under article 14 of the European Convention, which takes a particularly firm line against discrimination on the ground of sexual orientation.

102. In 2006, the Department issued a strategy document, *Adopting the Future*, for consultation. Among its proposals was to extend joint adoption to civil partners and unmarried couples, whether of the same or different sexes, living as partners in an enduring family relationship. This provoked a huge response, the great majority of it negative. The arguments, and the Department's response to them, are summarised in a

report published in January 2007. This is indeed an impressive document, which comprehensively demolishes the arguments put forward against a change in the law. In particular, the Department pointed out that:

“. . . the State has a duty to protect the rights of everyone in society irrespective of racial grouping, religious belief, political opinion, marital status, age, gender, sexual orientation, disability and dependency. . . . men and women who are unmarried regardless of sexual orientation can currently already legally adopt so the current proposal to enable joint adoption where unmarried people are living in a stable relationship is simply an extension of the existing provision to provide greater stability for the child.” (para 5.2.10)

Further,

“The . . . object of this proposal is primarily to enable children who would otherwise have been placed with unmarried carers to benefit from having two legal parents. While the proposals will not dramatically increase the pool of potential adopters, it is important that we try to find the best possible family for children outside their birth family and if the best route to permanence for an individual child is with a couple who are not married, the law should not stand in the way of that.” (para 5.2.23)

103. A notable feature in the development of the Department’s evidence since these proceedings began in 2004 has been the recognition that adoption should be seen as a way of providing a permanent home for children in the care system. In her first affidavit, in October 2004, Brenda Conlon emphasised that there was no shortage of prospective adopters in Northern Ireland. But thinking has clearly moved on since then. In her fourth affidavit, in May 2007, she pointed to “significant changes . . . in the number and profile of children needing adoption and in the wider legislative and social contexts which govern the delivery of children’s services”.

104. Since the 2006 consultation, the government of Northern Ireland has once again been devolved to the Northern Ireland institutions. Adoption is among the devolved matters. The Minister has been thoroughly briefed on where things stand but has currently reached no decision about what action, if any, to take.

105. Against that background, it is comparatively easy to conclude that the balance of the policy arguments now favours bringing the law in Northern Ireland into line with the law in Scotland, England and Wales. But is a law which continues to deny even the possibility of adoption to an unmarried couple, and to the child they wish to adopt, incompatible with their Convention rights?

### *Compatibility with Convention Rights*

106. Article 14 requires that “the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. It is common ground that the subject matter of this appeal falls within the ambit of the right to respect for family life which is guaranteed by article 8. Article 8 does not require that states provide a legal mechanism of adoption, any more than it requires the state to provide people with a home. But if they do so, they must provide it without unjustified discrimination on one of the Convention grounds.

107. I share the view that lack of marital status is as much a “status” for the purpose of article 14 as is the status of marriage itself. It is understandable that family lawyers might think otherwise, as did the Court of Appeal in this case. In family law, marriage is not just a contract; it is also a status, bringing with it rights and responsibilities, not only as between the parties, but also as against third parties and the state. There is no comparable status of being an unmarried couple. But for article 14 purposes, the absence of a particular status is just as much a prohibited ground of distinction as is its presence. To family lawyers, legitimacy was also a status, in the same way that marriage was a status, whereas illegitimacy was not. But the European Court of Human Rights long ago recognised that unjustified discrimination between the children of married and unmarried parents fell within article 14: see *Marckx v Belgium* (1979) 2 EHRR 330. The same applies to discrimination between married and unmarried fathers: see *Sahin v Germany* (200) 36 EMRR 765. It cannot seriously be argued that a difference in treatment between married and unmarried couples, in relation to the right to respect for their family life, is not covered by article 14.

108. There is clearly such a difference in treatment here. The unmarried couple are unable to gain legal recognition for the family life which they both enjoy with this child. The question is whether the difference in treatment can be justified. My initial view was that it could. The protection of the traditional family based on marriage is in principle capable of being a legitimate aim: see *Karner v Austria* (2003) 38 EHRR 528 [2003] 2 FLR 623, para 40. The promotion of the best interests of children is undoubtedly a legitimate and weighty aim. In this particular context, these aims inter-relate. All children need a “stable and harmonious home” in which to grow up. The stability of the parental relationship is therefore an important factor in assessing a couple’s suitability to adopt. This in itself would not justify treating married and unmarried couples differently, because both kinds of relationship are capable of breaking down. Some unmarried relationships are much more stable than some marriages, and vice versa. The law cannot force any couple, married or unmarried, to stay together. But being married does at least indicate an initial intention to stay together for life. More important, it makes a great legal difference to their relationship. Marriage brings with it legal rights and obligations between the couple which unmarried couples do not have. There is, for example, the right to live in the family home irrespective of who is its owner or tenant; the right to financial relief and property adjustment should the marriage break down; the right to succeed to a substantial portion of the estate of a spouse who has died intestate; and the right to financial provision from the estate if the provision made in any will or on intestacy is insufficient. People who want to adopt a child may find it hard to contemplate the ending of their relationship, whether by death, divorce or separation. But even in Northern Ireland, where divorce is still less common than it is in England and Wales, the possibility is by no means remote. It is not at all unknown for the advent of children and family responsibilities, which bring such a radical change to the finances and everyday lives of the couple, to lead to a breakdown in their relationship. If the relationship does break down, the parent who is the primary carer of the child will be much less financially secure if the parents are unmarried. And if the primary carer is less secure then so will the child be.

109. It is therefore appropriate to look with deep suspicion at the reasons why a couple who wish to adopt are unwilling to marry one another. These are not the olden days when the husband and wife were one person in law and that person was the husband. A desire to reject legal patriarchy is no longer a rational reason to reject marriage. It is not expensive to get married. Marriage should not be confused with the wedding. The only rational reason to reject the legal consequences of marriage is the desire to avoid the financial responsibilities towards one

another which it imposes on both husband and wife. Why should any couple who wish to take advantage of the law in order to become the legal parents of a child be anxious to avoid those responsibilities which could become so important to the child's welfare if things went wrong in the future?

110. But it is not difficult to think of circumstances in which that justification would not apply or would have much less force. There are couples who cannot marry. Strange though it may seem to some, there are people who have conscientious objections to divorce, but who do not have conscientious objections to living together outside marriage. There are also unmarried couples who have been looking after a child for a long time and now wish their relationship to have the security of adoption. In those cases, of which this is one, the choice is not between placing a child with a married or an unmarried couple for the first time. The choice is between the child remaining in that home with one legal parent or remaining there with two. The most telling point of all is that the law does not prohibit sole adoption by single people even if they have a long term partner. There again the choice is between giving the child one new legal parent or giving her two.

111. Of course, the argument would be very different if the law still treated the children of unmarried parents differently from the children of married parents. In the olden days a child whose parents were not married to one another had no legal relationship to speak of with her father and only a limited legal relationship with her mother. Those days have gone, although the process was only completed with the Family Law Reform Act 1987 in England and Wales and the Children Order 1995 in Northern Ireland. Article 155(1) of the 1995 Order is in the same terms as section 1(1) of the 1987 Act: in legislation and legal instruments, references to any relationship between two people are to be construed without regard to whether or not those relationships are traced through marriage.

112. If one can think of circumstances in which the legitimate aims of protecting the traditional family and safeguarding the welfare of the individual child would not apply, is it nonetheless justifiable to keep a "blanket ban" which will be appropriate in the great majority of cases even if there are a few where it will not? In *Pretty v United Kingdom* (2002) 35 EHRR 1, the Strasbourg court concluded that a blanket ban on assisting suicide was justifiable in order to protect the lives of vulnerable people, even though Mrs Pretty was not herself in that class. The interests at stake were so important that the interference in her

personal autonomy was not disproportionate. If one were only looking at this case from the point of view of a couple who could marry but chose not to do so, I would be inclined to say that the difference in treatment was not disproportionate. If they really wanted to adopt they could get married. But if one looks at this from the point of view of a child, whose best interests would be served by being adopted by this couple even if they remain unmarried, then the difference in treatment does indeed become disproportionate. At bottom the issue is whether the child should be deprived of the opportunity of having two legal parents. Whether in fact the would-be adopters prove suitable to adopt her is another matter. In my view, therefore, there is no longer an objective and reasonable justification for the 'blanket ban' on joint adoption by unmarried couples.

*Is this within the Strasbourg margin of appreciation?*

113. Our dilemma arises because this is a matter on which there are many different views within the Council of Europe. The current European Adoption Convention 1967 prohibits joint adoptions by unmarried couples and the United Kingdom had to denounce the Convention in this respect when the 2002 Act was passed. The new draft Convention, considered by the Council of Ministers on 7 May 2008, provides in article 7 that the law shall permit a child to be adopted by two persons of different sex who are married to each other or have entered into a registered partnership together or by one person. States are also free (but are not required) to extend the scope of the Convention to "same-sex couples who are married to each other or who have entered into a registered partnership together". They are also free to extend it to "different-sex couples and same-sex couples who are living together in a stable relationship". The final activity report of the working party on adoption, prepared for the European Committee on Legal Co-operation in March 2004, analysed the replies of 23 member states to a questionnaire on adoption. 10 were not opposed to the joint adoption of a child by an opposite sex unmarried couple if they had lived together for a considerable amount of time and 12 were against it. Five were not opposed to the joint adoption of a child by a same sex couple in a registered partnership and 17 were against it. Clearly there is as yet no consensus among the member states of the Council of Europe on these issues.

114. The European Court of Human Rights has for some time insisted that very weighty reasons are required to justify a difference in treatment based on sexual orientation: see *Lustig-Prean and Beckett v*

*United Kingdom* (1999) 29 EHRR 548; *Smith and Grady v United Kingdom* (1999) 29 EHRR 493; *Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 1055. Nevertheless, in *Fretté v France* (2002) 38 EHRR 438, the majority relied on the lack of common ground among member states on the issue of adoption by homosexuals, and the correspondingly wide margin of appreciation left to them, as justification for refusing to authorise a single homosexual man to adopt a child. In *EB v France*, 22 January 2008, however, a Grand Chamber held that a refusal based on sexual orientation was unacceptable. As Judge Costa put it, in a judgment dissenting in the result but not in the principle, “the message sent by our Court to the States Parties is clear: a person seeking to adopt cannot be prevented from doing so merely on the ground of his or her homosexuality”.

115. But it is by no means so clear that the Strasbourg court would send the same message if an unmarried couple were refused permission to adopt jointly simply because they were unmarried. It is possible that Strasbourg would regard this in the same light as discrimination between children of married and unmarried parents, or between married and unmarried fathers. But the latter can sometimes be justified: see eg *McMichael v United Kingdom* (1995) 20 EHRR 205. Differences in treatment between married and unmarried couples in the tax and social security systems have been allowed: see *Shackell v United Kingdom*, App no 45851/99, 27 April 2000, where it was said that “marriage remains an institution which is widely accepted as conferring a particular status on those who enter it”. Strasbourg might well be prepared to grant member states a wider margin of appreciation for differences in treatment on this ground than on the ground of sexual orientation, especially where the couple were free to marry but chose not to do so. Under Article 41.3.1 of the Irish Constitution, for example, “the State pledges itself to guard with special care the institution of Marriage, on which the Family is founded, and to protect it against attack”. It is possible that Strasbourg would regard the special constitutional protection of the marital family under that Constitution as justifying the continued restriction of joint adoption to married couples: see Adoption Act, 1991, s 10(1)(a) and (3). On the other hand, it is possible that Strasbourg would be unconvinced that the restriction served to protect marriage from attack: see, for example, the reasoning in *Karner v Austria*. In the United Kingdom, of course, we have no such constitutional protection for marriage, although we do still regard marriage as the best legal environment in which to bring up children. I therefore find myself unsure whether or not Strasbourg would regard this as within the United Kingdom’s margin of appreciation.

### *The consequences in the United Kingdom*

116. Section 6(1) of the Human Rights Act 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, unless required to do so by a provision in primary legislation: section 6(2). A court is a public authority for this purpose: section 6(3). If this were a provision of primary legislation which the court considered incompatible with a Convention right, the court would be bound to consider whether it was possible to interpret it so as to remove the incompatibility: see section 3(1). If this was not possible, the court would have the power, but not the duty, to make a declaration of incompatibility: see section 4(2). As far as I am aware, in all the cases in which either the interpretative duty in section 3 has been used, or a declaration of incompatibility made under section 4, it has been reasonably clear that the Strasbourg court would hold that United Kingdom law was incompatible with the Convention. *Ghaidan v Godin – Mendoza* [2004] UKHL 30, [2004] 2 AC 557 is an example of the one; *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467 an example of the other. No-one has drawn our attention to any case in which either section 3 or section 4 has been invoked on a matter which Strasbourg would hold to fall within the margin of appreciation allowed to member states. Where a provision of subordinate legislation is incompatible with the Convention rights, the remedies are different: section 3 applies but section 4 does not. The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed, in my view this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so.

117. So the issue is, what is meant by the Convention rights? I return to the dilemma posed at the outset: are the “Convention rights” for the purpose of the 1998 Act, the rights as defined by Strasbourg but given effect in United Kingdom law, or are they the rights defined by the United Kingdom within the parameters defined by Strasbourg? And if the latter, who defines them, the legislature or the courts? I confess to having found these questions more difficult to answer than have most of your lordships.

118. On the one hand, it is clear that the doctrine of the “margin of appreciation” as applied in Strasbourg has no application in domestic law. The Strasbourg court will allow a certain freedom of action to member states, which may mean that the same case will be answered

differently in different states (or even in different legal systems within the same state). This is particularly so when dealing with questions of justification, whether for interference in one of the qualified rights, or for a difference in treatment under article 14. National authorities are better able than Strasbourg to assess what restrictions are necessary in the democratic societies they serve. So to that extent the judgment must be one for the national authorities.

119. But that does not answer the question of whether that judgment should be made by the courts or by the legislature. Strasbourg is no help with this: it is concerned only with the end product, not who made it. So what did Parliament mean when it required the courts to act compatibly with the Convention rights? Did it mean us only to go as far as Strasbourg would go? Or did it mean us, in at least some cases, to be able to go further? It seems clear that Parliament recognised the problem and intended the latter. The Government's white paper, *Rights brought home: the Human Rights Bill*, 1997, Cm 3782, said this at para 2.5:

“The convention is often described as a ‘living instrument’ because it is interpreted by the European Court in the light of present day conditions and therefore reflects changing social attitudes and the changes in the circumstances of society. In future our judges will be able to contribute to this dynamic and evolving interpretation of the Convention.”

For what it is worth, there were also clear statements by the Home Secretary in the House of Commons (*Hansard (HC Debates)*, 16 February 1998, Vol 306, col 768) and by the Lord Chancellor in the House of Lords (*Hansard (HL Debates)*, 18 November 1997, Vol 583, cols 514-515) that the courts must be free to develop human rights jurisprudence and to move out in new directions.

120. Hence, if there is a clear and consistent line of Strasbourg jurisprudence, our courts will follow it. But if the matter is within the margin of appreciation which Strasbourg would allow to us, then we have to form our own judgment. In *R (S) v Chief Constable of South Yorkshire Police* [2004] UKHL 39, [2004] 1 WLR 2196, at para 27, Lord Steyn drew a distinction between the content of the right defined by article 8(1) and the question of objective justification for interferences in it under article 8(2). Citing the well-known passage from *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20 (quoted by Lord Hoffmann at para 30 above), at para 27, he

stated that “the question whether the retention of fingerprints and samples engages article 8(1) should receive a uniform interpretation throughout member states, unaffected by different cultural traditions”. But he had already said “I do accept that when one moves on to consider the question of objective justification under article 8(2) the cultural traditions in the United Kingdom are material”.

121. My Lords, I accept that there are differences between the cultural traditions of Northern Ireland and of Great Britain which should be taken into account in deciding whether this difference in treatment can be justified. On all the conventional measures, such as the rates of marriage, divorce, cohabitation and birth outside marriage, adherence to traditional family values is more widespread in Northern Ireland than in the rest of the United Kingdom, as is religious belief. But the legal traditions are the same as those in England and Wales. There is no special constitutional status afforded to marriage as there is in the Republic of Ireland. The sort of considerations which might lead Strasbourg to accord them a margin of appreciation on this matter do not apply.

122. The different cultural traditions in Northern Ireland might, however, make it more difficult for the legislature to act. It is, as Lord Hope has pointed out, a particular duty of the courts in a democracy to safeguard the rights of even unpopular minorities against unjustified discrimination: therein lies the balance between majority rule and the human rights of all. As I said in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557, para 132, “democracy values everyone equally even if the majority does not”. If, therefore, we have formed the view that there is no objective and reasonable justification for this difference in treatment, it is our duty to act compatibly with the Convention rights and afford the appellants a remedy. I am fortified in this conclusion by the opinion of Lord Hoffmann, Lord Hope and Lord Mance, who have not found the dilemma as acute as I have.

123. For the reasons given earlier, I agree that a blanket ban on all joint adoptions by unmarried couples can no longer be justified. Furthermore, there are no obstacles elsewhere in the 1987 Order to simply ignoring article 14(1) of the 1987 order and permitting this couple to apply to adopt jointly. If in due course an adoption order is made, then article 40 will apply. Of course, simply allowing them to apply is very far from granting them the order. Their reasons for not being willing to afford to one another the greater legal security that marriage would bring will require careful scrutiny. Nor does it follow

that because a blanket ban infringes their Convention rights, the denial of an adoption order would do so.

124. I too would allow this appeal and make the declaration proposed by Lord Hoffmann.

## **LORD MANCE**

My Lords,

### *General*

125. The issues on this appeal are whether the absolute bar under the Adoption (Northern Ireland) Order 1987 to joint adoption of the mother's natural child by the mother and her unmarried opposite sex partner (a) engages articles 8 and 14 of the Human Rights Convention and (b) is, if so, unjustifiably discriminatory. For the reasons given by my noble and learned friends Lord Hoffmann in paragraphs 1 to 29 and 38 of his speech and Lord Hope in his speech as well as those given in paragraphs 131 to 144 below, I consider that both issues would be likely to be answered affirmatively by the European Court of Human Rights in Strasbourg and should thus be answered affirmatively in Northern Ireland.

126. I also agree with the alternative route identified by Lord Hoffmann in paragraphs 30 to 37 of his speech by which he would, if necessary, be prepared to reach the same conclusion on issue (b). In short, even assuming that the European Court of Human Rights would hold that whether to permit joint adoption of a mother's natural child by the mother and her unmarried opposite sex partner is a matter within the United Kingdom's margin of appreciation, this does not resolve the question whether a prohibition on such adoption is at the domestic level compatible with the Convention rights as incorporated into United Kingdom law. In this respect, what Lord Hoffmann says would, as I see it, be consistent with dicta in Lord Steyn's leading speech in *R (S) v. Chief Constable of the South Yorkshire Police* [2004] UKHL 49; [2004] 1 WLR 2196, para. 27, which I cited more fully in *M v. Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, para. 130. Lord Steyn distinguished between article 8(1), which should, in

accordance with Lord Bingham of Cornhill's dictum in *R (Ullah) v. Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para. 20, in the absence of special circumstances receive a uniform interpretation throughout member states, unaffected by different cultural traditions, and article 8(2), in relation to which differing cultural traditions can be material to the question of objective justification.

127. United Kingdom courts should, normally, follow any "clear and constant jurisprudence of the Strasbourg court" (see *Ullah*, para. 20) in deciding whether any particular article(s) of the Convention are engaged by particular facts. That was the issue in *Ullah* and is issue (a) on the present appeal. But issue (b), whether objective justification exists in the context of a particular Contracting State, involves different considerations. The margin of appreciation is a principle which distributes responsibility between the international and national levels. As the Strasbourg court put it in *Handyside v. United Kingdom* (Application no. 5493/72) (1976) 1 EHRR 737, para. 48:

"..... the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights [*Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, 296, para 10 fine]. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and freedoms it enshrines. The institutions created by it make their own contribution to this task but they become involved only through contentious proceedings and once all domestic remedies have been exhausted (Article 26) .....

Consequently, Article 10 para. 2 leaves to the Contracting States a margin of appreciation. This margin is given both to the domestic legislator ('prescribed by law') and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force force [*Engel v The Netherlands* (1976) EHRR 684, para. 100; cf., for Article 8(2), *De Wilde, Ooms and Versyp v Belgium (No 1)* (1971) 1 EHRR 373, 412, para. 93, and *Golder v United Kingdom* (1975) 1 EHRR 524, 539, para. 45)."

At the international level, the margin is not unpoliced by the European Court of Human Rights. The European Court sets its parameters by taking a European view of the acceptability of the aims and proportionality of the measure in issue. But the width of the margin thus

identified may vary not only with the nature of the right protected, but also with the extent to which the Court is able to identify a common approach or common standards among member states.

128. At the domestic level, nothing in the Convention precludes Contracting States from introducing in their constitutions or general laws more extensive protection of human rights and fundamental freedoms than the Convention provides (see article 53 of the Convention). The United Kingdom does not have a written constitution with its own inbuilt protections of fundamental rights. But it has, by the Human Rights Act 1998, incorporated into domestic law the rights contained in the Convention. The Act creates as “part of this country’s law” rights in the same terms as the Convention rights, and the interpretation and impact of those new domestic rights depends upon the 1998 Act: see *In re McKerr* [2004] UKHL 12; [2004] 1 WLR 807, para. 25 per Lord Nicholls of Birkenhead, para. 48 per Lord Steyn and paras. 73 and 75 per Lord Rodger of Earlsferry. Ss. 3, 4 and 6 of the Human Rights Act define the courts’ role in relation to the new domestic Convention rights. Courts must act compatibly with them (unless primary legislation precludes this, when all that courts can do is make a declaration of incompatibility).

129. The meaning of the new domestic rights scheduled to the 1998 Act is a matter of domestic law, though United Kingdom courts must “take into account” any Strasbourg case-law: s.2(1) of the 1998 Act. But a Strasbourg decision that a matter falls within Contracting States’ margin of appreciation leaves issue (b) to the national authorities of Contracting States. It would be contrary to the Strasbourg court’s purpose, and circular, if national authorities were to take the view that they should not consider any question other than whether a particular solution was within the United Kingdom’s margin of appreciation. Under the 1998 Act, United Kingdom authorities (legislators and courts) have domestically to address the impact of the domestically enacted Convention rights in the particular context of the United Kingdom.

130. That is an exercise which may (as here) fall to be performed in the first instance by the relevant United Kingdom law-makers, but it is subject to United Kingdom courts’ duties of interpretation and review under ss. 3, 4 and 6 of the 1998 Act: see also *Kay v. Lambeth London Borough Council* [2006] UKHL 10; [2006] 2AC 465, para. 44, where Lord Bingham of Cornhill, speaking of circumstances falling within the margin of appreciation, identified the role of “national authorities, including national courts particularly” in deciding “how the principles

expounded in Strasbourg should be applied in the special context of national legislation, law, practice and social and other conditions”. In the case of subordinate legislation like the Adoption (Northern Ireland) Order 1987, the application of s.6(1) is not constrained by s.6(2) of the 1998 Act (and no question therefore arises of making a declaration of incompatibility under s.4). In performing their duties under ss. 3 and 6, courts must of course give appropriate weight to considerations of relative institutional competence, that is “to the decisions of a representative legislature and a democratic government within the discretionary area of judgment accorded to those bodies”: see *Brown v. Stott* [2003] 1 AC 681, 703, though the precise weight will depend on inter alia the nature of the right and whether it falls within an area in which the legislature, executive or judiciary can claim particular expertise: see *R v. DPP, ex p. Kebilene* [2000] 2 AC 326, 381 per Lord Hope of Craighead.

### *The facts*

131. Whilst the House can on the present appeal express no view on the suitability of the particular adoption proposal by the two appellants, such facts as do appear serve to highlight the legal issues. The child was born nearly eleven years ago. The child’s natural father has had no relationship with the mother or child since before the birth and has not contributed financially to the child’s upbringing. The mother’s relationship with her partner, with whom she wishes to be able jointly to adopt the child while maintaining her legal status as mother, dates back to before the child’s birth and has continued uninterrupted since then. All that the House is told about the couple’s reasons for not marrying is that they do not have religious or moral beliefs that require marriage, but do not believe that marriage would aid or strengthen their relationship.

### *Issue (a) – are articles 8 and 14 engaged?*

132. As to issue (a), in order for articles 8 and 14 to be engaged, it is necessary for there to have been discrimination in the exercise of a right engaged by article 8 (here the right to respect for private and/or family life) on a ground such as sex, race, colour, etc “or other status”. I agree with Lord Hoffmann that being either married or unmarried is another such “status”. In its recent decision in *Burden v. United Kingdom* (Application no. 13378/05) [2008] ECHR 357, para 63 the Grand Chamber confirmed its previous statement in *Shackell v. United Kingdom* (Application no. 45851/99) that “marriage remains an

institution which is widely accepted as conferring a particular status on those who enter into it”. The discrimination alleged was in *Shackell* the grant of limited social security benefits to surviving spouses not available to unmarried couples and in *Burden* the grant to married couples and civil partners of inheritance tax exemptions not available to the survivor of co-habiting siblings. The discrimination was in each case regarded as justified. The Court in *Burden* put the matter as follows (paragraph 65):

“Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand (see *Shackell*, above), the absence of such a legally binding agreement ... renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple.”

133. *Shackell* and *Burden* were decisions in the context of taxation and social benefits, where the right to which the alleged discrimination related was the right to protection of property provided under article 1 of Protocol No. 1 to the Convention. The present appeal arises in the different context of the right to respect for private and family life, in relation to which it is clear that distinctions between married and unmarried persons may be unjustifiably discriminatory. Lord Hoffmann has in paragraph 9 cited paragraph 28 of the Court’s ruling in *P. M. v. United Kingdom* (Application no. 6638/03) (2005) 18 BHRC 668, which demonstrates that differences in marital status may, even in the context of article 1 of Protocol No. 1, be unjustifiably discriminatory. In that case, the unjustified discrimination consisted of unequal tax treatment of payments made by an unmarried father to support the child of a former relationship, compared with similar payments made by a father who had been married and was now separated or divorced. The Court in paragraph 28 also noted that “as a general rule unmarried fathers, who have established family life with their children, can claim equal rights of contact and custody with married fathers (see *Sahin v. Germany* (2001) 36 EHRR 765, para 94”. *Sahin* was a case like the present where the alleged discrimination consisted of lack of appropriate respect for the applicant’s family life; the Court concluded that there had been a breach of article 8 read with 14. In my opinion, articles 8 and 14 are also engaged in the present case.

*Issue (b) – was there unjustifiable discrimination?*

134. The present case concerns the strengthening and deepening of private and family relationships that can arise on all sides from adoption. Adoption cements a family unit. It gives the child maintenance rights against the adoptor(s). It makes the child a member of the adoptor(s)' wider family, and confers inheritance rights in that connection. It is a process in relation to which the child's well-being ought to be paramount. The fact that proposed adoptors are a married couple is on any view a material factor. Society is entitled to place weight on the existence of such a bond. But that does not mean that every married couple are suitable or every unmarried couple unsuitable as adoptors. A close scrutiny of all the circumstances is required in the particular child's interests before any adoption can be sanctioned. A couple's decision to remain unmarried cannot determine what is in the child's best interests. In today's world, failure to tie the knot is not to be equated with lack of actual commitment; and one would have thought that a joint wish to adopt was itself, at least to some extent, a counterbalancing factor. The threshold criterion of marriage which exists under the Northern Irish legislation looks at the matter in terms of the couple's decision whether or not to marry, rather than from the viewpoint of the child or the potential benefits of joint adoption for the child. It excludes all possibility of adoption by all unmarried couples, however long-standing and stable their relationship. It precludes any second stage: any scrutiny at all of the circumstances, the needs or the interests of the particular child. The legislation distinguishes between a married and an unmarried couple, both equally suitable as adoptors, purely on the basis of marital status. The line drawn does not avoid the need for a second stage scrutiny where adoption is possible. It simply makes adoption and the security and benefits which it would bring for the child impossible in the case of this child unless the couple marry.

135. The legislation is thus in my view unjustifiably discriminatory on any objective assessment in a manner which cannot in a United Kingdom or Northern Irish context be reconciled with the respect for private and family life protected by article 8 read with article 14. The rights of family and private life engaged and the interests of the children potentially affected merit a high level of legal and judicial protection. Objections to joint adoption by an unmarried couple face the problem that adoption by either one of such a couple is anyway permissible. Objections to cohabitation focus on the wrong point, quite apart from their Canute-like qualities. I share the view of Baroness Hale of Richmond (in paragraphs 121 and 122 of her speech) that cultural differences between Northern Ireland and Great Britain cannot justify a

diametrically opposite approach to the possibility of adoption by an unmarried opposite sex couple in a child's interests. The Department of Health and Social Services and Public Safety of Northern Ireland has in its January 2007 report on the responses to its 2006 consultation document *Adopting the Future* demonstrated the difficulty of defending the present position in relation to Northern Ireland. I would further agree specifically with what Lord Hoffmann says in these respects in paragraphs 10 to 20 of his speech.

136. I consider that the Court's decisions in *Fretté v. France* (Application no. 36515/97) and *E.B. v. France* (Application no. 43546/02) are more easily reconciled and present less difficulty than might at first sight appear. In *Fretté v. France* the same two general issues arose as on the present appeal: (a) were articles 8 and 14 engaged? And (b) if so, had there been unjustifiable discrimination? As to issue (a) a majority of the judges (consisting of the sole judge apparently subscribing to the actual reasoning of the main judgment, Judge Kuris) and the three authors of the partially dissenting opinion (Sir Nicolas Bratza and Judges Fuhrmann and Tulkens) took the view that articles 8 and 14 of the Convention were engaged by the refusal, attributed to Mr Fretté's sexual orientation, to allow Mr Fretté to adopt: see paragraphs 33 and O-III (and also the analysis in paragraph 14 of the Joint Committee on Human Rights in its 24<sup>th</sup> Report on the Adoption and Children Bill: HL Paper 177, HC 979). The minority view on this point expressed by Judge Costa, joined by Judges Jungwiert and Traja, rested essentially on the consideration that the Convention does not guarantee a right to adopt: see paragraph O-I8 to 11 and Judge Costa's own analysis in his later dissenting judgment in *E.B. v. France* at paragraph 3.

137. As to issue (b) in *Fretté v. France*, Judge Kuris held that the difference in treatment was justified so that there was no unjustifiable discrimination (paragraph 43). Sir Nicolas Bratza and Judges Fuhrmann and Tulkens considered that there had been unjustifiable discrimination, while Judge Costa, joined by Judges Jungwiert and Traja, said that if he had had to decide the issue, he "would have been very hesitant" (paragraph O-I15) and that "the fundamental paradox of this judgment seems to me that it would have been easier to justify the rejection of the complaint on the legal basis of the inapplicability of Art. 14 than to declare Art. 14 applicable and then find no breach of it" (paragraph O-I18). There appears therefore (contrary to the analysis in paragraph 15 of the Joint Committee Report mentioned above) to have been no majority in favour of the view that, if articles 8 and 14 were engaged, the discrimination was justifiable. The majority in favour of dismissing the

complaint consisted of one (minority) judge (Judge Kuris) on issue (b) joining with three minority judges (Judges Costa, Jungwiert and Traja) on issue (a). The composite finding that there was no violation of articles 8 and 14 therefore certainly has a paradoxical aspect. Had the two issues, (a) and (b), been taken separately, it appears that there would have been (different) majorities on each issue in favour of the applicants' case that there had been a violation of articles 8 and 14 read together.

138. In *E.B. v. France* the French authorities had refused to authorise a woman living in a lesbian relationship to adopt a child, having regard to "her current lifestyle: unmarried and cohabiting with a female partner", who they also noted "did not feel committed" by the proposal. The majority of the European Court of Human Rights treated *Fretté v. France* – wrongly, it appears to me - as a case where, taking account of the broad margin of appreciation to be left to States, the refusal to authorise adoption had not infringed the principle of proportionality and had been objectively justified. On this basis, the majority sought to distinguish *Fretté v. France* on the facts, pointing inter alia to "the applicant's qualities and child-raising and emotional capacities" and to her "stable and permanent relationship" with her partner "which was a factor that had not featured in the application lodged by Mr Fretté" (paragraph 71). Finding that "the influence of the applicant's avowed homosexuality ... was a decisive factor leading to the decision to refuse her authorisation to adopt" (paragraph 89), the majority held that there had been unjustifiable discrimination under Article 8 read with 14.

139. Judge Costa wrote a dissenting opinion, in which he was joined by three other judges. His dissent considered *Fretté v. France*, of which he said (paragraph 3) that:

".... whilst I did vote with the majority in favour of finding that there had not been a violation that was because, in my view, the Articles of the Convention relied on were not applicable because the Convention does not guarantee a right to adopt (but the Chamber did not agree with my reasoning on that point, and I will not go into it again here – *perseverare diabolicum*)".

So, instead of repeating his stance in *Fretté v. France*, he accepted in *E.B. v. France* that articles 8 and 14 were engaged. But he considered

that on its facts the French authorities' decision could be justified by reference to the applicant's partner's disinterest in the adoption plan.

140. In paragraph 3 of his judgment in *E.B. v. France*, Judge Costa confirmed that he had not subscribed to the reasoning of the "majority" of the Chamber in *Fretté v. France* that the French authorities' rejection of Mr Fretté's application for authorisation to adopt could be justified under articles 8 and 14, if these were engaged. He described the judgment of the Grand Chamber in *E.B. v. France* as one which "overturns" the "majority" of the Chamber in *Fretté v. France* on this aspect. But it appears that in fact, as explained above, only one member of the seven-judge Chamber in *Fretté v. France* rejected the complaint on the basis that the discrimination was justified.

141. In both *Fretté v. France* and *E.B. v. France* the complaint was of unjustified discrimination on the grounds of sexual orientation. In the present case the complaint is of unjustified discrimination, consisting of the absolute bar to joint adoption of the mother's natural child by the unmarried opposite sex appellant couple and relating to the right to respect for private and/or family life based on article 8 read with article 14. It is clear that differing religious and social attitudes have affected and continue to affect thinking in the wider European area. A Council of Europe questionnaire, replies to which were summarised in the European Committee on Legal Co-operation's final activity report dated 22 March 2004 yielded information that 10 out of 23 States were not opposed to the joint adoption of a child by heterosexual cohabitantes, if they had lived together for a considerable time, and 12 were against it, while one took no position on the point. 5 were not opposed to the joint adoption of a child by homosexuals living together in a registered partnership, 17 were against it, and one again took no position.

142. The Council of Europe's Convention on the Adoption of Children (24.IV.1967) remains in terms which provide positively that "the law shall not permit a child to be adopted except by either persons married to each other, whether they adopt simultaneously or successively, or by one person" (article 6(1)). The United Kingdom partially denounced the Convention, in order to be able to permit adoption on a wider basis, as is now possible in England and Wales and will shortly be in Scotland as a consequence of the Adoption and Children (Scotland) Act 2007, s 29. Further, there are moves to amend the Convention. In the final activity report of 22 March 2004 and again on 1 March 2006 internal working groups or committees of the Council of Europe suggested a relaxation of the Convention to permit adoption

by “two persons of a different sex married to each other or living together in a relationship for at least 5 years without being married”. Instead of this, on 7 May 2008 the 118<sup>th</sup> Session of the Committee of Ministers adopted a new draft Convention, which would if ratified permit a child to be adopted by different sex married couples or (where such an institutions exists) registered partners, but would also provide that

“States are free to extend the scope of this Convention to same sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this Convention to different sex couples and same sex couples who are living together in a stable relationship.”

143. What support this draft Convention may obtain remains to be seen. It is in terms drafted presumably with an eye to achieving as much international support as possible. The Strasbourg court would not be under the same constraints. While the Strasbourg court would no doubt take close note of its provisions and background, it would not be bound by them, and would be bound to analyse the position under the Human Rights Convention for itself. For reasons I have given, I consider that the barrier to adoption presented by the present Northern Irish legislation cannot be justified in terms of that Convention, and that the European Court of Human Rights would be likely to reach that conclusion. If I am wrong on this, and if that Court would take the view that the present restriction on adoption falls within the margin of appreciation open to national authorities, then it is, as I have explained in paragraphs 128 to 130 above, for United Kingdom courts to assess whether objective justification exists for discrimination engaging private and family life, giving due weight to the role of the legislator, and the policy choices made (before the Human Rights Act 1998) in ss. 14 and 15(1) of the Adoption (Northern Ireland) Order 1987 and the consideration that the legislator has to date left those choices unchanged (apart from the ill-judged amendment of s 15(1)(a) by the Civil Partnership Act 2004 to exclude a civil partner from making a sole application, without giving civil partners any joint right to apply). For reasons indicated above (in particular in paragraphs 134 and 135), I would conclude that no such objective justification exists.

144. The House’s attention was drawn in argument to the review of the Northern Irish legislative position regarding adoption, which has been under way for a considerable period and to which my noble and learned friend Lord Walker refers at paragraphs 72 to 78. The House

was asked to allow this process to proceed, and the desirability of such an issue being resolved by the legislature was a significant factor in the judgments of both Gillen J at first instance in April 2006 and the Court of Appeal in June 2007. But it was not suggested that, if the House formed the view that the regime governing adoption in force in Northern Ireland under the Adoption (Northern Ireland) Order 1987 was objectively unjustified, it could on the facts of this case be an answer to the complaint of discrimination that national authorities had required time to adapt their laws to meet changing patterns of behaviour or attitudes (cf *M v. Secretary of State for Work and Pensions* [2006] UKHL 11; [2006] 2 AC 91). The absolute exclusion from eligibility for adoption of unmarried opposite sex couples in all circumstances in Northern Ireland represents discrimination which has been identified as unjustified for a long period. This is evidenced by the Joint Committee Report (above) which dates back to October 2002 and the report from Dr Ursula Kilkelly which was commissioned by the Department of Health and Social Services and Public Safety in Northern Ireland and is referred to by my noble and learned friend Lord Hoffmann in paragraph 28, and which was available and exhibited to an affidavit four years ago. The acknowledged absence of any reasonable justification appears to me to be further confirmed by the January 2007 report produced by the Department of Health and Social Services and Public Safety of Northern Ireland in response to the replies to its 2006 consultation document *Adopting the Future* (paragraph 135 above). I would only add (for completeness and not because argument was directed to the point before the House) that, even if one were to assume that it might have been open to the legislator to introduce a threshold criterion to eligibility to seek to adopt requiring some degree of permanency about the relationship of an unmarried couple towards each other and/or the child, there has been and could be no suggestion that these appellants' longstanding relationship towards each other and the child would not satisfy any such criterion. I would therefore allow the appeal and make the declaration sought that the appellants are entitled to apply to adopt the child.