lead to irreconcilable judgments. As Lord Hodge articulated, that is the price of certainty under the Regulation.

Post Brexit, and in the absence of any contrary agreement, the UK will become a third State for jurisdiction and enforcement of judgments. The Regulation depends on reciprocity to work. Without reciprocity, English parties would be constrained by the *lis pendens* and joinder rules, among others, without the advantages of certainty or the protected rules on jurisdiction in the Regulation. The national rules in CPR PD 6B r 3 adopt a more flexible *forum conveniens* approach. Those rules are easily altered to reflect practices in international commercial litigation. They are well established and currently in use for all defendants not domiciled in a Member State. They are highly developed to deal with multi-party litigation and to protect jurisdiction agreements, if necessary with anti-suit injunctions outlawed under the Regulation. The Brussels I Regulation Recast must not be simply replicated in UK legislation.

PIPPA ROGERSON

Address for Correspondence: Gonville and Caius College, Cambridge, CB2 1TA, UK. Email: pjr1000@cam.ac.uk

## JUSTIFIABLE DISCRIMINATION: THE CASE OF OPPOSITE-SEX CIVIL PARTNERSHIPS

OPPOSITE-SEX couples are prohibited from forming a civil partnership. Following the introduction of same-sex marriage, the Civil Partnership Act 2004 was not extended to opposite-sex couples, resulting in the unusual position that English law permits same-sex couples access to two relationship forms (marriage and civil partnership) yet limits opposite-sex couples to one (marriage). This discrimination was recently challenged in the courts by an opposite-sex couple, Rebecca Steinfeld and Charles Keidan, who wish to enter a civil partnership owing to their deeply-rooted ideological opposition to marriage. Rejecting marriage as a patriarchal institution and believing that a civil partnership would offer a more egalitarian public expression of their relationship, the couple argued that the current ban constitutes a breach of Article 14 read in conjunction with Article 8 of the European Convention on Human Rights.

The recent Court of Appeal decision in *Steinfeld & Keidan v Secretary of State for Education* [2017] EWCA Civ 81 provides the latest statement on this issue following the couple's earlier and unsuccessful challenge in the High Court. At first instance, the couple's challenge was found not to fall within the ambit of Article 8, on the basis that they were able to marry and it was merely the couple's consciences that prevented them from accessing an equivalent legal recognition of their status. Drawing upon dicta from the House of Lords in *M v Secretary of State for Work*

https://doi.org/10.1017/S0008197317000502 Published online by Cambridge University Press

*and Pensions* [2006] UKHL 11; [2006] 2 A.C. 91, Andrews J. erroneously analysed the ambit question by assessing the magnitude of detriment to the couple concerned, such as whether they were subjected to humiliation or detrimental treatment, rather than asking whether the ban was linked to the exercise of the right guaranteed (see *Petrovic v Austria* (2001) 33 EHRR 14 and for criticism of *M* see J. Scherpe, "Family and Private Life, Ambits and Pieces" [2007] C.F.L.Q. 390). Even had the measure been found to fall within the ambit, Andrews J. believed that the Secretary of State was justified in maintaining the ban under Article 14. Gathering data on the uptake of civil partnerships for same-sex couples following marriage equality served the legitimate aim of avoiding unnecessary disruption and waste of public expenditure.

The Court of Appeal dismissed the couple's appeal by a 2:1 majority. Arden L.J. produced the main and most detailed opinion, which was broken down into two issues: ambit and justification. In relation to ambit, the Court of Appeal unanimously reversed Andrews J. As recently affirmed in *Oliari and others v Italy* [2015] ECHR 716, Article 8(1) encompasses a positive obligation to respect family life for both same-sex and opposite-sex couples and thus the "modality" used to formally express those relationships falls within that specific obligation (at [33]–[34]). Contrary to the argument put forward by the Government in *Steinfeld*, the fact that the couple could marry did not mean, the Court of Appeal found, that they no longer possessed a personal interest close to the core of Article 8. The availability of a modality that in light of the couple's sincerely held views was "simply not an option" did not mean that any discrimination had ceased (at [169], per Briggs L.J.). After all, same-sex couples with reservations as to marriage currently possess a *choice* as to relationship form which is denied to opposite-sex couples (at [168], per Briggs L.J.). Moreover, the couple "cannot be forced to marry" and thus the availability of marriage was only found to have relevance at the justification stage (at [40]).

The Court of Appeal also had to navigate domestic authorities such as *M* and *Wilkinson v Kitzinger* [2006] EWHC 2022 (Fam); [2007] 1 F.L.R. 295 which suggested a measure would be outside the ambit of Article 8 unless it infringed some rights or interests of the appellants that were close to the core values of the rights in question and, in addition, that such infringement had an adverse impact. Recognising that the core values of family life do not have a static meaning, Arden L.J. acknowledged that the legal recognition of a relationship was "of moment" and was linked to an "individual's existence and identity" (at [62] referring to *Oliari* at [177]). As for the need to show adverse impact, a distinction was drawn between negative obligations imposed on a State requiring such impact to be evidenced and positive obligations, where, it was found, the "only test" was whether the appellants' claim was "too tenuous" to the positive obligation to promote family life (at [68]).

https://doi.org/10.1017/S0008197317000502 Published online by Cambridge University Press

However, in relation to justification, the Court of Appeal was divided as to whether the ban served a legitimate aim and was proportionate. All members accepted that awaiting statistical data on the uptake of civil partnerships following same-sex marriage constituted a legitimate aim by averting a potentially disruptive and expensive exercise of extending civil partnerships only to find that there was no demand for them. As to proportionality, Beatson L.J. and Briggs L.J. believed that the Government's position was justifiable *now* but not indefinitely. Their concern was that, despite the slow progress of the Government, the court must not "micromanage areas of social and economic policy" (at [162]). Nevertheless, without giving the Government a deadline for change, Beatson L.J. stated that over time it would become "increasingly difficult" to justify a "wait and see" position in the future (at [162]). Arden L.J. dissented on this point, considering that the delay was presently unjustifiable especially as the "discrimination in this case affects one the closest relationships which one adult has with another" (at [110]).

*Steinfeld* raises three key issues. First, while Arden L.J. applauded the "thoughtful and comprehensive" judgment of Andrews J., the court has, in part, clarified the meaning of ambit, which was a particularly troubling aspect of the first instance decision (at [10]). The court was correct to conceptualise the formal expression of a relationship as something capable of falling within the ambit, using the "link test", but the subdivision of ambit depending on whether it concerned a positive or negative obligation is problematic. Although Arden L.J. clearly did this to distinguish countervailing domestic authority, this distinction is not present at the Strasbourg level, and it is interesting to note that neither Beatson L.J. nor Briggs L.J. supported such a test. Given that the appellants wish to appeal to the Supreme Court, this aspect of the decision may be subject to heightened scrutiny, but it is likely that the situation would nevertheless be found to fall within the ambit on the basis that civil partnerships reflect a modality close to the core of Article 8.

Secondly, there is now a discernible shift in the Government's position over the optimal way forward. Of the menu of possible options for reform, ranging from abolition, phasing out (i.e. abolish same-sex civil partnerships but retain existing ones), or extension to opposite-sex couples, Beatson L.J. acknowledged that an earlier option of "maintaining the status quo is not being considered by the government" (at [153]). This change of position is significant and underlines the need for empirical data that can inform the future direction of travel. On this point Arden L.J. is correct to highlight that, whilst there has been a decline in civil partnerships following same-sex marriage, the "information is not all one-way" (at [121]). Here, she notes a substantial rise in civil partnership formations between both men and women over the age of 50. This broad critical focus is welcome, but it does overlook the fundamental nature of the appellants' claim: no amount

https://doi.org/10.1017/S0008197317000502 Published online by Cambridge University Press

of data on same-sex civil partnership registrations, conversions or dissolutions will cast light on the desire amongst opposite-sex couples for access to civil partnerships.

Thirdly, the use of *Oliari* as a frame for Arden L.J.'s reasoning adds an interesting dimension, particularly as counsel had not cited the case to Andrews J. in the High Court. The use of *Oliari* in *Steinfeld* perhaps militated towards finding against the Government but it must be noted the two cases were factually very different since, in the former, Italy was held to be in breach of Article 8 alone for its failure to provide any meaningful form of recognition of *same-sex* relationships (see A. Hayward, "Same-Sex Registered Partnerships: A Right to Be Recognised?" [2016] C.L.J. 27). Nevertheless, by drawing upon the emphasis placed in *Oliari* on the value of State recognition of relationships, choice and the significance of "labels", there is arguably greater potential for the appellants to argue for a breach of Article 8 alone (see [174], per Briggs L.J.). Whilst combining Article 8 and 14 would perhaps be more advantageous in light of the higher standard required to justify discrimination, this use of *Oliari* domestically may signal a broader conceptualisation of family life underpinning Article 8.

*Steinfeld* is a bizarre decision. Despite dismissing the couple's challenge, the Court of Appeal unanimously stated that the current position *is* discriminatory and, with varying degrees of patience, all members of the court stated that the status quo cannot be maintained indefinitely. On this basis, the litigants succeeded in a de facto manner; indeed, as Arden L.J. succinctly states, "the appellants are right" (at [16]–[17]). The Government clearly must make the next move. It would, however, be a cruel irony if such a move, precipitated by the *Steinfeld* litigants, involves removing the discrimination by simply abolishing access to civil partnerships for *all* couples.

ANDY HAYWARD

Address for Correspondence: Durham Law School, University of Durham, Durham, DH1 3LE, UK. Email: a.p.hayward@durham.ac.uk

## THE CJEU CONFUSED OVER RELIGION

CASE C-157/15 *Achbita v G4S Secure Solutions NV* ECLI:EU:C:2017:203 and Case C-188/15, *Bougnaoui v Micropole SA* ECLI:EU:C:2017:204 concerned Muslim women who wanted to wear a headscarf at work. In both cases the women were ultimately dismissed from their employment. In *Achbita* the employer, G4S, initially had an unwritten rule, which was converted into a written rule, prohibiting the wearing of visible signs of political, philosophical and religious beliefs. Ms Achbita refused to comply and was dismissed. In *Bougnaoui* it was not wholly clear whether the employer,

https://doi.org/10.1017/S0008197317000502 Published online by Cambridge University Press