attempts to meet this problem head on by providing expressly that a spouse or civil partner may adopt as a single person only if he or she is permanently separated from his or her spouse/civil partner, the latter cannot be found or is incapacitated (section 51 (3) and (3A) of the Adoption and Children Act 2002). This is a sensible rule and it is perhaps a lacuna in the English legislation that it does not also now extend to informal partnerships, whether opposite sex or same sex. Surely those who are in "enduring family relationships" ought not to be permitted to adopt as single persons but only as couples, as the legislation envisages (section 144 (4) of the Adoption and Children Act 2002).

Procedures for the acquisition of parental status by non-parents always involve a delicate balance between the desires of (usually) childless adults and the best interests of children. In theory at least, judicial scrutiny and the paramountcy of the child's welfare in adoption proceedings ensure that this balance is struck in favour of the child. The same cannot be said for the interests of the *intended* child in the context of assisted reproduction. Here there are some who would deny the relevance of the child's welfare at all. Under clause 14 of the Human Fertilisation and Embryology Bill 2007 welfare would not be completely ignored, but would be distinctly marginalised. Wherever it is proposed that legal parentage be conferred on non-parents or transferred to them, we are entitled to question whether it is really for the benefit of the children and we should continue to do so. Qualifications based on being single ought not to be misused by those who are not in reality single. The French authorities were, as the dissenting judges found, quite justified in stopping this particular application in its tracks.

ANDREW BAINHAM

ADOPTION AND DISCRIMINATION: WHAT ARE CONVENTION RIGHTS?

WHEN determining the scope of Convention rights under the Human Rights Act 1998 there is a tension between four principles: (1) that the Convention rights in municipal law are statutory rights (*In re McKerr* [2004] UKHL 12, [2004] 1 W.L.R. 807) yet (2) they share the limitations of the equivalent rights in international law (*R (Al-Skeini)* v. *Secretary of State for Defence (The Redress Trust intervening)* [2007] UKHL 26, [2008] 1 A.C. 153; *R (Al-Jedda)* v. *Secretary of State for Defence (JUSTICE intervening)* [2007] UKHL 58, [2008] 1 A.C. 332, p. 447, above); that (3) courts in the UK must give no more, but certainly no less, protection to them than the European Court of

Human Rights would offer (*R (Ullah)* v. *Special Adjudicator* [2004] UKHL 26, [2004] 2 A.C. 323) but (4) also respect the constitutional division of power between courts and legislatures in the field of economic and social policy (*Bellinger* v. *Bellinger (Lord Chancellor intervening)* [2003] UKHL 21, [2003] 2 A.C. 467).

In re P [2008] UKHL 38 focuses on principles (3) and (4). Article 14 of the Adoption (Northern Ireland) Order 1987 (SI 1987/2203 (NI 22)) provided that an adoption order might not be made unless the adopters were married (cf. England and Scotland where adoption by unmarried couples is now permitted). A proposal to remove the marriage requirement had provoked near-universal opposition in the Province. An unmarried couple and the child they wanted to adopt argued that the restriction was incompatible with their right to be free from discrimination on the ground of status taken with the right to respect for family life under Articles 14 and 8 of the ECHR and section 6 of the Human Rights Act 1998, so that the restriction was *ultra vires*. They failed before the High Court and Court of Appeal of Northern Ireland but succeeded in the House of Lords.

The House decided that being unmarried was as much a "status" as marriage for the purposes of Article 14, and it was clear that the Order treated unmarried couples less favourably than married ones. Did that rule have a rational and objective justification? Their Lordships accepted that marriage could give added stability which would be in the interests of an adopted child; a bright-line rule differentiating between groups can be justifiable where there was a need for certainty and the rule is not irrational or inappropriate. However, the majority held that ruling out unmarried adopters was irrational; indeed, any bright-line rule for eligibility to adopt would be irrational, because the need for certainty is always subordinate to the need to give priority to the best interests of each child assessed on a case-by-case basis. Refusal to marry might be a relevant consideration, but that cannot "be rationally elevated to an irrebuttable presumption of unsuitability" (Lord Hoffmann at [18]).

However, section 2 of the 1998 Act requires courts to take account of the case-law of the European Court of Human Rights. The Strasbourg Court had not considered discrimination against unmarried adopters, and the potentially analogous case-law on discrimination against homosexuals in adoption was not unequivocal. In *Fretté* v. *France* (2002) 38 E.H.R.R. 438, a Chamber had held by a 4-3 majority that it was within France's margin of appreciation to prohibit adoption by homosexuals because there was no pan-European consensus on the appropriate legal approach. In *EB* v. *France*, App. No. 43546/02, judgment of 22 January 2008, (p. 479, above) the Grand Chamber of the Court had taken the opposite view by ten votes to

seven. But might not the Court revert to its earlier position? And how did the judgments in those cases, both concerned with homosexual couples, relate to unmarried heterosexual couples? How did principle (3), above, apply when the Strasbourg case-law was unclear? Could it be proper for a UK court to say that a legislative rule was discriminatory, lacking an objective and rational justification, where the matter might be regarded by Strasbourg as within the state's margin of appreciation?

Lord Hoffmann's response, with which Lord Hope and Lord Mance agreed, had three aspects. First, despite the slight uncertainty, the direction of development in the Strasbourg Court's jurisprudence indicated that it would now be likely to hold a prohibition on unmarried adopters to be incompatible with Articles 14 and 8 (at [27]–[29]). Secondly, principle (3) could not apply where the Strasbourg Court had left the issue to be decided by each state within its margin of appreciation. National authorities, whether legislative, executive or judicial, had to make their own decisions (at [31]–[32], [36]–[37]). Thirdly, at [33], for some purposes at least the Convention rights have been treated as domestic rather than international rights: see e.g. *In re McKerr*, above, on the non-retroactive effect of the Human Rights Act 1998. Municipal courts must be able to interpret rights for themselves where the Strasbourg Court has not authoritatively done so (at [38]). Baroness Hale, at [122], despite some doubts, ultimately agreed that municipal courts have that duty in order to safeguard the rights of unpopular minorities in a democracy.

Lord Walker at [82]–[83], dissenting, thought that the legislature rather than the judiciary should make decisions on sensitive issues of social policy within the state's margin of appreciation. Yet he acknowledged that the Strasbourg Court might decide within two or three years that the matter is no longer within the state's margin of appreciation, at which stage the restriction in the Northern Ireland Order would inevitably become *ultra vires*. The majority's approach avoids the uncertainty that would have resulted in those circumstances.

It is now clear that, where the Strasbourg Court has not yet ruled on an issue or has left it within states' margin of appreciation, principle (3) does not prevent municipal courts from interpreting the rights in municipal law as protecting interests on which the Strasbourg Court has not ruled, and that the social sensitivity of an issue does not necessarily take it outside the competence of the courts under principle (4) if the issue is justiciable. As a result, unmarried couples in Northern Ireland are no longer ineligible to be considered as adoptive parents.

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