there so much as a hint of reference to the United Kingdom's international obligations. These are very largely couched in the language of rights. It is, with respect, quite simply unsustainable to deny that parents have rights when the European Court of Human Rights has made it very plain that they do. It might be argued that this is just a question of language. However, the crux of the matter is whether the courts are prepared to recognise that parents have legitimate *independent* interests. This the House of Lords appears to be unwilling to do by reaffirming the traditional interpretation of the paramountcy principle. The truth is that this interpretation is no longer tenable alongside the balancing exercise required by Article 8 of the ECHR (which involves express acknowledgment of the rights of *both* parents and children) and it will sooner or later need to be reformulated.

Notwithstanding these concerns the result in this case, the recognition given to the value of natural parenthood and the significance attached to the beginnings of life are much to be applauded and chime very well with the child's rights under Articles 7 and 8 of the United Nations Convention on the Rights of the Child. The view that the person looking after a child is at least the equivalent of a parent, and may have an even stronger claim to be regarded as *the* parent, is beloved of certain academics. It is unlikely to strike much of a chord with ordinary people who are well able to distinguish between parents and others looking after children.

ANDREW BAINHAM

EQUAL BUT DIFFERENT?

ON 26 August 2003 Susan Wilkinson (the petitioner) and Celia Kitzinger (the first respondent) celebrated their marriage in British Columbia, Canada. The marriage was lawful and valid under the law of British Columbia, which permits and recognises marriages between persons of the same sex. Both parties were then and are now domiciled in England. After the coming into force of the Civil Partnership Act 2004 they sought a declaration that their marriage was also to be considered a marriage under the law of England and Wales. If necessary, they further sought a declaration of incompatibility under section 4 of the Human Rights Act 1998 in relation to section 11(c) of the Matrimonial Causes Act 1973. The latter stipulates that a marriage is void if the parties are not respectively male and female. In *Wilkinson* v. *Kitzinger and others* [2006] EWHC 2022 (Fam) Sir Mark Potter P. dismissed the petitions.

While the issue remains controversial in some countries, same-sex couples in many countries now can have their relationship recognised legally. Some jurisdictions, like the Netherlands, Belgium, Spain, South Africa, Massachusetts and Canada, allow same-sex marriage. Others, like the Nordic Countries, Germany, Switzerland, Vermont and Connecticut, allow 'registered partnerships' or 'civil unions', which are very much like marriage in their legal consequences. England and Wales is also in the latter group, and the civil partnership available to same-sex couples in this jurisdiction is generally accepted to be "marriage in everything but name" (at [88]). While admittedly some differences remain, nevertheless civil partnership is the functional equivalent to marriage for same-sex couples. Yet, having their marriage recognised as a civil partnership in England was deemed unsatisfactory by the petitioner and the first respondent. They felt that they were discriminated against by being denied the symbolic status of marriage and "downgraded" to civil partnership and that this constituted a breach of Articles 8, 12 and 14 of the European Convention on Human Rights.

The conflict of law rules in this case are such that the form of the marriage is governed by the *lex loci celebrationis* (*Berthiaume* v. *Dastous* [1930] A.C. 79, PC), but the capacity to marry is generally governed by the law of the domicile of the parties at the time (*Padolecchia* v. *Padolecchia* [1968] P. 314), and this in *Wilkinson* v. *Kitzinger* meant the law of England and Wales in general and section 11(c) of the Matrimonial Causes Act 1973 in particular. While difficult points could have been made out of these conflict of laws questions, the case was not argued on that basis. Therefore the court only had to decide the three questions raised under the ECHR. First, was there a breach of Article 12 ECHR which guarantees men and women the right to marry and found a family according to the national laws governing the exercise of that right? Here the Contracting States of the ECHR clearly are given a wide margin of appreciation, and, as there is "no clear and consistent line of Strasbourg case law on the scope of art. 12" (Lord Mance in *M* v. *Secretary of State* [2006] UKHL 11, [at 152]), there is no obligation under the ECHR to recognise same-sex marriages as such. A similar line of argument provides the answer to the second question, whether there was a breach of the right to respect for private and family life under Article 8. While more and more jurisdictions (including England and Wales) accept same-sex relationships as familial relationships, the concepts of "private and family life" are autonomous ones under the ECHR and there again is neither a general consensus amongst the Contracting States nor a binding ruling from the ECtHR on the matter. So while it is debatable whether Article 8 is engaged or not, there are in any event good arguments to

be made that recognising the relationship only as a civil partnership but not as a marriage is justifiable under Article 8(2) and well within the margin of appreciation afforded to the Contracting States.

The third question whether there is a discrimination contrary to Article 14 ECHR is more difficult. Article 14 is not a free-standing anti-discrimination provision, it must be read in conjunction with other European Convention rights. Therefore it is relevant whether the "ambit" of Articles 8 or 12 are concerned. Sir Mark Potter P. in *Wilkinson* v. *Kitzinger* (following the arguments of the majority in *M* v. *Secretary of State*) did not see the matter falling within the "ambit" of Article 8; he found, however, that it did come within the "ambit" of Article 12. Space precludes a detailed discussion of the "ambit" point, but it suffices to say that once the act in question falls within the "ambit" of any convention right, then the court must ask whether there is a similar or analogous situation and whether the differential treatment is justifiable (see, for example, *Marckx* v. *Belgium* (1979) 2 E.H.R.R. 330 at [32]). In *Karner* v. *Austria* (2004) 38 E.H.R.R. 24, [at 40] the ECtHR stated that it "can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment", but then required the principle of proportionality to be respected. In *Wilkinson* v. *Kitzinger* the recognition of the relationship was not totally withheld from the couple, as it could be recognised as a civil partnership according to section 215 of the Civil Partnership Act 2004. It was only the recognition as marriage as such that was not available. There is little factual difference between marriage and civil partnership; indeed the Act was introduced specifically in order to remove the legal, social and economic disadvantages of same-sex couples. The complaint of the petitioner and the first respondent therefore was that they are denied the symbolic value and formal status of marriage. According to the ECtHR the legislator is pursuing a legitimate aim by protecting "the family in the traditional sense" when making a distinction between marriage and civil partnership. Given that the disadvantages suffered are mainly symbolic and that the legal position is almost identical to that of married couples, the discrimination is also – as Sir Mark Potter P. held – reasonable and proportionate and thus within the margin of appreciation of the Contracting State; therefore there is no breach of the ECHR and the petitions were rightly dismissed.

Whether such a position is tenable in the long run is a different matter. Family law is undergoing a rapid change in many countries in Europe; same-sex relationships increasingly are recognised, and so are cohabitation relationships and gender change. Indeed the entire concept of "family" is in flux, and our courts will be confronted with family law constructs that are not known in England and for which

there will be no functional equivalents. For example, sooner or later couples in opposite-sex registered relationships like the Dutch registered partnerships or the French *pacte civil de solidarité* will seek recognition of their relationship and it will be interesting to see which position English courts will take.

JENS M. SCHERPE

VIOLATING ARTICLE 8

ANYONE seeking a reminder of Strasbourg's influence on English law need look no further than the European Court of Human Rights' (the "ECtHR") decision in *Wainwright* v. *United Kingdom* (App No 12350/04, 26 September 2006). Granting relief where the House of Lords had denied it (in *Wainwright* v. *Home Office* [2003] UKHL 53, [2004] 2 A.C. 406) the ECtHR held that the United Kingdom had breached its article 8 right "to respect for private… life" by subjecting the applicants to an unduly intrusive strip search.

The applicants, a Mrs Wainwright and her mentally and physically impaired son, were strip searched during a visit to Mrs Wainwright's other son in prison. A number of prison rules were breached during the search. Mrs Wainwright was searched in front of a window overlooking the street; both applicants were required effectively to strip naked; neither party was shown a consent form before the search began; and the officers put their fingers in the son's armpits, handled his penis and pulled back his foreskin (in spite of a rule that only a visitor's hair, mouth and ears should be touched). Both applicants were distressed by the search (the son developed post-traumatic stress disorder) and brought claims against the Home Office in battery, intentional infliction of emotional distress and breach of privacy. (The search took place before the Human Rights Act 1998 (the "HRA") was passed).

The Home Office conceded that the touching of the son's genitals was a battery, but the other two claims were unsuccessful in the House of Lords. In the leading judgment, Lord Hoffmann held that there was no general tort of invasion of privacy and that the requirements of *Wilkinson* v. *Downton* [1897] 2 Q.B. 57 were not satisfied. He also rejected the argument that failure to provide the Wainwrights with a remedy would leave the Government vulnerable to an adverse finding in Strasbourg. He had "no doubt" that the search was not serious enough to amount to "torture or… inhuman or degrading treatment or punishment" under Article 3 of the European Convention of Human Rights (the "Convention") and, although he accepted, *obiter*,