on avoiding transactions, hotchpot, preference, set off and so on should not.

Despite Lord Hoffmann's view that there was inherent jurisdiction to remit the assets, the majority of their Lordships held that section 426 had to be used where the rules on distribution were different. That conclusion limits the application of foreign law to insolvencies in those countries designated as relevant by the Secretary of State. Nevertheless this case marks an important advance towards internationalism.

PIPPA ROGERSON

HOMOSEXUAL ADOPTION

A GRAND Chamber of the European Court of Human Rights has held by majority in *EB* v. *France* (No. 43546/02) [2008] 1 F.L.R. 850 that it was a violation of Article 8 of the European Convention on Human Rights, taken in conjunction with Article 14, for France to refuse authorisation to a "single" lesbian applicant to apply to adopt a child. Her sexual orientation had appeared to be a decisive or determining factor in the decision. The applicant, a nursery school teacher, sought authorisation as a single person despite the fact that she was in a longstanding and continuing relationship. She and her partner did not apparently regard themselves as a couple and it was clear that her partner, though not expressly opposed to the adoption proposal, was indifferent and unwilling to commit to it. The French authorities refused authorisation partly because of their concern that there was no paternal referent in the adoption proposal and partly because of the ambiguous attitude of the partner.

Both the majority and the minority were agreed that the latter ground could be a legitimate basis for refusal and had nothing to do with sexual orientation, but the majority thought the first ground illegitimate and that it had the effect of "contaminating" the whole decision. The ECHR does not require states to permit adoption by single persons but France allows it. That being the case it was not then open to France to render ineffective the right of a single person to apply, either by demanding that she provide a paternal referent from her family or circle of friends or by treating homosexuals in a discriminatory manner. The minority rejected this "contamination theory" which Judge Loucaides thought "more appropriate to medical science", taking the view that each ground was separate, autonomous and not linked to the other.

It is crystal clear from this judgment that it is no longer lawful under the Convention for states to operate a blanket rule that they will

not permit adoption by homosexuals. While sexual orientation *can* be relevant, along with all other circumstances, it *cannot* be a bar to eligibility. Despite the efforts of some judges in *EB* to distinguish the Court's earlier decision in *Fretté* v. *France* (No. 36515/97) [2003] 2 F.L.R. 9 (which intriguingly involved a single *male* applicant), it is clear that the Grand Chamber has overturned it. Beyond this, several difficulties and uncertainties remain. French law, like English law before 2005, permits adoption by couples only where they are married or by single applicants. It makes no sense at all, however, to allow one member of an established partnership to adopt a child alone (though this device was also used in England before the reforms: see *Re W* (*Adoption: Homosexual Adopter*) [1997] 2 F.L.R. 406). If adoption by same-sex couples is to be permitted the sole route should be to permit a joint adoption by them. English law, but not that in many other European countries, now provides for this (sections 50 (1) and 144 (4) of the Adoption and Children Act 2002).

The Law Lords in *Re P and Others* [2008] UKHL 38, p. 481, below, were recently divided on whether the European Court would find it contrary to the ECHR for states to restrict couples' eligibility to adopt to the married. The better view is that, since there is clearly no consensus in the Council of Europe on this question, the Court would find it within a state's margin of appreciation to do so. This view is reinforced by the provisions of the Draft European Convention on the Adoption of Children which would only mandate states to allow adoption by a married couple or heterosexual couple in a registered partnership (where that institution exists) and single persons. States would then be permitted, but not required, to provide for adoption by same-sex partners who have formalised their relationships through marriage or registration and couples in informal partnerships, whether heterosexual or homosexual.

In truth the problem which this application presented to the French authorities did not have at its core either the issue of sexual orientation or the absence of a paternal figure in the proposed family. The key objection, recognised by all the judges in the Grand Chamber, was not the absence but the *presence* in the household of a partner who clearly did not wish to take on a parental role. There is a strong case for saying that someone whose long-term partner is unwilling to join in should not be allowed to proceed. None of the judges mention family conflict in their respective opinions, but if there is one thing upon which all researchers are agreed it is that exposure to family conflict is bad for children. Surely the case for refusing authorisation in *EB* should have rested squarely on the potential for conflict between the applicant and her partner if a child should be introduced into the family who was wanted by one and not by the other. English law

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