THE BENEFITS OF CONJUGALITY AND THE BURDENS OF CONSANGUINITY

THE Civil Partnership Act 2004 enables same-sex couples to enter a registered partnership that, in legal terms, is almost identical to marriage. The level of equivalence is such that relatives within certain degrees of relationship are unable to enter a civil partnership, just as they are forbidden to marry (section 3). This left Joyce and Sybil Burden outside the scope of the Act. These elderly sisters have lived together in a mutually supportive and economically interdependent relationship for over 30 years, and they fear that when one of them dies, the other will have to sell their house in order to pay the inheritance tax bill. If they were married or civil partners, they would be entirely exempt from this liability (Inheritance Tax Act 1984, s. 18).

The Burdens brought their case to the European Court of Human Rights, claiming that English Law breached Article 14 of the European Convention on Human Rights by discriminating against them in relation to their right to peaceful enjoyment of possessions under Article 1 of the First Protocol (*Burden and another* v. *United Kingdom* Application No. 13378/05, (2007) 44 E.H.R.R. 51). The Court held, by a majority of four to three, that the matter was well within the margin of appreciation enjoyed by the State in a delicate area of social policy. In doing so, it left open the question of whether the Burdens' relationship was comparable with that of a couple in a marriage or civil partnership. The case was recently referred to the Grand Chamber ([2008] 2 F.C.R. 244).

The Grand Chamber accepted that the application was admissible and found that the matter was within the ambit of Article 1 of Protocol 1. The next hurdle for the Burdens was to show that there were people in a relevantly similar situation to their own who were being treated differently without an objective and reasonable justification. By a majority of 15 to two, the Grand Chamber decided that they had not done this. In fact, most of the judges did not consider the Burdens to be in a situation analogous to a marriage or civil partnership at all. The defining feature of their relationship, it was decided, was consanguinity, and the fact that the sisters had not taken on any of the rights and obligations attaching to a marriage or civil partnership was decisive.

The Burdens therefore failed at an earlier stage than in the Chamber below. But the circularity in the Grand Chamber's reasoning is readily apparent. It is illogical to exclude people from a certain status, thereby denying them rights, while justifying that denial on the basis that they did not take on the very status that they were prevented from obtaining in the first place. Judge David Thór Björgvinsson pointed out this flaw, and said that the relationships in question

should be compared without reference to the legal framework by which they were governed. He convincingly argued that the closeness of the relationship between the parties was the most important factor. He found that the sisters' relationship had more in common with that of a married couple than it had distinctive features, even though he recognised the importance of the sexual element usually present in a marriage or civil partnership.

In support of its conclusion, the majority cited the Court's decision in *Shackell* v. *United Kingdom* (Application No. 45851/99, unreported, 27 April 2000) in which it held that married couples and unmarried cohabitants were not comparable for the purposes of survivors' benefits. It could be argued, however, that it is between unmarried cohabitants and blood relatives that an analogy is truly lacking. Cohabitants always have the option to marry, while relatives like the Burdens are treated differently because of something they cannot change.

Despite considering the relationships comparable, Judge David Thór Björgvinsson held that the discrimination could be justified. On the increasingly questionable basis that marriage is the cornerstone of family life in the UK (given the growth of unmarried cohabitation and the increasing birth rate outside of marriage), he was concerned about the far-reaching consequences of interference by the Court in fiscal matters such as those at the heart of the present case. He expressed this concern in spite of the UK Government's inability to provide an estimate of the costs flowing from the change in the law that would be required to accommodate the Burdens. Only Judges Zupančič and Borrego Borrego held that there had been a breach of Article 14. While Judge Borrego Borrego's dissent was emotive and criticised the majority for failing to provide an answer to the question asked of them, Judge Zupančič argued that once a benefit had been extended to one extra-marital group (*e.g.* civil partners) a State had to satisfy a minimal reasonableness test before deciding not to extend it to others, and the Government had failed to do this.

The reasoning of the majority of the Grand Chamber in this case is unconvincing, and the result particularly harsh given the extent of the differential treatment involved. Nevertheless, a different decision may have undermined the near-equality introduced for same-sex couples by the 2004 Act, since Judge Zupančič's argument, for example, was predicated on a clear distinction between marriage on the one hand and all other types of relationship on the other. Indeed, this equality-based criticism was levelled at the failed attempt of some Conservative peers to include blood relatives within the scope of the Civil Partnership Bill as it passed through Parliament. (See, *e.g.*, Glennon, (2005) 17 Child and Family Law Quarterly 141.)

In a broader sense, modern Western society must confront the rationale for continuing to attach legal rights and responsibilities to formal partnerships rather than adopting a purely functional approach. This is especially important at a time when increasing numbers of people are choosing to live in long-term relationships, and to bring up children, outside those formal mechanisms. Should the institution of marriage, and its functional equivalent, be used to implement a particular vision of how people should arrange their personal lives and conduct sexual relationships, in which case these institutional forms will remain irrelevant to people like the Burdens? Alternatively, should they be a means of encouraging people to support and take responsibility for each other, irrespective of whether they are in a sexual relationship? If the support of stable personal relationships is a legitimate social aim, as the UK Government argued in this case, is not the Burden sisters' relationship exactly the sort of relationship that should be protected? These are vital policy questions that lawyers alone cannot answer.

BRIAN SLOAN