Neutral Citation Number: [2016] EWHC 128 (Admin)

Case No: CO/6008/2014

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2016

Before :

MRS JUSTICE ANDREWS DBE

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Between :

(1) REBECCA HANNAH STEINFELD	**Claimants**
(2) CHARLES ROBIN KEIDAN	
- and -	
THE SECRETARY OF STATE FOR EDUCATION	**Defendant**

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- -

Ms Karon Monaghan QC (instructed by **Deighton Pierce Glynn**) for the **Claimants**
Mr Daniel Squires (instructed by **The Government Legal Department**) for the **Defendant**

Hearing dates: 19 and 20 January 2016

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Approved Judgment

Mrs Justice Andrews:

Introduction

1. This case raises issues concerning the different routes by which same-sex and opposite-sex partners are able to achieve formal legal recognition of their relationships, which, without wishing in any way to minimise their importance to the Claimants, potentially have a wider public interest. The Defendant to the claim is the Secretary of State for Education, ("the Secretary of State") because equality issues currently fall within her ministerial portfolio.

2. The Claimants are a young couple in a committed long-term relationship, who now have a child. They wish to formalise their relationship, but they have deep-rooted and genuine ideological objections to the institution of marriage, based upon what they consider to be its historically patriarchal nature. They wish, instead, to enter into a civil partnership, a status which they consider reflects their values and gives due recognition to the equality of their relationship. However, they are currently unable to do so.

3. A civil partnership is defined by s.1 of the Civil Partnership Act 2004 ("the CPA") as "a relationship between *two people of the same sex* when they register as civil partners of each other." S. 3(1)(a) of the CPA underlines this restriction by providing that two people are not eligible to register as civil partners of each other if they are not of the same sex.

4. The Claimants do not suggest that there is any substantial difference between civil marriage and civil partnerships in terms of the legal rights and responsibilities they accord or the process by which they can be entered into. Nor do they dispute that they could choose how to celebrate (or not celebrate) a civil marriage, and that they could continue to conduct their relationship, once married, as equals. Nevertheless, without the ability to enter into a civil partnership, the Claimants say they would be forced to enter into marriage against their conscience in order to obtain the legal protections and privileges to which they aspire, and the formal recognition of their relationship to which they say they are entitled.

5. It is not the Claimants' case that the UK has a legal obligation to make available to them an institution which will recognise their relationship but to which they do not have the same ideological objections as marriage. Rather, it is their case that, having chosen to create such an institution, the UK can no longer lawfully exclude them from entering into it by reason of their sexual orientation. They contend that, in consequence of the enactment of the Marriage (Same Sex Couples) Act 2013, ("the 2013 Act") which permits same-sex couples to marry and civil partners to convert their relationship into marriage, the provisions of the CPA which preclude opposite-sex couples from registering as civil partners have become incompatible with Article 14 of the European Convention on Human Rights ("the Convention") taken in conjunction with Article 8.

6. This is because same-sex couples now have a choice as to how they go about acquiring formal recognition of their relationship by the state, whereas opposite-sex couples have to marry in order to obtain the same recognition. The Claimants submit that there is no legitimate aim to be served by maintaining the difference in treatment

on grounds of sexual orientation and consequently there can be no justification for it in law.

7. The claim is novel because unlike most challenges to legal measures on grounds of discrimination, it is not suggested that sections 1 and 3(1)(a) of the CPA were incompatible with the Convention when they were enacted. Plainly, they were not. The CPA was a breakthrough piece of legislation designed to afford same-sex couples a means of achieving formal recognition of their relationship and commitment to each other, where no such means previously existed. At the time when it was enacted, the position both in domestic law and in Strasbourg was that there was no positive obligation on a state to create a new category of legal institution or status which would afford couples (whether same-sex or opposite-sex) the same rights and benefits as are enjoyed by those who are married. That remains the case.

8. The Claimants do not seek to argue that, prior to the enactment of the 2013 Act, it would have been unlawful to deny a same-sex couple the right to marry. Indeed that issue was decided by Sir Mark Potter, President of the Family Division, in *Wilkinson v Kitzinger and another* (No 2) [2006] EWHC 2022 (Fam), [2007] 1 FCR 183, a case in which a same-sex couple who were lawfully married in Canada unsuccessfully contended that the statutory provisions of the Matrimonial Causes Act 1973 and of the CPA that precluded recognition of their union as a marriage, but treated it instead as a civil partnership, infringed Art 14 read together with Art 8.

9. The reasoning in that case (to which I shall return) and its outcome would apply with equal force to an opposite-sex couple who sought to contend that their inability to enter into a civil partnership infringed Art 14 read together with Art 8. In the light of that, if this claim had been brought prior to the enactment of the 2013 Act it would have been unsuccessful. On behalf of the Claimants, Ms Monaghan QC did not seek to suggest otherwise. Instead, she submitted that restrictions that were lawful when enacted have become unlawful in consequence of the enactment of a further statute which in itself promotes equality amongst people of different sexual orientations by opening up civil marriage to same-sex partners. The argument, in short, is that having chosen to create the status of civil partners, and then having subsequently chosen to allow same-sex couples to marry, it became incumbent on the UK to treat opposite-sex couples equally by allowing them to become civil partners.

10. The Claimants seek a declaration of incompatibility pursuant to s.4 of the Human Rights Act 1998. Such a declaration, of course, would go no further than establishing that the status quo is unlawful, if such be the case. The Claimants recognise that it would then be a matter for Parliament to decide how to redress the situation, and that its options would include abolishing the status of civil partners, or phasing it out over time. If Parliament chooses to go down either of those routes, Ms Monaghan accepted that it would not be open to challenge on the basis of incompatibility with Art 14 read together with Art 8 of the Convention, on grounds of discrimination, because marriage would still be available to all couples regardless of their sexual orientation.

The two public consultations

11. The claim is brought against a background in which the Government has been far from inactive in considering the impact on civil partnerships of the extension of marriage to same-sex couples. Having reviewed the situation in the light of responses

to a public consultation carried out at a time when the changes brought about by the 2013 Act had not yet come fully into effect, the Government has decided to wait to discover how, in practice, the availability of marriage affects the continued demand for civil partnerships, before deciding what to do about them. However, it has given no indication of how long it plans to wait before making that decision.

12. In March 2012, the Government launched a public consultation exercise entitled "Equal Civil Marriage: a consultation". The Ministerial Foreword to that exercise recorded the Government's recognition that the personal commitment made by same-sex couples when they enter into a civil partnership is no different to the commitment made by opposite-sex couples when they marry. The stated aim of the consultation was to seek views on how lifting the ban on same-sex couples having a civil marriage could be implemented in a way that worked for everyone.

13. The consultation document made it plain that the Government was not considering changes on who could enter a civil partnership. Given that civil partnerships were an established mechanism to recognise same-sex relationships, the Government said it intended to retain them after the bar was removed on same-sex marriage. Nevertheless, the consultation asked three questions directed towards civil partnerships: question 6, whether the respondent agreed or disagreed with keeping the option of civil partnerships, question 7, if those respondents who identified as being lesbian, gay or bisexual would prefer to have a civil partnership or a civil marriage, and question 8, whether the respondent agreed or disagreed with the decision not to open up civil partnerships to opposite-sex couples.

14. The Government published its response to the consultation in December 2012. The response it had received was the largest ever to a Government consultation – over 228,000 individual responses, plus 19 petitions. In answer to question 7 the overwhelming majority of those who identified as lesbian, gay or bisexual said that they would prefer marriage, a statistic which has been borne out by the number of same-sex marriages and conversions from civil partnerships since the changes were implemented. 61% of those who responded to question 8 disagreed with the suggestion that civil partnerships should not be made available to opposite-sex couples. This was approximately the same number of people who said, in answer to question 6, that civil partnerships should be retained for same-sex couples. Some of those who responded to these questions expressed a concern that allowing same-sex couples to get married, without allowing opposite-sex couples to have a civil partnership, might be legally unsustainable.

15. In response, the Government said that it was unconvinced that extending civil partnerships to opposite-sex couples was a necessary change. There was no need to change civil partnership in order to achieve the goal of extending civil marriage to same-sex couples. Civil partnerships were created to allow equivalent access to rights, responsibilities and protections for same-sex couples as those afforded by marriage. They were not intended or designed as an alternative to marriage. Therefore the Government did not believe that they should now be seen as an alternative to marriage for opposite sex couples, who have access to marriage via a civil or religious ceremony which is both legally and socially recognized. It understood that not all opposite-sex couples wish to marry, but said that that decision is theirs to make, and they have the option to do so. The Government also said that it had not been made

clear what detriment opposite-sex couples suffer by not having access to civil partnerships.

16. In line with the Government's stated position, there was no provision in the Marriage (Same Sex Couples) Bill specifically addressing civil partnerships. However, during debates in the passage of the Bill through Parliament, concerns were raised about the continuing role of civil partnership once marriage was extended to same-sex couples. The Government therefore agreed to introduce an amendment to the Bill so as to include an express provision obliging it to carry out a review of the operation and future of the CPA in England and Wales as soon as practicable, including a full public consultation. This became section 15 of the 2013 Act.

17. That further consultation took place between January and April 2014. It received a far lower number of responses than the earlier consultation (approximately 11,500). Ms Monaghan observed that this might have been because the 78,556 people who had said in answer to the previous consultation that they favoured extending civil partnerships to opposite sex couples thought they had already made their views sufficiently clear, but that is pure speculation. The earlier question had been asked in a very different context. Moreover, unlike the first consultation, the second was specifically directed at the future of civil partnerships. The questions were more nuanced and admitted of more than a simple "yes/no" answer.

18. The Government's position at the time it launched this second consultation was that there was no legal reason for changing the current position, but that it was considering the policy and practical issues through its review. It made it clear that it was not consulting on Government proposals, but on ideas for change that others had suggested. It pointed out that changing the legal framework for civil partnership would be a significant endeavour, as it is made up of a large volume of primary and secondary legislation; the 2004 Act itself has 264 sections and 30 schedules. Specific information was provided in the consultation paper on the likely cost of implementation of the three options under consideration (i.e. abolition of civil partnerships, phasing them out, or extending them to opposite sex couples).

19. The Government published the outcome of its review of the CPA and the response to the second consultation in June 2014. Less than a third of those who responded favoured abolishing civil partnerships. Some of these considered that it was too soon to consider abolishing them or phasing them out. However a significant majority of the 10,634 people who responded to the question whether civil partnership should be opened up to opposite sex couples (76%) opposed the idea.

20. The Government noted that there was some support for each of the three potential changes, but this was outweighed by the opposition to each of them from a majority of respondents. There was no loud call for change and no united view about what the future of civil partnership should be. A number of respondents had expressly suggested that it was too soon to take a view. The Government pointed out that it would take some time for people to get used to the new system, and that conversion from civil partnership to marriage would only become available in December 2014. In time, official statistics would be available to show the long term trend on the numbers of marriages, civil partnerships and conversions. Given the lack of consensus, the Government said that it would not be making any changes (at present).

21. Had the Claimants sought judicial review of the Government's decision to wait and see, it is highly unlikely that they would have even obtained permission to bring the claim. The decision was taken after a full and proper public consultation on the way forward, it took the responses into account, and it was not irrational. On the face of it, it appears to be sensible. Many people might consider that it would not be a good idea to spend time and money on making extensive changes to the CPA if it transpired, a few years down the line, that those changes were not really warranted, or that they were undesirable. Yet the effect of the Claimants' case is that the Government was not entitled to wait and see what practical impact the 2013 Act has upon civil partnerships. They contend that it could not extend marriage to same sex couples without, at the same time, extending civil partnership to opposite sex couples.

22. The Claimants feel that it is unfair that a route to state recognition of their relationship which is open to a same-sex couple with exactly the same deeply held objections to marriage as theirs remains unavailable to them simply because they are heterosexual, despite the fact that same-sex couples who wish to marry can now do so. No doubt there will be many people who sympathise with that point of view. However, unfairness does not necessarily equate to incompatibility with the Convention. It does not follow from the fact that there is a difference in treatment that there is discrimination which engages Art 14 read together with Art 8. Nor does it follow that this is a matter which properly falls within the remit of the Court's supervisory powers, rather than being a matter of social policy for a democratically-elected Government to address.

Is there an infringement falling within the ambit of Art 8?

23. Art 14 of the Convention provides as follows:

> "*Prohibition of discrimination*
>
> *The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*".

There is no dispute that discrimination on grounds of sexual orientation falls within that prohibition.

24. Art 14 is to be contrasted with article 1 of the Twelfth Protocol to the Convention, which guarantees the "*enjoyment of any right set forth by law*" without discrimination: see the discussion of the distinction between them by Lord Nicholls in *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91 (hereafter referred to as "*M v SSWP")* at [9]–[15]. Mr Squires, on behalf of the Secretary of State, contended that this claim was an attempt to bring within the ambit of Art 14 a claim which would only fall within article 1 of the Twelfth Protocol, which is still not operative within the UK.

25. In order to invoke Art 14, a person does not have to go so far as to show that a substantive Convention right has been violated, but they must establish that a personal interest close to the core of such a right is infringed by the difference in treatment complained of. That involves the Court in considering, in respect of each Convention

right relied on (in this case, the right to family life and the right to private life under Art 8) what value that substantive right exists to protect: *R(Clift) v Secretary of State for the Home Department* [2006] UKHL 54, [2007] 1 AC 484 per Lord Bingham at [12]-[13]. It is only if the facts fall within the ambit of one or more of the Convention rights that the Court goes on to consider the remaining questions posed by Baroness Hale in *Ghaidan v Godin-Mendoza* [2004] UKHL 30, [2004] 2 AC 557 at [133]-[134], including, most pertinently, whether the difference in treatment was objectively justifiable, i.e. did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

26. The core values protected by Art 8 were identified in *M v SSWP*. Lord Bingham, at [5] spoke of the "love, trust, confidence, mutual dependence and unconstrained social intercourse" which are the essence of family life and the "sphere of personal and sexual autonomy" which are the essence of private life. He said that the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached where there is no meaningful connection at all.

27. Lord Nicholls, at [14] distilled from the Strasbourg jurisprudence the approach that in Art 14 cases, the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the substantive article, the more readily it will be regarded as being within the ambit of that article; and vice versa. Each case will involve the making of a value judgment.

28. In rejecting the argument that any alleged act of discrimination on grounds of personal status falls within the ambit of Art 8, Lord Walker said at [83]-[84] that the unique feature of [the private life aspect of] Art 8 is that it is concerned with the failure to accord *respect*. Thus criminalisation of any manifestation of an individual's sexual orientation plainly failed to respect that person's private life. So too would any interference with that person's right to earn a living which involved subjecting them to humiliation on grounds of their sexual orientation, or measures that were so draconian as to threaten the ability of the individual concerned to live a normal personal life. However, less serious interference would not fall within the ambit of Art 8 at all. Likewise, in order to engage the right to family life under Art 8, there had to be a "very close connection" between the measure complained of, and the family life.

29. In *M v SSWP*, the House of Lords held by a majority that a statutory scheme which resulted in M's weekly payment of child support contributions being greater than it would have been had she been living with a heterosexual partner did not fall within the ambit of discrimination under Art 14 read with Art 8. Another aspect of the decision (relating to Art 1 of Protocol 1 of the Convention) was eventually held by the ECtHR to have been wrongly decided, but it was common ground before me that nothing was said on that occasion to disturb the findings on the Art 8 and Art 14 aspects of the case.

30. Ms Monaghan pointed out that at the time when that case was decided, Strasbourg had not yet recognised that an established relationship between same-sex partners fell within the scope of "family life" whereas the law has since moved on. The landmark decision in *Schalk and Kopf v Austria* (2011) 53 EHRR 20 established that such a relationship does constitute "family life" regardless of whether the couple have children. That is true, but in the course of deciding that the measures complained of did not impact upon the core values protected by Art 8, Lord Bingham implicitly [5]

and Lord Walker expressly [87] made the assumption in favour of M and her partner that the unit that consisted of them and their children by their former marriages should be regarded as a family for Art 8 purposes. It was only Lord Mance who regarded Strasbourg's then negative answer to the question whether a same-sex relationship constituted "family life" as determinative of the outcome.

31. In *Wilkinson v Kitzinger* the President rightly identified the particular importance of the decision in *M v SSWP* as being the limitation which it placed upon increasingly broad arguments being deployed in human rights cases to the effect that various aspects of social legislation impacting upon the personal and economic interests of citizens constitute a failure on the part of the state to afford respect to those citizens' private or family life.

32. The Art 8/Art 14 argument in *Wilson v Kitzinger* was that the symbolic status of marriage as a fundamental social institution provides for social recognition of key relationships, and for the same-sex couple in that case to have their relationship denied that symbolic status "*devalues it relative to the relationships of heterosexual people*." It was contended that even if the rights and benefits conferred by civil partnerships are identical to those which are conferred by marriage within Britain itself, this was not so beyond its boundaries. Marriage was the key social institution, celebrated and recognised around the world. A civil partnership was a lesser alternative, which would not be recognised around the world or even in Europe. The court heard full argument on the issues, because the Lord Chancellor intervened by counsel to argue that the statutory provisions under challenge were clear and compatible with the petitioner's Convention rights.

33. The President interpreted *M v SSWP* in one respect rather narrowly, concluding that the presence of the children within the family unit was an essential part of the favourable assumption made by Lords Bingham and Walker (and by Baroness Hale in her dissenting speech) that it was arguable that the right to family life was engaged by the measures concerned. He expressed the view at [75] that the House of Lords recognised that the Convention concept of family life, as the law in Strasbourg then stood, did not extend to childless same-sex couples. For present purposes it does not matter whether his interpretation was right or wrong, because he subsequently went on in his judgment to make the wider assumption in favour of the couple that he considered Lords Bingham and Walker had failed to make in *M v SSWP*.

34. So far as family life was concerned, he found at [107] that even if the Convention were to recognise a childless same-sex relationship as constituting family life, "*the withholding of recognition of the relationship… [as a marriage] does not impair the love, trust, mutual dependence and unconstrained social intercourse which are the essence of family life.*" Thus the decision in *Wilkinson v Kitzinger* is not dependent upon a finding (still less an assumption) that the measures complained of could not impinge upon the right to family life because the case involved a same-sex couple without children. The recognition in Strasbourg some years later that a same-sex relationship does indeed constitute "family life" is therefore immaterial.

35. So far as private life was concerned, the President concluded, also at [107], and consistently with *M v SSWP*, that there was no intrusion on the couple's right to respect for their private life because the personal and sexual autonomy of the

petitioner had not been invaded, nor had she been criminalised, threatened or humiliated in any way.

36. Mr Squires submitted that the Claimants' case is significantly weaker than that of the same-sex couple in *Wilkinson v Kitzinger*. They cannot argue that marriage is not recognised around the world, or that it is generally regarded socially as being of lesser value than a civil partnership. If there was no interference with family or private life within the ambit of Art 8 given the symbolic differences between marriage and civil partnerships adverted to in *Wilkinson v Kitzinger*, then there is all the more reason for concluding that there is no such interference in the present case.

37. There has been no suggestion in the evidence or in Ms Monaghan's submissions that the denial of the status of civil partners to the Claimants devalues their relationship either generally, or relative to similar committed relationships of same-sex partners. By denying them the right to enter into a civil partnership the state has done nothing to interfere with their love, trust, confidence, or mutual dependence and has placed no constraints on their social intercourse. Their ability to continue to live together as a family is wholly unimpaired. This is not a case where they cannot achieve formal state recognition of their relationship, with all the rights, benefits and protections that flow from such recognition; on the contrary, it is open to them to obtain that recognition by getting married.

38. The alleged interference by the state with their right to private life by denying them the right to enter a civil partnership is even more tenuous. There is no evidence that they are subjected to humiliation, derogatory treatment, or any other lack of respect for their private lives on grounds of their heterosexual orientation by reason of the withholding of the status of civil partners from them.

39. The only obstacle to the Claimants obtaining the equivalent legal recognition of their status and the same rights and benefits as a same-sex couple is their conscience. That was the case both before and after the enactment of the 2013 Act. Whilst their views are of course to be afforded respect, it is their choice not to avail themselves of the means of state recognition that is open to them. The state has fulfilled its obligations under the Convention by making a means of formal recognition of their relationship available. The denial of a <u>further</u> means of formal recognition which is open to same-sex couples, does not amount to unlawful state interference with the Claimants' right to family life or private life, any more than the denial of marriage to same-sex couples did prior to the enactment of the 2013 Act. There is no lack of respect afforded to any specific aspect of the Claimants' private or family life on account of their orientation as a heterosexual couple. Thus the statutory restrictions complained of do not impinge upon the core values under either limb of Art 8 to the degree necessary to entitle the Claimants to rely upon Art 14. The link between the measures complained of, and their right to enjoy their family and private life, is a tenuous one.

40. I would have come to that conclusion independently of any authority, but I am fortified in it by the fact that Sir Mark Potter P. reached a similar conclusion (on stronger arguments) in *Wilkinson v Kitzinger*.

41. Ms Monaghan accepted that, as a matter of judicial comity, I am bound to follow *Wilkinson v Kitzinger* unless the decision is "clearly wrong". However, she relies upon the decisions of the Grand Chamber of the European Court of Human Rights in

Strasbourg in *Schalk and Kopf v Austria* (above) and *Vallianatos v Greece* (2014) 59 EHRR 12 in support of the submission that the law has materially changed since *M v SSWP* and *Wilkinson v Kitzinger* were decided. She submitted that it is now the case that the regulation or recognition of same sex or opposite sex relationships by the state will, *without more*, engage Art 8. In order to mount an Art 14 argument based on Art 8 it is therefore no longer necessary to show that the measure complained of has any detrimental impact on family or private life.

42. Attractively though that submission was presented, I am unable to accept it. That was not the issue which the court in Strasbourg was asked to determine in either of the cases relied on by Ms Monaghan, nor was its determination a necessary part of the ECtHR's reasoning. Both cases concerned the scenario where there was plainly a detrimental effect upon the enjoyment of family life brought about by the denial of *any* form of state recognition to a same-sex relationship.

43. In *Schalk*, a same-sex couple contended that the denial of their right to marry violated their right to respect for private and family life because they had no other possibility to have their relationship recognised by law (see paragraph [65]). Subsequently, the Austrian government had enacted legislation which enabled same-sex couples to enter into a legal partnership. By the time the matter reached the ECtHR, the issue had become whether Austria should have provided the applicants with an alternative means of legal recognition of their partnership earlier than it did. The ECtHR decided that issue in favour of Austria, on the basis that the timing for introduction of such a change fell within the margin of appreciation afforded to a state against the background of the evolving change in social attitudes towards same-sex relationships.

44. It was undisputed that the relationship between a same-sex couple fell within the notion of "private life," but the ECtHR specifically took the opportunity to consider and address the issue whether their relationship also constituted "family life." It concluded that in view of what it described as a "rapid evolution of social attitudes towards same-sex couples" it was artificial to continue to maintain the distinction, and that the relationship did constitute "family life". However the Court made it very clear, at [103], that it was only concerned with the facts of the concrete case before it. It had not been called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Art 14 when taken with Art 8. The Court said that, since there was not yet a majority of states providing for legal recognition of same-sex couples, the area in question must be regarded as one of evolving rights with no established consensus, where states must enjoy a margin of appreciation in the timing of the introduction of legislative changes.

45. The ECtHR was not concerned with a *Wilkinson v Kitzinger* situation, because no complaint was being made about the form of the means of recognition of the couple's relationship that Austria had subsequently introduced, or that it conferred some form of lesser status than marriage. The complaint was about the prior absence of *any* such means of recognition. Once it was accepted that a committed relationship between same-sex couples fell within the ambit of "family life", there could be very little doubt that the denial of *any* form of state recognition to a committed same-sex relationship would have an adverse impact on the core values under Art 8 identified by Lord Bingham in *M v SSWP*. Indeed, it appears that the contrary was not even argued by Austria in *Schalk*, see [79]. The court did not address the question whether the legal regulation or recognition by the state of certain relationships *in and of itself*

fell within the ambit of Art 8, because that question did not arise for determination. It did not even arise tangentially.

46. *Vallianatos*, like *Schalk*, concerned a situation in which same-sex couples had no means of obtaining state recognition of their relationship at the time when the complaint was brought; but unlike Austria, the state concerned (Greece) had done nothing to redress the inequality of treatment. Instead, Greece had decided to create a new form of "civil union" besides marriage, but for reasons which it sought to justify, confined the new status to opposite-sex couples. By the time *Vallianatos* came to be decided by the ECtHR, social attitudes had evolved still further. Even though there were (and are) still a significant number of states in which same-sex couples had no form of legal status at all, (on the evidence before me, currently there are 23), the position taken by Greece was now against the tide of popular opinion. There was only one other member state of the Council of Europe, Lithuania, which denied same-sex couples any form of legal status and which, on introducing civil unions as an alternative to marriage, extended them only to opposite-sex couples. It appears to have been conceded that Art 8 was engaged, see [71].

47. The ECtHR again took pains to delineate the scope of what it had to determine. The only issue before it was whether Greece was entitled to enact a law introducing alongside the institution of marriage a new registered partnership scheme for unmarried couples that excluded same-sex couples. The starting-point taken at [70] was an acceptance by the Court that *Schalk* had decided that "*access for same-sex couples to marriage or another form of legal recognition*" fell to be examined under Art 8 coupled with Art 14 – indeed the Greek Government did not dispute that approach. The Court considered that was an appropriate course for it to take. It rejected the suggestion by Greece that it made a difference to whether "family life" was engaged if the couple concerned did not cohabit.

48. In the course of consideration of various materials that were placed before it, the ECtHR made passing reference to a Recommendation made by the Committee of Ministers (CM/Rec (2010) 5 on measures to combat discrimination on grounds of sexual orientation or gender identity). Among the various recommendations to member states contained within that document was a recommendation that where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights. As Mr Squires pointed out, that was simply a recommendation. The Court said nothing specifically to endorse it, let alone to suggest that failure to follow it would engage Art 8 either in isolation or read together with Art 14.

49. The passage in *Vallianatos* upon which Ms Monaghan placed most reliance appears in the part of the judgment dealing with legitimate aim and proportionality. The Court's observations are therefore not directed at the prior question whether the measure under consideration fell within the ambit of Art 8 taken together with Art 14 in the first place. By this stage in its reasoning, the Court was proceeding on the assumption that it did. At [81], addressing the argument by Greece that same-sex couples could already achieve exactly the same rights as opposite-sex couples who entered into a civil union, simply by entering into a private contract, the ECtHR said that even if that were true, it did not take account of the fact that the civil partnership created by the new law as an officially recognised alternative to marriage had "*an intrinsic value for*

the applicants irrespective of the legal effects, however narrow or extensive, that they would produce."

50. Taken in isolation and out of context, that sentence might appear supportive of the Claimants' position. However, the Court then went on to explain what it meant by that observation. It said that same-sex couples were just as capable of entering into stable committed relationships as opposite sex couples, and that if they did, the couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples. Accordingly, the option of entering into a civil union would afford same-sex couples the only opportunity available to them under Greek law of formalising their relationship by conferring on it a legal status recognised by the state. The Court noted that extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under ordinary law, but on the basis of the legal rules governing civil unions, thus having their relationship officially recognised by the state.

51. If the same issue had arisen for consideration in a context where Greek law permitted same-sex couples to *marry*, the answer may well have been different. In any event, it cannot be assumed that it would have been the same. The focus in *Vallianatos* was upon provision of some kind of formal route or status by which same-sex partners could achieve official recognition *by the state* of their relationship, in the same way as those who were married. As in *Schalk*, the absence of any alternative form of state recognition of a same-sex relationship was crucial both to the Court's decision and its reasoning at the stage of the analysis when justification for the difference in treatment came to be considered.

52. Therefore neither of these cases is authority, let alone clear and consistent authority, for the proposition that Ms Monaghan seeks to make good. They do not address the situation where at all material times an available form of state recognition of the relationship exists, but the couple concerned do not wish to avail themselves of it. They do not drive this court to the conclusion that *Wilkinson v Kitzinger* was wrongly decided.

53. Whilst national courts are obliged to take relevant Strasbourg cases into account, they are only under an obligation to follow any clear and consistent jurisprudence of the ECtHR. The interpretation of rights accorded by the Convention is essentially a matter for the ECtHR: see *R (Ullah) v Special Adjudicator* [2004] 2 AC 323 at [20]. The national courts should keep pace with Strasbourg jurisprudence as it evolves over time, but they have no business overtaking it. There is no decision of the ECtHR which comes anywhere near suggesting that where a couple is able to enter into a legal relationship according full protection to all the values falling within or close to Art 8 (such as marriage) there is nevertheless state interference with the core values protected by their rights to family and/or private life under that Article because they cannot enter a different form of legal relationship which would afford them the same rights as marriage.

54. The reasoning of the ECtHR in *Vallianatos* is not founded upon the proposition that if a new form of legal status is created, it must be open to all couples regardless of their sexual orientation, unless there is justification for the difference in treatment. In any event that is not the Claimants' case. As I have already stated, their case is that the

CPA became unlawfully discriminatory solely in consequence of the extension to same-sex couples of the right to marry. However there is nothing in *Schalk* or in *Vallianatos* to support the contention that if a state voluntarily extends an existing form of legal status (here, marriage) to couples of a particular sexual orientation, it must be *compelled* to simultaneously extend a different existing form of legal status specifically created for such couples in order to give them equal rights, to couples of a different sexual orientation who could always marry.

55. Just as the UK was under no obligation to extend marriage to same-sex couples, it has never been under an obligation to extend civil partnership to heterosexual couples. There was no such obligation when the CPA was enacted, and in my judgment the 2013 Act has made no difference to the situation. The conferring upon same-sex couples of an alternative and additional route to recognition of their relationship to that which previously was the sole means, did not somehow suddenly cause the provisions of the CPA excluding heterosexual couples from becoming civil partners to fall within the ambit of Art 8, when they did not do so before.

56. For those reasons this claim falls at the first hurdle. However, for the sake of completeness, I shall go on to deal with the arguments on legitimate aim and proportionality on the assumption that Art 8 and Art 14 are engaged.

Is the difference in treatment on grounds of sexual orientation objectively and legally justified?

57. In determining whether a difference in treatment has an objective and reasonable justification pursuant to Art 14, the ECtHR has recognised that whilst the final decision is for the court, contracting states enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations, justify a difference in treatment. The scope of that margin of appreciation will depend on the circumstances, the subject matter and the background.

58. "Margin of appreciation" is a supranational concept referred to in the Strasbourg jurisprudence to describe the application of the Convention in a flexible way according to local needs and conditions. However, at the domestic level, especially in areas of social and economic policy, there is also recognition by the courts that a difficult exercise may have to be undertaken by the legislature and the executive when applying the principles of the Convention, balancing the rights of the individual and the needs of society.

59. Mr Squires relied on the well-known passage in Lord Hope's speech in *R v DPP ex parte Kebilene* [2000] 2 AC 323 at 380 E-381D. He highlighted the statement that in some circumstances it will be appropriate for the courts to recognise that there is an area of judgment to which the judiciary will defer on democratic grounds to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. He also relied on Lord Mance in *M v SSWP* at [137]-[138] as a further example of a domestic authority where the expression "discretionary area of judgment" was used to describe a broadly similar concept to the "margin of appreciation" referred to by the ECtHR.

60. This is not a case in which the Government has decided, once and for all, to maintain the current situation in which same-sex couples have a choice of civil partnership or

marriage and opposite-sex couples do not have the same choice. That being so, I do not have to address the issue whether affording different types of legal recognition to same-sex partners and opposite-sex partners, as the means of achieving precisely the same rights, benefits and protections, falls within the discretionary area of judgment afforded to the legislature and the executive in the sphere of social policy.

61. The question here is, rather, whether the Government's decision not to immediately extend civil partnerships to opposite-sex couples (or to immediately abolish or phase them out) but instead, to maintain the status quo and wait and see what the impact on civil partnerships of the extension of marriage to same-sex couples will be, before deciding how to address the situation, is objectively justifiable.

62. It became evident in the course of argument that the Claimants' real grievance is not so much about the decision to wait, as with the fact that the Government has given no indication of how long it proposes to wait. Whilst recognising that it would take time to introduce any legislative changes designed to address the situation in any event, they are keen to put some legitimate pressure on the Government to make a move.

63. Both counsel addressed arguments on the ambit of the margin of appreciation or discretionary judgment. Ms Monaghan submitted that where there is direct discrimination on grounds of sexual orientation, the margin of appreciation afforded to the state is so narrow as to be almost negligible. She relied on *Vallianatos*, where the ECtHR said at [84] that:

"*In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a different in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people… from the scope of application of the provisions at issue…*"

64. Thus, Ms Monaghan submitted, in determining whether a contracting state is entitled to give legal recognition to same-sex and different-sex couples in different ways, the court will subject the discriminatory measure to strict scrutiny. She further submitted that the Secretary of State had identified no good grounds for continuing to fail to permit opposite sex partners to enter civil partnerships, and the argument that it was necessary to achieve a legitimate aim was unsustainable because there was no legitimate aim for maintaining the distinction.

65. Mr Squires submitted that this was a case in which Parliament had recently decided, following debate, not to extend civil partnerships to opposite sex couples at the same time as extending marriage to same-sex couples, but instead to carry out a review. When that review proved inconclusive, the Government had decided to wait for a time until further hard evidence was available to enable it to take a considered view as to what to do. These were matters of moral judgment and social policy falling well within the "discretionary area of judgment" accorded to democratically elected bodies. Although the fact that such a decision had recently been taken by the Government was not conclusive of the issue, the court should afford that decision considerable respect when deciding if there was justification for not bringing into effect changes to the CPA straight away.

66. In answer to Ms Monaghan's reliance on *Vallianatos*, Mr Squires submitted that the situation there was very different. On the evidence before the ECtHR, Greece was by then in a very small minority of member states which not only continued to deny same-sex partners any means of legal recognition of their relationship but, having chosen to introduce a new form of civil union besides marriage, deliberately confined it to opposite-sex couples. Social attitudes had moved on to such an extent that a position of unequal treatment that operated to the disadvantage of same-sex couples which may well have been justified only a few years earlier, was no longer treated by Strasbourg as falling within the margin of appreciation at state level.

67. He pointed out that where the discrimination adversely affected people falling within a class that was historically subject to adverse treatment on grounds of race, sex, or sexual orientation, there would be ample justification for taking the approach that the margin of appreciation should be narrow and that discriminatory measures should be subject to strict scrutiny, and justified only if they were necessary to achieve a legitimate aim. It did not necessarily follow that Strasbourg would apply the same approach if the persons complaining about the measures did not fall within such a class.

68. Opposite-sex partners obviously do not fall within a class of persons who have suffered historic discrimination on the basis of their sexual orientation, but I am not persuaded that this means that some different standard of scrutiny would apply to a measure that discriminates against them on grounds of their sexual orientation to that which would apply to a measure that discriminates against a same-sex couple on those grounds.

69. However, I do accept that there is no clear consensus among member states that opposite-sex partners should be able to obtain legal recognition of their relationship by a route other than marriage. In order to make good that point, Mr Squires referred the Court to the evidence of Ms Hobman, a Senior Civil Servant at the Government Equalities Office. Her evidence is that only 8 of the 43 member states of the Council of Europe have some form of civil union for opposite sex couples, and of these, only two, Malta and the Netherlands, currently have a civil union *that is equivalent to marriage* and which is open to couples regardless of their sexual orientation. A table within Ms Hobman's statement illustrates that in four of the states where marriage for same-sex couples has been introduced, civil unions or civil partnerships have now been abolished. Malta and the Netherlands allow both marriage and civil unions equivalent to marriage, and the UK is waiting to decide what to do.

70. Therefore, in failing to extend civil partnerships to opposite-sex couples, the UK is not going against a general social trend, as Greece was in *Vallianatos* by failing to afford any form of legal recognition to same-sex relationships. If anything, the UK appears to be in line with the majority approach, which is to recognize opposite-sex relationships through marriage alone. Mr Squires submitted that, as demonstrated by *Schalk*, in a situation where there is no consensus as between member states, and the issue really concerns the timing of introducing legislative change, then even where the underlying complaint is one of discrimination on grounds of sexual orientation, a wide margin of appreciation is appropriate.

71. I agree with Mr Squires that the situation in the present case is not analogous to *Valliantos*; it is far closer to *Schalk*, in which there was recognition by the ECtHR that

a member state should be afforded a relatively generous leeway as to the timing of introducing legislative changes in areas of social policy where there is no clear consensus among Member States. However it is unnecessary for me to decide this claim on the basis of the width or narrowness of the margin of appreciation or discretionary area of judgment afforded to the state or to its legislature or executive arms. I am satisfied that on any view, even on the application of strict scrutiny, there is sufficient objective justification for maintaining the disparity in the short term, whilst the Government takes stock of the impact of the 2013 Act upon civil partnerships.

72. Even if the measures complained of do impact upon the enjoyment of the Claimants' Art 8 rights, the impact is light; whilst civil partnerships remain unavailable, the state is still making available the alternative means of recognition of their relationship which has always existed. They suffer no obvious disadvantage in consequence of the decision to wait and see; the state cannot be held responsible for their choice not to avail themselves of the existing means of achieving recognition. The lack of appreciable impact on the enjoyment by heterosexual couples of their right to family and private life is a relevant factor to weigh in the balance when considering whether maintaining the current situation in the short term is or is not objectively justified.

73. Ms Monaghan submitted that the initial step in the analysis must be to ask what, if any, legitimate aim is said by the Government to be served by maintaining the discriminatory measure, even in the short term. It is only if a legitimate aim for treating same-sex couples differently can be identified that the court then goes on to ask the question whether the measure under challenge is proportionate to that aim. She submitted that the Government had failed to identify a legitimate aim and therefore the question of proportionality did not even arise.

74. That staged approach is easy enough to apply when evaluating a measure which is, on the face of it, discriminatory at the point of enactment. In such a case, the state concerned would give its justification for drawing a distinction between heterosexual and same-sex couples, and it would only be appropriate to consider proportionality (and necessity, where applicable) if the justification appeared on the face of it to be sound. For example, the justification for the exclusion of opposite-sex couples from civil partnerships when the CPA was originally enacted was that opposite-sex couples were already able to enjoy formal recognition of their relationship by getting married and thus there was no need to create civil partnerships for them. The whole purpose of the CPA was to create a means of official recognition of the status of same-sex couples, where no form of legal recognition of their status previously existed. So far as proportionality is concerned, in practical terms the rights and benefits enjoyed by civil partners and married couples are the same and thus it was unnecessary to take the step of extending marriage to same-sex partners at that juncture.

75. However, the logical consequence of taking the same staged approach in a situation such as this, where it is said that the measure has automatically become discriminatory in consequence of the enactment of another statute conferring additional rights on those for whom the status of civil partnership was especially created, would be that the state concerned would probably never be able to justify maintaining the difference in treatment between those affected, even for a reasonable period to enable it to take stock of the practical impact of the changes. *Ex hypothesi*, if one accepts the initial premise of the argument, the original justification for the

discriminatory restriction would have disappeared, and there could be no fresh objective justification for maintaining it.

76. Ms Monaghan did not shrink from that proposition. Her submission was that the Government should have planned for the change in advance of enacting the 2013 Act. It would have been no answer to the creation of a discriminatory measure that the Government failed to think about the implications beforehand, even if that had been the case. In fact, the Government was well aware of the potential ramifications of going ahead with the reforms to civil marriage without addressing civil partnerships. It knew there was an argument that extending marriage to same-sex couples without simultaneously extending civil partnership was unjustified discrimination. She pointed to the fact that when the Marriage (Same Sex Couples) Bill was undergoing legislative scrutiny, a letter to the Chair from the Minister for Sport, who then held the portfolio for Equality, expressly recognised that someone might raise the arguments now being relied on by the Claimants. A different justification was put forward in paragraph 76 of that letter for maintaining the difference in treatment, namely, promoting entry into marriage as the more desirable status. The Government does not seek to rely on that justification in these proceedings.

77. Ms Monaghan accepted that this was not a case in which measures were being taken in response to an evolution across Europe in attitudes towards heterosexual couples. However, she submitted that in consequence, the justification in *Schalk* for the margin of appreciation afforded to Austria regarding the timing of the introduction of rights for same-sex partners did not exist. She argued that the timing of a decision is not a legitimate aim in itself or something falling within the margin of appreciation or discretion allowed to the Government. However she candidly acknowledged that if the Government had announced a timescale within which it would consider the situation and decide what to do about it, the Claimants may well have struggled to obtain permission to bring the claim for judicial review.

78. Mr Squires submitted that in the present scenario the approach to justification necessarily becomes more nuanced. What has to be justified is maintaining, for an (as yet) unquantified period, a situation in which same-sex couples have two formal routes to state recognition of their relationship whereas opposite-sex couples have only one. He submitted that the Government's decision to "wait and see" serves a legitimate aim and falls comfortably within the margin of appreciation or discretion afforded to it, however widely or narrowly that margin may be drawn.

79. Mr Squires accepted that the cost of taking steps to address the difference in treatment straight away would not by itself be a sufficient justification for maintaining the status quo, but contended that it is a legitimate aim for the Government to avoid the *unnecessary* expenditure of large amounts of taxpayers' money as well as the disruption and potential waste of time and effort that could be caused by immediate legislative change, by taking a reasonable amount of time to make its mind up about when, and how best to deal with the situation. Otherwise the Government might find itself taking one viable route to create equality of treatment (e.g. by amending numerous provisions of statutes and rules to allow heterosexual couples to register civil partnerships) only to find, when sufficient statistics become available, that there is virtually no continuing demand for civil partnerships and it would have made far better sense to abolish them or phase them out.

80. Ms Monaghan submitted that avoiding the waste of time and cost involved in creating equal treatment by one of a number of available routes, even if that time and cost is significant, could never be a legitimate aim for maintaining a discriminatory measure even in the short term. I disagree.

81. In my judgment the question whether maintaining the discrimination complained of is justified must depend upon the specific context. Here, the decision is to wait and see how the extension of marriage to same-sex partners affects civil partnerships before determining what to do about them. At present there is no clear evidence as to how civil partnerships are likely to be affected by extending marriage to same-sex couples and no clear social consensus on what their future should be (as the outcome of the two consultations demonstrates). However the figures that have emerged since March 2014 indicate that there has been a sharp decline in the number of civil partnerships formed in England and Wales compared to 2013, with a corresponding increase in the number of marriages of same-sex couples. In a consultation by the Scottish Government on Review of Civil Partnership dated September 2015, the statistics relating to jurisdictions where both marriage and civil partnerships are available to same sex and opposite sex couples (the Netherlands, New Zealand, and Hawaii) indicate that the vast majority of couples prefer marriage – in New Zealand in 2014 only 0.3% of the couples opted for civil partnership. In Scotland itself, after civil marriage was introduced for same-sex partners, there were only 8 civil partnerships registered in the second quarter of 2015, a decline of 94% from the previous year.

82. I accept Mr Squires' submission that the differences between countries are likely to reflect different social attitudes to marriage and civil partnerships. It is too soon to discern any particular trend in England and Wales. Taking measures to amend the CPA without gathering sufficient information about the practical impact of the 2013 Act on civil partnerships would be taking a leap in the dark which could turn out to be an extremely expensive mistake. That is why it must be justifiable for the Government to postpone taking any final decision about the future of civil partnerships until it has acquired sufficient information to enable it to determine whether there is any justification for keeping them or, conversely, any significant demand for extending them. That is so, even though it is a necessary concomitant that the inequality of treatment complained of by the Claimants will continue for however long it takes to gather the necessary information.

83. Whilst it would obviously have been preferable if the Government had given some indication of timescale, in my judgment its failure to do so does not remove the justification for its failure to take steps to address the situation immediately. As Mr Squires submitted, in a case such as this justification and proportionality really go hand in hand. Given the marginal practical impact that denying an alternative route to state recognition in the short term is likely to have on opposite-sex couples, and the continued availability of marriage, it cannot really be said that maintaining the status quo until there is better evidence available about the impact of same sex marriage on civil partnerships is a disproportionate means of saving the expenditure of unnecessary time and public resources and the disruption that making uninformed immediate legislative changes would entail.

Conclusion

84. For the reasons given above, I do not accept that the enactment of the 2013 Act has caused the restrictions in sections 1 and 3 of the CPA on opposite-sex couples entering into a civil partnership to become unlawful. Those provisions have not become incompatible with Arts 14 and 8 of the Convention just because same-sex couples now have two routes to achieving legal recognition of their relationship by the state and opposite-sex couples continue to only have one. The difference in treatment complained of does not infringe a personal interest close to the core of the right to family life, still less the right to private life protected by Art 8.

85. I would have reached that conclusion irrespective of any prior authority directly in point, but in any event I am bound to follow the decision in *Wilkinson v Kitzinger* which remains good law and has not been overtaken by the decisions of the ECtHR in *Schalk* and *Vallianatos*.

86. If for any reason I am wrong about this, and the difference in treatment does fall within the ambit of Art 8 read together with Art 14, then maintaining that difference in the short-term is objectively justified. By deciding to wait until it is in a better position to evaluate the impact of the 2013 Act on civil partnerships before taking any legislative steps, against a background where there is no consensus either domestically or within Europe as to the appropriate course to take, the Government is acting well within the ambit of discretion afforded to it with regard to the regulation of social matters. Opposite-sex couples are not disadvantaged by the hiatus, because they can achieve exactly the same recognition of their relationship and the same rights, benefits and protections by getting married, as they always could.

87. The Government's decision to wait and see serves the legitimate aim of avoiding the unnecessary disruption and the waste of time and money that plunging into a programme of legislative reform without waiting is likely to produce.

88. Consequently, this claim for judicial review must fail.