File-number: 8254/11

EUROPEAN COURT OF HUMAN RIGHTS

Council of Europe
Strasbourg, France

APPLICATION

under Article 34 of the European Convention on Human Rights
and Rules 45 and 47 of the Rules of Court

lodged with the Court on 2 February 2011

Sharon FERGUSON, Franka STRIETZEL,
Colette FRENCH, Katie GREEN,
Richard HULL, David WATTERS,
Scott MALONEY, Matthew TORESEN,
Katherine DOYLE, Thomas FREEMAN,
Thomas GARRETT, Lucy HILKEN,
Ian GOGGIN, Kristin SKARSHOLT,
Stephanie MUNRO and Andrew O'NEILL

(FERGUSON and Others)

v.

UNITED KINGDOM

I. THE PARTIES [personal information submitted to the Court deleted]

A. THE FIRST APPLICANT

1. Surname: FERGUSON 2. First names: Sharon 3. Sex: female

4. Nationality: 5. Profession:

6. Date and place of birth:

7. Permanent address:

8. Tel. N°:

B. THE SECOND APPLICANT

9. Surname: STRIETZEL 10. First names: Franka 11. Sex: female

12. Nationality: 13. Profession:

14. Date and place of birth:

15. Permanent address:

16. Tel. N°:

C. THE THIRD APPLICANT

17. Surname: FRENCH 18. First names: Colette 19. Sex: female

20. Nationality: 21. Profession:

22. Date and place of birth:

23. Permanent address:

24. Tel. N°:

D. THE FOURTH APPLICANT

25. Surname: GREEN 26. First name: Katie 27. Sex: female

28. Nationality: 29. Profession:

30. Date and place of birth:

31. Permanent address:

32. Tel. N°:

E. THE FIFTH APPLICANT

33. Surname: HULL 34. First names: Richard 35. Sex: male

36. Nationality: 37. Profession:

38. Date and place of birth:

39. Permanent address:

40. Tel. N°:

F. THE SIXTH APPLICANT

41. Surname: WATTERS 42. First names: David 43. Sex: male

44. Nationality: 45. Profession:

46. Date and place of birth:

47. Permanent address:

48. Tel. N°:

G. THE SEVENTH APPLICANT

49. Surname: MALONEY 50. First names: Scott 51. Sex: male

52. Nationality: 53. Profession:

54. Date and place of birth:

55. Permanent address:

56. Tel. N°:

H. THE EIGHTH APPLICANT

57. Surname: TORESEN 58. First names: Matthew 59. Sex: male

60. Nationality: 61. Profession:

62. Date and place of birth:

63. Permanent address:

64. Tel. N°:

I. THE NINTH APPLICANT

65. Surname: DOYLE 66. First names: Katherine 67. Sex: female

68. Nationality: 69. Profession:

70. Date and place of birth:

71. Permanent address:

72. Tel. N°:

J. THE TENTH APPLICANT

73. Surname: FREEMAN 74. First names: Thomas 75. Sex: male

76. Nationality: 77. Profession:

78. Date and place of birth:

79. Permanent address:

80. Tel. N°:

K. THE ELEVENTH APPLICANT

81. Surname: GARRETT 82. First names: Thomas 83. Sex: male

84. Nationality: 85. Profession:

86. Date and place of birth:

87. Permanent address:

88. Tel. N°:

L. THE TWELFTH APPLICANT

89. Surname: HILKEN 90. First names: Lucy 91. Sex: female

92. Nationality: 93. Profession:

94. Date and place of birth:

95. Permanent address:

96. Tel. N°:

M. THE THIRTEENTH APPLICANT

97. Surname: GOGGIN 98. First names: Ian 99. Sex: male

100. Nationality: 101. Profession:

102. Date and place of birth:

103. Permanent address:

104. Tel. N°:

N. THE FOURTEENTH APPLICANT

105. Surname: SKARSHOLT 106. First names: Kristin

107. Sex: female 108. Nationality:

109. Profession:

110. Date and place of birth:

111. Permanent address:

112. Tel. N°:

O. THE FIFTEENTH APPLICANT

113. Surname: MUNRO 114. First names: Stephanie 115. Sex: female

116. Nationality: 117. Profession:

118. Date and place of birth:

119. Permanent address:

120. Tel. N°:

P. THE SIXTEENTH APPLICANT

121. Surname: O'NEILL 122. First names: Andrew 123. Sex: male

124. Nationality: 125. Profession:

126. Date and place of birth:

127. Permanent address:

128. Tel. N°:

Q. INFORMATION COMMON TO ALL SIXTEEN APPLICANTS

129. Name of representative: Professor Robert WINTEMUTE (eight forms of authority signed by the sixteen applicants are attached to this Application)

130. Occupation of representative:

131. Address of representative:

132. Tel. N°: Fax N°:

R. THE HIGH CONTRACTING PARTY

133. UNITED KINGDOM

II. STATEMENT OF THE FACTS

134. The first and second applicants are two lesbian women who live together as a couple. Their relationship began in 2008. They wish to marry. They do not wish to register a civil partnership. On 2 November 2010, they attempted to give notice of their intention to marry at Greenwich Register Office, Town Hall, Woolwich, London. The local government officials present that day refused to allow them to do so, because they are both women. A letter from Doreen South, Superintendent Registrar, dated 3 November 2010 and attached to this Application, explains that the reason for the refusal was section 11(c) of the Matrimonial Causes Act 1973: "A marriage ... shall be void [if] ... the parties are not respectively male and female ..."

135. The third and fourth applicants are two lesbian women who live together as a couple. Their relationship began in 2008. They wish to marry. They do not wish to register a civil partnership. On 30 November 2010, they attempted to give notice of their intention to marry at Petersfield Registration Office in the County of Hampshire. The local government officials present that day refused to allow them to do so, because they are both women. A letter from Lucinda Thursfield, Superintendent Registrar, dated 1 December 2010 and attached to this Application, explains that the reason for the refusal was section 11(c) of the Matrimonial Causes Act 1973: "A marriage ... shall be void [if] ... the parties are not respectively male and female ..."

136. The fifth and sixth applicants are two gay men who live together as a couple. Their relationship began in 2004. They wish to marry. They do not wish to register a civil partnership. On 2 December 2010, they attempted to give notice of their intention to marry at Greenwich Register Office, Town Hall, Woolwich, London. The local government officials present that day refused to allow them to do so, because they are both men. A letter from Doreen South, Superintendent Registrar, dated 6 December 2010 and attached to this Application, explains that the reason for the refusal was section 11(c) of the Matrimonial Causes Act 1973: "A marriage ... shall be void [if] ... the parties are not respectively male and female ..."

137. The seventh and eight applicants are two gay men who live together as a couple. Their relationship began in 1992. They wish to marry. They do not wish to register a

civil partnership. On 16 November 2010, they attempted to give notice of their intention to marry at Northampton Registration Office in the County of Northamptonshire. The local government officials present that day refused to allow them to do so, because they are both men. A letter from Robert Chadwick, Registration Services Manager, dated 1 December 2010 and attached to this Application, explains that the reason for the refusal was section 11(c) of the Matrimonial Causes Act 1973: "A marriage ... shall be void [if] ... the parties are not respectively male and female ..."

138. The ninth and tenth applicants are a heterosexual woman and a heterosexual man who live together as a couple. Their relationship began in 2006. They wish to register a civil partnership. They do not wish to marry. On 9 November 2010, they attempted to give notice of their intention to register a civil partnership at Islington Register Office, Town Hall, Islington, London. The local government officials present that day refused to allow them to do so, because they are a woman and a man. A letter from John Lynch, Head of Service - Democratic Services, dated 9 November 2010 and attached to this Application, explains that the reason for the refusal was section 3(1) of the Civil Partnership Act 2004: "Two people are not eligible to register as civil partners ... if they are not of the same sex ..."

139. The eleventh and twelfth applicants are a heterosexual man and a heterosexual woman who live together as a couple. Their relationship began in 1999. They have a daughter, ----------, born on ----------. They wish to register a civil partnership, for their own benefit, and for the benefit of their daughter. They do not wish to marry. On 14 December 2010, they attempted to give notice of their intention to register a civil partnership at Aldershot Registration Office in the County of Hampshire. The local government officials present that day refused to allow them to do so, because they are a man and a woman. A letter from Lucinda Thursfield, Superintendent Registrar, dated 14 December 2010 and attached to this Application, explains that the reason for the refusal was section 3(1) of the Civil Partnership Act 2004: "Two people are not eligible to register as civil partners ... if they are not of the same sex ..."

140. The thirteenth and fourteenth applicants are a heterosexual man and a heterosexual woman who live together as a couple. Their relationship began in 2008. They wish to register a civil partnership. They do not wish to marry. On 23 November 2010, they attempted to give notice of their intention to register a civil partnership at Bristol Register Office, Bristol. The local government officials present that day refused to allow them to do so, because they are a man and a woman. A letter from E.A. Matthews, Registration Superintendent, dated 23 November 2010 and attached to this Application, explains that the reason for the refusal was section 3(1) of the Civil Partnership Act 2004: "Two people are not eligible to register as civil partners ... if they are not of the same sex ..."

141. The fifteenth and sixteenth applicants are a heterosexual woman and a heterosexual man who live together as a couple. Their relationship began in 2005. They wish to register a civil partnership. They do not wish to marry. On 8 December 2010, they attempted to give notice of their intention to register a civil partnership at Camden Register Office, Town Hall, Camden, London. The local government officials present that day refused to allow them to do so, because they are a woman

and a man. A letter from Jenni Grant, Superintendent Registrar, dated 22 December 2010 and attached to this Application, explains that the reason for the officials' refusal was section 3(1) of the Civil Partnership Act 2004: "Two people are not eligible to register as civil partners ... if they are not of the same sex ..."

142. Apart from their sexual orientations, all of the applicants were eligible to marry or register a civil partnership, because they were above the minimum age, were not close relatives, and were not parties to another marriage or civil partnership (or the equivalent) anywhere in the world.

III. STATEMENT OF ALLEGED VIOLATION(S) OF THE CONVENTION AND/OR PROTOCOLS AND OF RELEVANT ARGUMENTS

A. Summary of arguments

143. The refusal of the United Kingdom to allow the first to eighth applicants to marry, and the ninth to sixteenth applicants to register a civil partnership, constitutes discrimination violating Article 14 of the Convention, combined with Article 12 (right to marry), and Article 8 (respect for family life), or violations of Articles 12 and 8 taken alone. The combination of the Matrimonial Causes Act 1973[1] and the Civil Partnership Act 2004[2] creates a system that segregates couples into two separate legal institutions, with different names but virtually identical rights and obligations. This system constitutes, with regard to all the applicants, direct discrimination based on sexual orientation. Different-sex couples are permitted to marry. Same-sex couples are not. Same-sex couples are permitted to register civil partnerships. Different-sex couples are not. This discriminatory system of segregation of couples violates Article 14 combined with Articles 12 and 8, or violates Articles 12 and 8 taken alone.

144. As the Court said in *Schalk & Kopf* v. *Austria* (24 June 2010), para. 97, differences in treatment based on sexual orientation "require particularly serious reasons by way of justification", like differences in treatment based on race, religion or sex. Unlike many Council of Europe member states, which either have no law permitting same-sex couples to register their relationships, or maintain significant differences between same-sex registered partnerships and different-sex marriages (especially with regard to joint adoption of children and access to medically assisted procreation), same-sex civil partners and different-sex spouses in the United Kingdom enjoy virtually identical rights and obligations, including the same right to apply to adopt children jointly, and the same access to medically assisted procreation and the parental rights and obligations that follow such procreation. There are no "particularly serious reasons" that could justify excluding same-sex couples from the traditional, public, legal institution of marriage, and different-sex couples from the new, public, legal institution of civil partnership.

145. The only reason for maintaining the two forms of exclusion is to use the law to stigmatise: to mark same-sex couples as inferior, and different-sex couples as

[1] The Act applies to England and Wales. Equivalent rules may be found in the Marriage (Scotland) Act 1977, s. 5(4)(e), and the Marriage (Northern Ireland) Order 2003, Art. 6(6)(e).

[2] The Act applies to the entire United Kingdom. Civil partnership ceremonies became generally available in England and Wales on 21 December 2005.

superior. Same-sex couples are excluded from marriage, which is the universal system for legally recognising a loving, committed, sexual relationship between two adults. Legal segregation of couples based on sexual orientation is similar to the racial segregation of public beaches, drinking fountains, schools or buses that existed in South Africa under apartheid, or in the southern United States in the 1950s. It is comparable to having a system of marriage for Christians and civil partnership for non-Christians. Using the law to maintain a social hierarchy based on sexual orientation is not a legitimate aim of government, for the purposes of Article 14, Article 12 or Article 8.

146. The fact that, as of 2 February 2011, only 7 of 47 Council of Europe member states permit same-sex couples to marry, should not prevent the Court from finding in favour of the applicants. Although that number could rise to 12 or more over the next three years, the applicants are not asking the Court to decide that all Council of Europe member states must permit same-sex couples to marry. The applicants are only asking the Court to interpret the Convention, in the light of developments in European Union law to be discussed below (Part III.C.4), as imposing an "obligation of consistency" on those European governments that voluntarily create a legal institution like civil partnership, and then grant same-sex civil partners all of the rights of different-sex spouses, with no significant exceptions.

147. The Court should, as a matter of consistency and to preclude pettiness, require the United Kingdom, and any other Council of Europe member states in the same position (probably only Denmark), to take the final step and grant access to the traditional, public, legal institution and word "marriage". If the Court reaches this conclusion with regard to same-sex couples (the first to eighth applicants), it follows that, to eliminate discrimination based on sexual orientation in its legislation, the United Kingdom must also allow different-sex couples (the ninth to sixteenth applicants) access to the new, public, legal institution and words "civil partnership" (as in the Netherlands, Québec, Illinois, Nevada, the District of Columbia, South Africa, New Zealand, the Australian Capital Territory, New South Wales, Tasmania and Victoria), or repeal the Civil Partnership Act 2004 (as in Iceland, Norway, Sweden, Connecticut, New Hampshire and Vermont).

B. Applicability of Article 14

148. The applicants respectfully urge the Court to analyse their complaints under Article 14, combined with Article 12 (right to marry) and Article 8 (respect for family life). As the Court noted in *Schalk & Kopf* (para. 87), in "cases concerning discrimination on account of sexual orientation" with regard to parental rights, or the treatment of unmarried couples, the Court has preferred to examine the case under Article 14 taken in conjunction with Article 8. The main examples are *Mouta* v. *Portugal* (21 Dec. 1999), *Karner* v. *Austria* (24 July 2003), and *E.B.* v. *France* (22 Jan. 2008). Although the Court decided in *Schalk & Kopf* to examine the exclusion of the applicants from the right to marry under Article 12 taken alone, rather than under Article 14 taken in conjunction with Article 12, the applicants would respectfully suggest that a discrimination analysis would facilitate the Court's review of the United Kingdom's system of segregating couples according to their sexual orientations.

149. This is because it would be misleading to view the exclusion of same-sex couples from marriage in the United Kingdom in isolation from the exclusion of different-sex couples from civil partnership, and vice versa. Examining the combination of the Matrimonial Causes Act 1973 and the Civil Partnership Act 2004, as potential discrimination violating Article 14, will assist the Court in appreciating how the two laws work together to maintain a legal and social hierarchy of sexual orientations. This advantage could be lost if the Court were to examine the 1973 Act solely under Article 12.

150. The Court recently found a violation of Article 14, read together with Article 12, in *O'Donoghue* v. *United Kingdom* (14 Dec. 2010, paras. 93-103), a case involving direct discrimination on the ground of religion in access to the right to marry (without the approval of an immigration official). Finding Article 14 applicable in conjunction with Article 12 in this case would be consistent with the Court's approach in *Mouta*, *Karner*, *E.B.* and (with regard to the absence of a registered partnership law in Austria before 1 Jan. 2010) *Schalk & Kopf*. The applicants would respectfully suggest that, in relation to access to marriage, it is no longer necessary for the Court to confine its analysis to Article 12, in light of *Schalk & Kopf*, para. 61: "... the Court would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex". This statement harmonised the Court's interpretation of Article 12 with the text of Article 9 of the Charter of Fundamental Rights of the European Union.

151. Because the Court is no longer obliged, since *Schalk & Kopf*, to focus on the reference to "men and women", on which persons qualify as "men" or "women", and therefore on the definition of the "right to marry" (as the Court still had to do in *Christine Goodwin* v. *United Kingdom*, 11 July 2002), the Court may now focus its attention on the reason for excluding the first to eighth applicants from the traditional, public, legal institution of marriage. There is no reason why the Court should not treat discrimination in relation to access to marriage in the same way as discrimination in relation to parental rights under Article 8 (as in *Mouta* and *E.B.*), freedom of religion under Article 9 (*Savez crkava "Rijec zivota" & Others* v. *Croatia*, 9 Dec. 2010), freedom of assembly under Article 11 (*Alekseyev* v. *Russia*, 21 Oct. 2010), social security under Article 1 of Protocol No. 1 (*Gaygusuz* v. *Austria*, 16 Sept. 1996), education under Article 2 of Protocol No. 1 (*Belgian Linguistic Case*, 23 July 1968), or free elections under Article 3 of Protocol No. 1 (*Sejdić & Finci* v. *Bosnia & Herzegovina*, 22 Dec. 2009).

152. The applicants would respectfully suggest that it is often better to examine cases of discrimination against minorities in Europe under Article 14, combined with another Convention right, rather than under the other Convention right taken alone. This approach permits the Court to focus on the reason why the minority has been excluded from an opportunity (falling "within the ambit" of another Convention right) that is provided to the majority. The reason why the first to eighth applicants have been excluded from the traditional, public, legal institution of marriage is their individual sexual orientations, ie, lesbian or gay, or the sexual orientation of their couple relationships, ie, same-sex. Either description of the reason for the difference in treatment only applies to a small minority of persons in Europe, possibly fewer than 5% of the population. In *Alekseyev*, the Court described the applicant as having

"organised a march to draw public attention to discrimination against the gay and lesbian minority in Russia" (para. 6), and noted "the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority" (para. 84).

153. If the Court decides to examine this Application under Article 14, then Article 14 is clearly applicable, with regard to the first to eighth applicants, because the facts at issue fall "within the ambit" of the "right to marry" in Article 12. As the Court said in *Schalk & Kopf*, at para. 61, "it cannot be said that Article 12 is inapplicable to the applicants' complaint [that they are a same-sex couple unable to marry]". Article 14 is also clearly applicable, with regard to the ninth to sixteenth applicants, because the facts at issue fall "within the ambit" of the right to respect for "family life" in Article 8. As the Court said in *Schalk & Kopf*, at para. 94, "the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of 'family life', just as the relationship of a different-sex couple in the same situation would". There can be no doubt that the United Kingdom's exclusion of same-sex couples from marriage, and different-sex couples from civil partnership, affects the enjoyment of the Article 12 "right to marry" of the first to eighth applicants, and the enjoyment of the Article 8 right to respect for "family life" of the ninth to sixteenth applicants, in a manner that is sufficient to make Article 14 applicable with respect to all of the applicants.

C. Compliance with Article 14

1. Differences in treatment of persons in relevantly similar situations

154. As the Court said in *Schalk & Kopf*, at para. 96, "in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations". All sixteen applicants are in relevantly similar situations, apart from their sexual orientations. They are all, as the Court said in *Schalk & Kopf*, at para. 94, "cohabiting same-sex [or different-sex] couple[s] living in a stable *de facto* partnership". Similarly, the Court took as its starting point in *Schalk & Kopf*, at para. 99, "the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship."

155. The only difference between their situations is their sexual orientations. The first to eighth applicants are lesbian or gay individuals, and members of same-sex couples. The eighth to sixteenth applicants are heterosexual individuals, and members of different-sex couples. For each applicant, their individual sexual orientation (lesbian, gay or heterosexual), or the sexual orientation of their couple relationship (same-sex or different-sex), determines whether or not they have access to marriage or civil partnership. The first to eighth applicants, as lesbian and gay individuals and members of same-sex couples, are denied access to marriage. The ninth to sixteenth applicants, as heterosexual individuals and members of different-sex couples, are denied access to civil partnership. It could be said that the "comparators" of the first to eighth applicants are the ninth to sixteenth applicants, and that the "comparators" of the ninth to sixteenth applicants are the first to eighth applicants. Each applicant would have been granted access to their choice of legal

institution, but for their individual sexual orientation, or the sexual orientation of their couple relationship.

2. Absence of objective and reasonable justifications for the differences in treatment

156. As the Court noted in *Schalk & Kopf*, at para. 96, "a difference in treatment of persons in relevantly similar situations ... is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised". Differences in treatment based on sexual orientation, like those based on race, religion or sex, can only be justified by "particularly serious reasons".[3] As the Court said in *Karner*:

> "41. In cases in which the margin of appreciation ... is narrow, as ... where there is a difference in treatment based on ... sexual orientation, the principle of proportionality does not merely require that the measure chosen is ... suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude ... persons living in a homosexual relationship ..."

157. The principles stated in *Schalk & Kopf* and *Karner* require the United Kingdom to identify the legitimate aims pursued by its twin exclusions of same-sex couples from marriage, and different-sex couples from civil partnership, and demonstrate why it is necessary, in order to achieve these aims, to "exclude ... persons living in a same-sex relationship", in the case of marriage, and to "exclude ... persons living in a different-sex relationship", in the case of civil partnership. The Court found no evidence of necessity in *Karner*, where the difference in treatment was between unmarried same-sex couples and unmarried different-sex couples. Applying the Court's *Karner* reasoning, how does excluding same-sex couples from access to marriage "protect" different-sex couples in the United Kingdom, or in any way improve their lives? The harm to same-sex couples who do not wish to register a civil partnership is clear. The benefit to different-sex couples is not. Similarly, how does excluding different-sex couples from access to civil partnership "protect" same-sex couples in the United Kingdom, or in any way improve their lives? The harm to different-sex couples who do not wish to marry is clear. The benefit to same-sex couples is not.

158. The applicants would respectfully suggest that there are no rational arguments against allowing same-sex couples to marry. The possible desires of the heterosexual majority to maintain a tradition that favours it, or to impose dominant religious beliefs on the lesbian and gay minority, cannot be valid justifications. There is no shortage of marriage licenses and no need to ration them. Tradition on its own cannot be a sufficient justification for a difference in treatment (cf. the long European traditions of discriminating against women and ethnic or religious minorities).

159. The only factual difference between different-sex and same-sex couples is that most different-sex couples are able to procreate without a third party's assistance,

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[3] *Schalk & Kopf* v. *Austria* (24 June 2010), para. 97; *Karner* v. *Austria* (24 July 2003), para. 37; *Mouta* v. *Portugal* (21 Dec. 1999), para. 36; *Smith & Grady* v. *UK* (27 Sept. 1999), para. 97; *Dudgeon* v. *UK* (22 Oct 1981), para 52.

whereas no same-sex couple is able to do so. But in *Christine Goodwin*, the Court rejected as justifications both Ms. Goodwin's lack of procreative capacity, and the fact that she was legally male and able to marry a woman:

> "98. ... Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to [marry] ...
>
> 101. ... [I]t is artificial to assert that post-operative transsexuals ... remain able to marry a person of their former opposite sex. The applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. ... [S]he may therefore claim that the very essence of her right to marry has been infringed."

Thus, in the case of two women, it is irrelevant that they cannot produce a child on their own, or that each woman could marry a man. The same is true for two men.

160. Most Council of Europe member states (such as Austria) that do not allow same-sex couples to marry, and offer them registered partnership as a substitute, do so because these states are not ready to allow these couples to adopt children jointly, or to grant lesbian couples access to donor insemination. But this is not the situation in the United Kingdom. The Adoption and Children Act 2002, ss. 49-51 and 144(4) (in force on 30 Dec. 2005), granted same-sex couples in England and Wales the right to adopt children jointly.[4] The original version of the Civil Partnership Act 2004 (in force on 5 Dec. 2005) granted the right to register a civil partnership and acquire all of the rights of married different-sex couples, except for certain rights related to medically assisted procreation. The Human Fertilisation and Embryology Act 2008, ss. 42-47 and 53-54 (all of these sections in force by 6 April 2010), granted full equality in relation to all forms of medically assisted procreation, including donor insemination.

161. Since the relevant provisions of the 2008 Act came into force, all significant differences between the substantive rights of same-sex civil partners and different-sex spouses have been eliminated.[5] It will be very difficult for the United Kingdom to

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[4] See also Adoption and Children (Scotland) Act 2007. In Northern Ireland, the right is probably now available because of *In re P*, [2008] UKHL 38 (18 June 2008) (unmarried different-sex couples must be allowed to adopt jointly), read with *Karner*.

[5] Under the Equality Act 2010, s. 83 (which gives effect to the exception in para. 18(1) of Schedule 9 to the Act), pension schemes are not required to count pensionable service before 5 Dec. 2005 towards survivor's pensions for civil partners. In practice, many schemes do count all pensionable service prior to this date voluntarily, while other rules require some schemes to count service from 6 April 1988. During a very long transitional period (from 5 Dec. 2005 until 5 Dec. 2045), some surviving civil partners may find that they receive a smaller survivor's pension than if they were a surviving spouse. Although existing United Kingdom anti-discrimination law permits this difference in treatment, European Union anti-discrimination law (Directive 2000/78/EC) almost certainly does not, since the judgment of the Court of Justice of the European Union in Case C-267/06, *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* (1 April 2008). Under *Maruko*, public and private sector pension schemes in the United Kingdom must provide the same pensions to surviving

explain why, after taking all the most politically sensitive decisions voluntarily, and having gone so far to ensure equality between the two institutions, the United Kingdom should be allowed to withhold access to the traditional, public, legal institution and word "marriage" from same-sex couples, and access to the new, public, legal institution and words "civil partnership" from different-sex couples. Given that marriage and civil partnership confer virtually identical rights and obligations, how can the United Kingdom justify maintaining two different public, legal institutions, with eligibility for membership based on sexual orientation?

3. Comparative case law on "separate but equal"

162. The United Kingdom could attempt to avoid the question of justification by asserting that, as a result of the recent equalisation of rights, the first to eighth applicants suffer no material harm by being excluded from marriage, and the ninth to sixteenth applicants suffer no material harm by being excluded from civil partnership. Being denied access to the institution offering their preference of name, related terminology ("husband", "wife" or "spouse" vs. "civil partner"), and history (with regard to the legal and social equality of women and men) is a trivial harm, perhaps so trivial that the applicants have not suffered "a significant disadvantage" within the meaning of Article 35(3)(b) of the Convention.

163. The following survey of decisions of eight appellate courts in three democratic societies (Canada, the United States, and South Africa) is intended to assist the Court: (i) in deciding whether there is harm in segregating same-sex and different-sex couples into "separate but equal" legal institutions, with different names; and (ii) in deciding whether, in the particular circumstances of this case, the Court should find that excluding same-sex couples from marriage is discrimination based on sexual orientation, violating the Convention. As will be seen below, all eight courts concluded that "separate is not equal", and that the exclusion of same-sex couples from marriage was discrimination based on sexual orientation, contrary to the constitution it was their duty to interpret, even if same-sex couples already had access to all of the rights of marriage through an institution with another name.

164. The first appellate court to order the immediate issuance of marriage licenses to same-sex couples was the Ontario Court of Appeal in *Halpern* v. *Canada (Attorney General)* (10 June 2003).[6] The Ontario Court observed that existing legislation equalising the rights and obligations of unmarried different-sex and unmarried same-sex couples, and bringing them very close to those of married different-sex couples, was not sufficient:

> "106. ... [Section] 15(1) [of the Canadian Charter of Rights and Freedoms] guarantees more than equal access to economic benefits. One must also consider whether persons ... have been excluded from fundamental societal institutions. ...

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civil partners as to surviving spouses, and years of pensionable service must be counted from the same date, even if this date is many years before the entry into force of the Civil Partnership Act 2004 (5 Dec. 2005). In *Maruko*, the deceased registered life partner joined his pension scheme in 1959, and all of his pensionable service from that date had to count, even though the German law on registered life partnerships did not enter into force until 2001.

[6] See http://www.ontariocourts.on.ca/decisions/2003/june/halpernC39172.htm (3-0).

> 107. ... [S]ame-sex couples are excluded from a fundamental societal institution – marriage. The societal significance of marriage, and [its non-economic] benefits ... available only to married persons, cannot be overlooked. ... Exclusion perpetuates the view that same-sex relationships are less worthy of recognition than opposite-sex relationships ... [and] offends the dignity of persons in same-sex relationships."

165. As in *Christine Goodwin*, the Ontario Court rejected the justification that legal marriage exists to promote procreation (without the assistance of a third party):

> "121. We fail to see how the encouragement of procreation and childrearing [justifies] maintaining marriage as an exclusively heterosexual institution. Heterosexual married couples will not stop having ... children because same-sex couples are permitted to marry. ...
>
> 130. ... The law is both overinclusive and underinclusive. ... [M]any opposite-sex couples that marry are unable to have children or choose not to do so. Simultaneously, the law is underinclusive because it excludes same-sex couples that have and raise children."

166. The Ontario Court dismissed as speculative any threat to the institution of marriage:

> "129. ... It is not disputed that marriage has been a stabilizing and effective societal institution. The [applicants] are not seeking to abolish the institution of marriage; they are seeking access to it. ...
>
> 134. ... [S]ame-sex couples and their children should be able to benefit from the same stabilizing institution as their opposite-sex counterparts."

167. The Ontario Court therefore made the following historic order on 10 June 2003:

> "156. ... [W]e: (1) declare the existing common law [case law] definition of marriage to be invalid to the extent that it refers to 'one man and one woman'; (2) reformulate the common law definition of marriage as 'the voluntary union for life of two persons to the exclusion of all others'; (3) order the declaration of invalidity in (1) and the reformulated definition in (2) to have immediate effect; (4) order the ... City of Toronto to issue marriage licenses to the [applicants] ..."

168. After finding unconstitutional discrimination in *EGALE Canada Inc.* v. *Canada (Attorney General)* (1 May 2003),[7] the British Columbia Court of Appeal concluded that the only suitable remedy was to allow same-sex couples to marry (from 12 July 2004, to allow time for amendments to legislation):

> "156. ... [T]his is the only road to true equality for same-sex couples. Any other form of recognition of same-sex relationships, including the parallel institution of [registered domestic partnerships], falls short of true equality. This Court should not be asked to grant a remedy which makes same-

[7] See http://www.courts.gov.bc.ca/Jdb-txt/CA/03/02/2003BCCA0251.htm (3-0).

> sex couples 'almost equal', or to leave it to governments to choose amongst less-than-equal solutions." [emphasis added]

On 8 July 2003, the British Columbia Court lifted the suspension of its remedy and allowed same-sex couples to marry in British Columbia that day, because of the Ontario Court of Appeal's judgment of 10 June 2003, and the Government of Canada's decision not to appeal the Ontario Court's judgment.[8] The rulings of the Ontario and British Columbia Courts were later extended to all ten provinces and three territories of Canada by federal legislation.[9]

169. The two Canadian appellate courts helped inspire the Supreme Judicial Court of Massachusetts (USA) to conclude on 18 Nov. 2003, in *Goodridge* v. *Department of Public Health*, that the Massachusetts Constitution requires equal access to marriage for same-sex couples,[10] and on 3 Feb. 2004 that civil unions are not an adequate substitute:[11]

> "[A] person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. ...
>
> Without ... the right to choose to marry--one is excluded from the full range of human experience and denied full protection of the laws for one's 'avowed commitment to an intimate and lasting human relationship.' ...
>
> For decades, indeed centuries, in much of this country (including Massachusetts) no lawful marriage was possible between white and black Americans. ... In this case, as in *Perez* [Supreme Court of California, 1948] and *Loving* [Supreme Court of the United States, 1967], a statute deprives individuals of access to ... the institution of marriage--because of a single trait: skin color in *Perez* and *Loving*, sexual orientation here. ...
>
> Fertility is not a condition of marriage, nor is it grounds for divorce. ... People who cannot stir from their deathbed may marry. ... [I]t is the exclusive and permanent commitment of the marriage partners to one another, not [having] children, that is the sine qua non of civil marriage. ...
>
> [T]he marriage restriction ... confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect. ... [It] is rooted in persistent prejudices against [homosexual] persons ...
>
> We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others. ... We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts

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[8] Robert Wintemute, "Sexual Orientation and the Charter", (2004) 49 *McGill Law Journal* 1143, http://lawjournal.mcgill.ca/documents/4winte.pdf.
[9] Civil Marriage Act, Statutes of Canada 2005, chapter 33.
[10] 798 N.E.2d 941 (4-3).
[11] *In re the Opinions of the Justices to the Senate*, 802 N.E.2d 565 (4-3).

> Constitution. ... Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion. ..."

170. This stay was intended to allow the Massachusetts legislature to make consequential amendments to legislation (eg, specifying that two brothers or two sisters may not marry each other), not to propose civil unions as a substitute for civil marriage. The Massachusetts Court made this clear on 3 Feb. 2004 in its advisory opinion to the Senate:

> "... The history of our nation has demonstrated that separate is seldom, if ever, equal. ... The bill's absolute prohibition of the use of the word 'marriage' by 'spouses' who are the same sex is more than semantic. The dissimilitude between the terms 'civil marriage' and 'civil union' ... reflects a demonstrable assigning of same-sex ... couples to second-class status. ... The bill would have the effect of maintaining and fostering a stigma of exclusion that the [Massachusetts] Constitution prohibits. ...
>
> [T]he pending [civil unions] bill palliates some of the financial and other concrete manifestations of the discrimination at issue in *Goodridge*. But the question ... in *Goodridge* was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens ... and withhold from that class the right to participate in the institution of civil marriage, along with its ... tangible and intangible ... benefits ..." [emphasis added]

171. On 30 Nov. 2004, South Africa's Supreme Court of Appeal agreed with the Canadian and Massachusetts courts, and restated the common-law definition of marriage as: "the union between two persons to the exclusion of all others for life."[12] Its reasoning was then followed by the Constitutional Court of South Africa in *Fourie* (1 December 2005):[13]

> "71. ... [the exclusion] represent[s] a harsh ... statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated ... as failed or lapsed human beings who do not fit into normal society, and ... do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples."

172. The Constitutional Court gave the South African Parliament 12 months to provide a remedy for the constitutional violation, but made it virtually impossible to propose civil unions as a substitute for marriage:

> "81. ... Same-sex unions continue ... to be treated with the same degree of repudiation that the state until two decades ago reserved for interracial unions ...

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[12] *Fourie* v. *Minister of Home Affairs* (30 Nov. 2004), Case No. 232/2003.

[13] *Minister of Home Affairs* v. *Fourie* and *Lesbian and Gay Equality Project* v. *Minister of Home Affairs*, Cases CCT 60/04, CCT 10/05, http://www.constitutionalcourt.org.za (9-0).

> The negative impact is not only symbolic but also practical, and each aspect has to be responded to. ... [I]t would not be sufficient merely to deal with all the practical consequences of exclusion from marriage. It would also have to accord to same-sex couples a public and private status equal to that which heterosexual couples achieve from being married." [emphasis added]

173. In granting Parliament 12 months to provide a remedy, the majority of the Constitutional Court (8 of 9 judges; one judge would have granted an immediate remedy) intended to allow Parliament to lay a stronger foundation for the final stage in the legal emancipation of lesbian and gay persons in South Africa. The majority did not intend to allow Parliament to consider civil unions as a substitute for civil marriage for same-sex couples. The main choice for Parliament was whether to allow same-sex couples to marry through a simple amendment to the existing Marriage Act (see [140]), or through a new Reformed Marriage Act, which would include a variety of reforms unrelated to the question of equality for same-sex couples (see [144])**:**

> "[147] ... The one unshakeable criterion is that the present exclusion of same-sex couples from enjoying the status[,] entitlements [and] responsibilities ... accorded to heterosexual couples by ... the Marriage Act, is constitutionally unsustainable. The defect must be remedied ...
>
> [150] ,,, Parliament ... [must] avoid a remedy that ... would provide equal protection, but ... in a manner that ... would be [likely] to reproduce new forms of marginalisation. Historically the concept of 'separate but equal' served as a threadbare cloak for covering distaste for[,] or repudiation by those in power of[,] the group subjected to segregation. ... [emphasis added]
>
> [153] ... [W]hatever legislative remedy is chosen must be as generous and accepting towards same-sex couples as it is to heterosexual couples, both in terms of the intangibles as well as the tangibles involved. In a context of ... deep past discrimination and continuing homophobia, appropriate sensitivity must be shown to providing a remedy that is truly and manifestly respectful of the dignity of same-sex couples.
>
> [161] ... [I]t is necessary that the [Order] ... make it clear that if Parliament fails to cure the defect within twelve months, the words 'or spouse' will automatically be read into ... the Marriage Act. In this event the Marriage Act will, without more, become the legal vehicle to enable same-sex couples to achieve the status[,] benefits [and] responsibilities which it presently makes available to heterosexual couples."

174. The South African Parliament correctly concluded that it must permit same-sex couples to marry. It passed the Civil Union Act 2006, which allows any couple, same-sex or different-sex, to enter into a "civil union" and choose to have it be known as a "marriage", or as a "civil partnership" (s. 11(1)).

175. The sixth appellate court to rule was the Supreme Court of California (USA) in *In re Marriage Cases* (15 May 2008),[14] almost sixty years after *Perez* v. *Sharp* (1

[14] See http://www.courtinfo.ca.gov/courts/supreme/highprofile/documents/S147999.pdf (4-3).

Oct. 1948), in which it struck down a law banning "the marriage of a white person with a Negro, mulatto, Mongolian or member of the Malay race".[15] The Court considered the legislation excluding same-sex couples from legal marriage as both: (a) a prima facie breach of their fundamental right to marry, an aspect of the right of privacy (pp. 49, 79); and (b) a prima facie breach of their right to equal protection based on sexual orientation, which is a "suspect classification" (pp. 97-98, 101, 106).

176. For these two reasons, the Court subjected the legislation to "strict scrutiny" and found (pp. 115-121) that it was not "necessary" to further a "compelling constitutional interest", even though same-sex couples could acquire nearly all the rights and obligations attached to marriage by California law through a "separate but equal" institution known as "domestic partnership":

> "... [I]f we have learned anything from the significant evolution in the prevailing societal views and official policies toward members of minority races and toward women ..., it is that even the most familiar and generally accepted of social practices and traditions often mask an unfairness and inequality that ... is not recognized or appreciated by those not directly harmed by those practices or traditions [in this case, heterosexual persons].
>
> ... [T]he [legislation] clearly is not necessary to preserve the rights and benefits of marriage currently enjoyed by opposite-sex couples. ... 'There are enough marriage licenses to go around for everyone.' ... [P]ermitting same-sex couples access to the designation of marriage will not alter the substantive nature of the legal institution ... [or] impinge upon ... religious freedom ... no religious officiant will be required to solemnize a marriage in contravention of his or her religious beliefs.
>
> ... [Existing laws] ... likely will be viewed as an official statement that the family relationship of same-sex couples is not of ... equal dignity to the family relationship of opposite-sex couples. ... [B]ecause of the historic disparagement of gay persons, the retention of a distinction in nomenclature by which the term 'marriage' is withheld ... is all the more likely to cause [a] parallel institution ... for same-sex couples ['domestic partnership'] to be considered a mark of second-class citizenship. [emphasis added]
>
> ... [W]e determine that the [wording in the Family Code] limiting ... marriage to a union 'between a man and a woman' is unconstitutional and must be stricken ..., and that the [rest] must be understood as making ... marriage available both to opposite-sex and same-sex couples."

177. The Supreme Court of California's decision allowed same-sex couples to marry in California from 16 June 2008 until 4 November 2008, when 52% of voters in a referendum supported an amendment to the California Constitution (Proposition 8).[16] Proposition 8 converted the rule denying access to legal marriage to same-sex couples from a sub-constitutional rule (adopted after a referendum on Proposition 22 in 2000

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[15] *Perez*, 32 Cal. 2d 711, paved the way for *Loving* v. *Virginia* (12 June 1967), 388 U.S. 1. See http://scholar.google.co.uk/scholar_case?case=16628726707857061522&hl=en&as_sdt=2&as_vis=1&oi=scholarr.

[16] Art. I, Sec. 7.5: "Only marriage between a man and a woman is valid or recognized in California."

and struck down by the Court in 2008) to a constitutional rule that can only be repealed after a second referendum, as the Court confirmed in *Strauss* v. *Horton* (26 May 2009), while maintaining the validity of the civil marriages of 18,000 same-sex couples who married before 4 November 2008.[17] Repeal is likely to happen by November 2012, because support for the exclusion of same-sex couples from civil marriage fell from 61% in the 2000 referendum on Proposition 22 to 52% in the 2008 referendum on Proposition 8.[18] Proposition 8 can therefore be considered a temporary suspension of the effect of the Court's decision, which merely illustrates the fact that the California Constitution is too easy to amend. It is also possible that Proposition 8 will be struck down under the federal Constitution, before Nov. 2012.[19]

178. The seventh appellate court to rule was the Supreme Court of Connecticut (USA) in *Kerrigan* v. *Commissioner of Public Health* (10 Oct. 2008).[20] As in California, same-sex couples in Connecticut had access to all or nearly all the rights and obligations attached to marriage through a "separate but equal" institution known as "civil union". Nonetheless, the Connecticut Court held**:**

> "[p. 11] In view of the exalted status of marriage in our society, it is hardly surprising that civil unions are perceived to be inferior ... Although [they] ... embody the same legal rights ..., they are by no means 'equal'. ... [Marriage] is an institution of transcendent historical, cultural and social significance, whereas [civil union] most surely is not. Even though ... [this] differential treatment ... may be characterized as symbolic or intangible ... it is no less real than more tangible forms of discrimination, at least when ... [it] singles out a group that historically has been the object of scorn, intolerance, ridicule or worse. ... [emphasis added]
>
> [p. 64] Tradition alone never can provide sufficient cause to discriminate against a protected class, ...
>
> [p. 66] ... [W]e do not exceed our authority by mandating equal treatment for gay persons; ... any other action would be an abdication of our responsibility.
>
> [p. 67] ... Interpreting our state constitutional provisions in accordance with firmly established equal protection principles leads inevitably to the conclusion that gay persons are entitled to marry the otherwise qualified same sex partner of their choice. To decide otherwise would require us to apply one set of constitutional principles to gay persons and another to all others. The guarantee of equal protection under the law, and our obligation to uphold that command, forbids us from doing so. ...
>
> [p. 5] We conclude that, in light of the history of pernicious discrimination faced by gay men and lesbians, and because the institution of marriage carries with it a status and significance that the newly created [institution] of civil

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[17] See http://www.courtinfo.ca.gov/opinions/archive/S168047.PDF (pp. 12-13, 135) (6-1).

[18] See http://primary2000.sos.ca.gov/returns/prop/00.htm; http://www.sos.ca.gov/elections/sov/2008_general/7_votes_for_against.pdf.

[19] See *Perry* v. *Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (appeal heard by U.S. Court of Appeals for the Ninth Circuit on 6 Dec. 2010).

[20] See http://www.jud.state.ct.us/external/supapp/archiveAROsup08.htm (4-3; released 28 Oct. 2009).

> unions does not embody, the segregation of heterosexual and homosexual couples into separate institutions constitutes a cognizable harm [emphasis added]. We also conclude that ... our state scheme discriminates on the basis of sexual orientation, ... and ... [that] the state has failed to provide sufficient justification for excluding same sex couples from the institution of marriage."

179. The eighth appellate court to rule was the Supreme Court of Iowa (USA) in *Varnum* v. *Brien* (3 April 2009). Unlike the 4-3 majority decisions in Massachusetts, California and Connecticut, the Iowa decision was unanimous (7-0), like those in Ontario (3-0), British Columbia (3-0) and South Africa (9-0)**:**

> "[p. 15] Our responsibility ... is to protect constitutional rights of individuals ..., even when the rights have not yet been broadly accepted, were at one time unimagined, or challenge a deeply ingrained practice or law viewed to be impervious to the passage of time.
>
> [pp. 30-31] It is true the marriage statute does not expressly prohibit gay and lesbian persons from marrying; it does, however, require that if they marry, it must be to someone of the opposite sex. ... [C]ivil marriage with a person of the opposite sex is as unappealing to a gay or lesbian person as civil marriage with a person of the same sex is to a heterosexual. Thus, the right of a gay or lesbian person ... to enter into a civil marriage only with a person of the opposite sex is no right at all. ... [G]ay or lesbian individuals cannot simultaneously fulfill their deeply felt need for a committed personal relationship, as influenced by their sexual orientation, and gain the civil status and attendant benefits granted by the [marriage] statute. ... By purposefully placing civil marriage outside the realistic reach of gay and lesbian individuals, the ban on same-sex civil marriages differentiates implicitly on the basis of sexual orientation.
>
> [pp. 64-67] ... [M]uch of society rejects same-sex marriage due to sincere ... religious belief. Yet, ... other equally sincere ... people ... have strong religious views that yield the opposite conclusion. ... Our constitution does not permit any branch of government to resolve these types of religious debates ... [W]e proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil [in the sense of "legal"] marriage ... State government can have no religious views, either directly or indirectly, expressed through its legislation. ... This ... is the essence of the separation of church and state. ... [C]ivil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals.... [O]ur constitutional principles ... require that the state recognize both opposite-sex and same-sex civil marriage. Religious doctrine and views contrary to this principle of law are unaffected, and people can continue to associate with the religion that best reflects their views. A religious denomination can still define marriage as a union between a man and a woman ... The only difference is [that] *civil* marriage will now take on a new meaning that reflects a more complete understanding of equal protection of the law. ..."

180. After considering the government's justifications, the Iowa Court concluded:

> "[p. 67] J. Constitutional Infirmity**.** We are firmly convinced the exclusion of gay and lesbian people from the institution of civil marriage does not substantially further any important governmental objective. The legislature has excluded a historically disfavored class of persons from a supremely important civil institution without a constitutionally sufficient justification. ... We have a constitutional duty to ensure equal protection of the law. Faithfulness to that duty requires us to hold [that] Iowa's marriage statute ... violates the Iowa Constitution. To decide otherwise would be an abdication of our constitutional duty. If gay and lesbian people must submit to different treatment without an exceedingly persuasive justification, they are deprived of the benefits of the principle of equal protection upon which the rule of law is founded. ..."

181. As for the option of creating a new, "separate but equal" institution for same-sex couples (eg, civil union rather than civil marriage), the Iowa Court said:

> "[p. 68] A new distinction based on sexual orientation would be equally suspect and difficult to square with the fundamental principles of equal protection embodied in our constitution. This record [the evidence submitted by the parties], our independent research, and the appropriate equal protection analysis do not suggest the existence of a justification for such a legislative classification ... Consequently, the language in Iowa Code section 595.2 limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage."

182. To summarise the impact of the decisions of these eight appellate courts, same-sex couples are able to marry in Massachusetts, Connecticut and Iowa (and were able to marry in California for over four months in 2008) solely because of appellate court decisions. In Canada (including Ontario and British Columbia) and South Africa, it was a combination of appellate court decisions and legislative action that permitted same-sex couples to marry throughout both countries. In the Netherlands, Belgium, Spain, Norway, Sweden, Portugal and Iceland, as well as New Hampshire, Vermont and the District of Columbia in the USA, the Federal District of Mexico, and Argentina, same-sex couples were granted equal access to marriage by the legislature.

183. In Europe, although no national court has yet interpreted its national constitution as prohibiting the exclusion of same-sex couples from marriage, on 9 July 2009, 2 of 5 judges of the *Tribunal Constitucional* in Portugal dissented from the majority's decision to uphold the exclusion, despite an express prohibition of sexual orientation discrimination (Art. 13(2) of Portugal's Constitution).[21] On 2 July 2009, the Constitutional Court of Slovenia held in *Blažic & Kern v. Slovenia* (U-I-425/06-10) that same-sex registered partners must be granted the same inheritance rights as different-sex spouses. And on 7 July 2009, the German Federal Constitutional Court held (1 BvR 1164/07) that same-sex registered partners and different-sex spouses must be granted the same survivor's pensions.

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[21] See *Acórdão* 359/09 (9 July 2009), http://w3.tribunalconstitucional.pt/acordaos/acordaos09/301-400/35909.htm (*Declaração de Voto*: Judges Gil Galvão and Maria João Antunes).

4. "European consensus": The Court should supplement the "minimum standard" with an "obligation of consistency"

184. It is clear that the United Kingdom has no justification for maintaining the current system, other than tradition. and a desire to avoid a confrontation with religious opponents of any form of legal marriage for same-sex couples. But does the absence of "European consensus" on the need to open up marriage to same-sex couples (only 7 of 47 Council of Europe member states currently permit them to marry) provide the United Kingdom with a complete defence to this Application, and prevent the Court from declaring that the current system is discriminatory?

185. The applicants respectfully submit that the state of "European consensus" is relevant to identifying the "minimum standard" for all 47 Council of Europe member states. As of 2 February 2011, the "minimum standard" with regard to legal recognition of same-sex couples is that no recognition is required, unless a member state voluntarily decides to grant rights to, and impose obligations on, unmarried different-sex couples. If a member state does so, then the Court's judgments in *Karner, Kozak* v. *Poland* (2 March 2010), *P.B. & J.S.* v. *Austria* (22 July 2010), and *J.M.* v. *United Kingdom* (28 Sept. 2010) require that the same rights be granted, and the same obligations imposed on, unmarried same-sex couples. In *Schalk & Kopf*, the three dissenting judges were willing to find an obligation under Article 14, combined with Article 8, to introduce a form of registered partnership law for same-sex couples, which Austria breached by failing to introduce such a law before 1 Jan. 2010. The majority of the Court found that Austria had no obligation to act earlier than it did, but noted at para. 103: "Given that at present it is open to the applicants to enter into a registered partnership, the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if it still obtained today."

186. In light of *Schalk & Kopf*, the Court could, in a future case from a member state with no law permitting same-sex couples to register their relationships, raise the "minimum standard" from "no recognition unless unmarried different-sex couples are recognised" to the standard proposed by the three dissenting judges in *Schalk & Kopf*:

> "9. Today it is widely recognised and also accepted by society that same-sex couples enter into stable relationships. Any absence of a legal framework offering them, at least to a certain extent, the same rights or benefits attached to marriage ... would need robust justification, especially taking into account the growing trend in Europe to offer some means of qualifying for such rights or benefits."

However, it is unlikely that the Court will, in the next three years, raise the "minimum standard" to one requiring access to marriage for same-sex couples.

187. Is this the end of the matter? The applicants would argue that it is not. The Court strives to harmonise its interpretation of the Convention with developments in European Union law (see, eg, *D.H.* v. *Czech Republic*, 13 Nov. 2007, with regard to indirect discrimination, and *Schalk & Kopf* with regard to the right to marry). The Court should therefore consider supplementing the "minimum standard" with an "obligation of consistency", by adopting the approach of the Court of Justice of the

European Union ("CJEU") in Case C-267/06, *Tadao Maruko* v. *Versorgungsanstalt der deutschen Bühnen* (1 April 2008).

188. In areas falling within the scope of EU law, the "minimum standard" with regard to recognition of same-sex couples is the same as under the Convention in *Karner* ("no recognition unless unmarried different-sex couples are recognised"), because of the CJEU's respect for the Court's case law. Yet, in *Maruko*, at para. 73, the CJEU interpreted Council Directive 2000/78/EC, which prohibits discrimination based on sexual orientation in all aspects of employment (including pensions and other forms of "pay"), as "preclud[ing] legislation ... under which, after the death of his [same-sex registered] life partner, the surviving [same-sex] partner does not receive a survivor's benefit equivalent to that granted to a surviving [different-sex] spouse, even though, under national law, life partnership places persons of the same sex in a situation comparable to that of spouses so far as concerns that survivor's benefit". The CJEU reached this conclusion despite Recital 22 of the preamble to the Directive ("This Directive is without prejudice to national laws on marital status and the benefits dependent thereon."):

> "59. Admittedly, civil status and the benefits flowing therefrom are matters which fall within the competence of the Member States and Community law does not detract from that competence. However, it must be recalled that in the exercise of that competence the Member States must comply with Community law and, in particular, with the provisions relating to the principle of non-discrimination ...
>
> 60 Since [the] survivor's benefit ... at issue ... has been identified as 'pay' ... and falls within the scope of Directive 2000/78, ... Recital 22 ... cannot affect the application of the Directive."

189. In effect, the CJEU supplemented the "minimum standard" by imposing an "obligation of consistency" on Germany. The CJEU ruled that it was up to Germany, in the exercise of its competence over civil status and other aspects of family law, to decide whether or not to have a registered partnership law for same-sex couples, and how many rights to grant registered same-sex partners. But once Germany decided voluntarily to pass a registered partnership law, and to put registered same-sex partners "in a situation comparable to that of spouses", Germany could not exclude them from survivor's benefits under employment-related pension plans that fell within the scope of EU anti-discrimination law. It is the voluntary decision to put registered same-sex partners "in a situation comparable to spouses" that triggers the "obligation of consistency". In areas governed by EU anti-discrimination law (including employment-related pensions), Germany may not depart from its voluntary decision to treat registered partnerships as equivalent to marriage, because treating registered same-sex partners less favourably than different-sex spouses (in these circumstances) would be direct discrimination based on sexual orientation, contrary to Directive 2000/78. In Great Britain, s. 23(3) of the Equality Act 2010 contains a rule that gives effect to *Maruko*:

> "If the protected characteristic is sexual orientation, the fact that one person ... is a civil partner while another is married is not a material difference between the circumstances relating to each case [when a

> comparison is made to determine whether there is direct discrimination]."

190. The "obligation of consistency" in *Maruko* was perhaps inspired by Directive 2004/38/EC of the European Parliament and of the Council. Article 2(2)(b) of the Directive defines "family member" as including "the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage ...". The "minimum standard" under Directive 2004/38/EC is implicitly that of *Karner*. An EU member state is not required to recognise same-sex couples for the purpose of residence permits.[22] But if an EU member state voluntarily grants residence permits to unmarried different-sex partners of EU citizens, then the same must apply to unmarried same-sex partners. In addition to the "minimum standard", Directive 2004/38/EC imposes an "obligation of consistency". If a member state voluntarily decides to adopt a registered partnership law, and to "treat[] registered partnerships as equivalent to marriage" (which means, implicitly, in most areas of national law), then it must recognise the registered partners (different-sex or same-sex) of nationals of other EU member states, for the purpose of granting residence permits to the family members of EU citizens. In the area of immigration, the host member state may not depart from its voluntary decision to treat registered partnerships as equivalent to marriage, by failing to treat registered partners in the same way as spouses.

191. It is true that the "obligation of consistency" in *Maruko* did not extend so far as to require Germany to grant access to marriage to same-sex couples. However, the competence of EU member states over capacity to marry, and other aspects of family law, makes it extremely unlikely that the CJEU would rule on a particular exclusion from the right to marry. No such constraint applies to the European Court of Human Rights, which is able to review national rules on capacity to marry under Articles 12 and 14 of the Convention. Thus, the Court found in *Christine Goodwin* that the United Kingdom could no longer exclude post-operative transsexual individuals from the right to marry a person of the sex opposite to their reassigned sex. Because the CJEU did not see itself as having jurisdiction over national law on capacity to marry, it waited until after the Court's *Goodwin* judgment to decide Case C-117/01, *K.B.* v. *National Health Service Pensions Agency* (7 Jan. 2004), in which a female employee's transsexual male partner was ineligible for a survivor's pension, because his legal sex was female, making the couple legally same-sex and unable to marry.

192. In view of its clear authority to review national legislation on access to marriage, there is no reason why the Court should not impose an "obligation of consistency", where appropriate, with regard to access to marriage. The "obligation of consistency", which the applicants urge the Court to impose on the United Kingdom, is supported by the consensus among the relevant group of Council of Europe member states, ie, those states in which a registered partnership law has been passed voluntarily, registered partners have been granted the right to adopt children jointly, and lesbian registered partners have been granted access to donor

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[22] The CJEU has yet to interpret the obligation to "facilitate entry and residence" in Art. 3(3) of the Directive.

insemination.[23] Among the six countries in this group (Denmark, Iceland, the Netherlands, Norway, Sweden, and the United Kingdom), four out of six (all but Denmark and the United Kingdom) have taken the final step and allowed same-sex couples to marry. Three other states have taken the final step, even though they had not yet created a national registered partnership law fully equivalent to marriage (in the cases of Belgium, Spain and Portugal), or had not yet resolved the questions of access to joint adoption or donor insemination (in the cases of Belgium and Portugal).

193. Many examples could be cited in which the Court's "minimum standard" is, in fact, that no action is required, and that member states enjoy a wide margin of appreciation. However, if a member state decides voluntarily to grant a certain right or benefit, then an "obligation of consistency" triggers a higher standard. The *Karner* requirement to treat unmarried same-sex couples in the same way as unmarried different-sex couples could be viewed as an "obligation of consistency", triggered by a voluntary decision to recognise unmarried different-sex couples. The *E.B.* v. *France* requirement, not to discriminate against lesbian and gay applicants for adoption, only applies to member states that have decided voluntarily to allow unmarried individuals to adopt children. The *Gaygusuz* prohibition of nationality discrimination, in relation to certain social security benefits, only applies if the member state voluntarily decides to provide the benefits to its own nationals. As the Court said in *Abdulaziz* v. *United Kingdom* (25 April 1985):

> "82. There remains a more general argument ... that the United Kingdom was not in violation of Article 14 ... by reason of the fact that it acted more generously in some respects ... than the Convention required.
>
> The Court cannot accept this argument. ... The notion of discrimination within the meaning of Article 14 includes in general cases where a person or group is treated, without proper justification, less favourably than another, <u>even though the more favourable treatment is not called for by the Convention</u>." [emphasis added]

194. In *S.H. & Others* v. *Austria* (1 April 2010; Grand Chamber hearing on 23 Feb. 2011), the Chamber suggested that the "minimum standard" under the Convention permits a member state to prohibit all forms of medically assisted procreation, but that certain "obligations of consistency" arise if a member state voluntarily decides to permit medically assisted procreation. The Chamber concluded that Article 14, combined with Article 8, prevents Austria from deciding to allow medically assisted procreation, but then deciding to prohibit particular techniques, ie, the use of donated sperm for in vitro fertilisation, as opposed to insemination, and the use of donated eggs:

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[23] France is not one of these countries, because of the substantial differences between the rights attached to marriage and those attached to a *pacte civil de solidarité*, e.g., in the areas of survivor's pensions, and access to adoption or donor insemination. See *Manenc* v. *France* (Application No. 66686/09) (decision of 21 Sept. 2010, inadmissible); *Gas & Dubois* v. *France* (Application No. 25951/07) (decision of 31 Aug. 2010, admissible; Grand Chamber hearing on 12 April 2011); *Chapin & Charpentier* v. *France* (Application No. 40183/07) (no decision or judgment yet).

> "74. ... [C]oncerns based on moral considerations or on social acceptability are not in themselves sufficient reasons for a complete ban on a specific artificial procreation technique such as ova donation. Such reasons may be particularly weighty at the stage of deciding whether or not to allow artificial procreation in general, and the Court would emphasise that there is no obligation on a State to enact legislation of the kind and to allow artificial procreation. However, once the decision has been taken to allow artificial procreation and notwithstanding the wide margin of appreciation afforded to the Contracting States, the legal framework devised for this purpose must be shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention."

195. Applying the Chamber's reasoning in *S.H. & Others*, the Court could conclude that the United Kingdom's legal framework relating to marriage and civil partnership is, "notwithstanding the wide margin of appreciation afforded to the Contracting States", not "shaped in a coherent manner which allows the different legitimate interests involved to be taken into account adequately and in accordance with the obligations deriving from the Convention". The incoherence of the legal framework is evident in the lack of any rational justification for using sexual orientation as the criterion for deciding which couples may marry, and which couples may register a civil partnership. In the particular circumstances of the United Kingdom's legal framework, the Court should impose an "obligation of consistency" on the United Kingdom, which would require it to remove the criterion of sexual orientation from its legislation on marriage and civil partnership.

D. Alternative analysis: Violations of Articles 12 and 8 taken alone

196. If the Court prefers to examine the case under Articles 12 and 8, taken alone, the applicants respectfully submit that, for all of the reasons mentioned above, the exclusion of the first to eighth applicants from marriage violates Article 12, and the exclusion of the ninth to sixteenth applicants from civil partnership violates Article 8.

E. Conclusion

197. A concern with avoiding discrimination underlies, not only the eight appellate court decisions discussed above, which required that same-sex couples be allowed to marry, but also voluntary national legislation opening up marriage to same-sex couples. This was clear in the speech of Prime Minister Zapatero to the Spanish Parliament in 2005:

> "We are not the first, but I can assure you that we will not be the last. Behind us will come many other countries, propelled ... by two unstoppable forces: liberty and equality. This is a small change to the legal text ... which will bring an immense change to the lives of thousands of our compatriots. We are not legislating ... for people who are remote or foreign, we are increasing opportunities for happiness for our neighbours, for our work colleagues, for our friends, for our relatives and, at the same time, we are building a more decent country, because a decent society is one that does not humiliate its members. ... [T]his law will not cause any harm, ... its only consequence will be to prevent useless suffering of human beings ... With [its] approval ... our

> country takes one more step on the road of liberty and tolerance that began with the transition to democracy."[24]

198. The sixteen applicants all experienced humiliation, of the kind mentioned by Prime Minister Zapatero, when they went to register offices in England and asked to be admitted to their choice of a public, legal institution. All of the applicants were told, in effect, by local government officials applying United Kingdom legislation, that they were of "the wrong sexual orientation". The humiliation was worse in the case of the first to eighth applicants, given the long history of discrimination against same-sex couples in the United Kingdom, and all Council of Europe member states.

199. Looking back only 150 years, to 2 February 1861, two men caught engaging in sexual activity in England or Wales could have been executed by hanging. The death penalty for the "abominable Crime of Buggery" was only reduced to life imprisonment by s. 61 of the Offences against the Person Act 1861, when it entered into force on 1 Nov. 1861. Sexual activity between men only ceased to be a criminal offence after the passage of the Sexual Offences Act 1967. From 1988 to 2003, s. 2A of the Local Government Act 1986 (inserted by s. 28 of the Local Government Act 1988) prohibited local authorities from "promot[ing] the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship". With the passage of the Civil Partnership Act 2004, two men or two women living together as a couple went, in the eyes of United Kingdom law, from living in a "pretended family relationship" to living "as if they were civil partners".

200. The applicants respectfully urge the Court to impose an "obligation of consistency" on the United Kingdom, and require the United Kingdom to take the final, small step in the 150-year-long legal evolution of the treatment of same-sex couples, from "criminals deserving the death penalty" to "criminals" to "pretended families" to "civil partners", but not "spouses", by finding that existing legislation on access to marriage and civil partnership discriminates on the ground of sexual orientation, and therefore violates Article 14 combined with Article 12 (right to marry) and Article 8 (respect for private life), or Articles 12 and 8 taken alone.

IV. STATEMENT RELATIVE TO ARTICLE 35 § 1 OF THE CONVENTION

201. The eight refusals to allow the sixteen applicants to give notice of their intention to marry, or to register a civil partnership, were based on primary legislation of the United Kingdom Parliament:

> Matrimonial Causes Act 1973, s. 11(c): "A marriage ... shall be void [if] ... the parties are not respectively male and female ..."
>
> Civil Partnership Act 2004, s. 3(1): "Two people are not eligible to register as civil partners ... if they are not of the same sex ..."

202. In the case of primary legislation that is incompatible with rights contained in the European Convention on Human Rights and cannot, because the incompatibility

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[24] See *Cortes Generales*, *Diario de Sesiones del Congreso de los Diputados* (30 June 2005), No. 103, p. 5228.

is found in clear wording that represents a "fundamental feature" of the legislation, be interpreted in a way that would avoid the incompatibility, the only remedy available to the applicants is a "declaration of incompatibility" under s. 4 of the Human Rights Act 1998. Under s. 4(6) of the Act:

> "A declaration under this section ('a declaration of incompatibility') -
>
> (a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and
>
> (b) is not binding on the parties to the proceedings in which it is made."

203. After a "declaration of incompatibility", neither the Human Rights Act 1998 nor any other provision of United Kingdom law requires the United Kingdom Government to take any action to remove the incompatibility. Under s. 10(2) of the Human Rights Act 1998 (emphasis added):

> "... a Minister of the Crown ... may by order make such amendments to the legislation as he considers necessary to remove the incompatibility."

204. The Grand Chamber of the Court confirmed, in *Burden & Burden* v. *United Kingdom* (29 April 2008), that a "declaration of incompatibility" is not an effective remedy that must be exhausted before an application may be made to the Court against the United Kingdom:

> "40. The Grand Chamber recalls that the Human Rights Act places no legal obligation on the executive or the legislature to amend the law following a declaration of incompatibility and that, primarily for this reason, the Court has held on a number of previous occasions that such a declaration cannot be regarded as an effective remedy within the meaning of Article 35 § 1 ...
>
> 43. The Grand Chamber agrees with the Chamber that it cannot be excluded that at some time in the future the practice of giving effect to the national courts' declarations of incompatibility by amendment of the legislation is so certain as to indicate that section 4 of the Human Rights Act is to be interpreted as imposing a binding obligation. ...
>
> 44. This is not yet the case, however, and the Grand Chamber therefore rejects the Government's objection on grounds of non-exhaustion of domestic remedies."

205. The Court recently mentioned, in *O'Donoghue* v. *United Kingdom* (14 Dec. 2010, para. 97), the applicants' observation that the United Kingdom Government had failed to comply with a declaration of incompatibility (finding discrimination based on religion affecting the right to marry) more than four years after it was made by the High Court of England and Wales.

V. STATEMENT OF THE OBJECT OF THE APPLICATION

206. The applicants seek a declaration that the United Kingdom has violated the European Convention on Human Rights (Article 14 combined with Article 12, right to marry, and Article 8, respect for family life) by refusing to allow the first to eighth applicants to marry, and by refusing to allow the ninth to sixteenth applicants to register a civil partnership, because all of the refusals constitute discrimination based on the sexual orientations of the applicants. Such a declaration by the Court should cause the Committee of Ministers of the Council of Europe, in supervising execution of the Court's judgment under Article 46(2) of the Convention, to insist that the United Kingdom amend its legislation on marriage and civil partnership in a way that will remove all discrimination based on sexual orientation. At the appropriate time, the applicants will also request just satisfaction under Article 41 of the Convention, consisting of financial compensation for the pecuniary and non-pecuniary damage they have suffered as a result of the United Kingdom's violation of the Convention, along with reimbursement of legal costs and expenses.

VI. STATEMENT CONCERNING OTHER INTERNATIONAL PROCEEDINGS

207. Have you submitted the above complaints to any other procedure of international investigation or settlement? No.

VII. LIST OF DOCUMENTS

208. Authority signed by the first and second applicants.

209. Authority signed by the third and fourth applicants.

210. Authority signed by the fifth and sixth applicants.

211. Authority signed by the seventh and eighth applicants.

212. Authority signed by the ninth and tenth applicants.

213. Authority signed by the eleventh and twelth applicants.

214. Authority signed by the thirteenth and fourteenth applicants.

215. Authority signed by the fifteenth and sixteenth applicants.

216. Letter acknowledging refusal of the request of the first and second applicants.

217. Letter acknowledging refusal of the request of the third and fourth applicants.

218. Letter acknowledging refusal of the request of the fifth and sixth applicants.

219. Letter acknowledging refusal of the request of the seventh and eighth applicants.

220. Letter acknowledging refusal of the request of the ninth and tenth applicants.

221. Letter acknowledging refusal of the request of the eleventh and twelth applicants.

222. Letter acknowledging refusal of the request of the thirteenth and fourteenth applicants.

223. Letter acknowledging refusal of the request of the fifteenth and sixteenth applicants.

VIII. DECLARATION AND SIGNATURE

I hereby declare that, to the best of my knowledge and belief, the information I have given in the present application form is correct.

Place: London, England, United Kingdom
Date: 2 February 2011

(Signature of the applicants' representative)