TAKING THE TIME TO DISCRIMINATE - *R (ON THE APPLICATION OF STEINFELD AND KEIDAN) v SECRETARY OF STATE FOR INTERNATIONAL DEVELOPMENT* [2018] UKSC 32

Keywords: Civil Partnerships – Marriage – European Convention for the Protection of Human Rights and Fundamental Freedoms 1950, Articles 8 and 14 – Human Rights Act 1998

The campaign for equal civil partnerships recently won a decisive victory in the Supreme Court. After four years of litigation, a unanimous Court in *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32 declared that the current ban on different-sex civil partnerships, contained within sections 1 and 3 of the Civil Partnership Act 2004, was incompatible with Articles 8 and 14 of the European Convention on Human Rights.

The background to this appeal has been comprehensively analysed elsewhere (see Wintemute, 2016; Bendall, 2017; Hayward, 2017). Steinfeld and Keidan are a different-sex couple with two children that wish to enter a civil partnership owing to an ideological opposition to marriage, which they view as a patriarchal and outdated institution. The litigants were unsuccessful in the High Court after Andrews J determined that their claim did not fall within the ambit of Article 8. Whilst it was accepted in the Court of Appeal that their claim did fall within the ambit of that article and that their inability to register a civil partnership constituted discriminatory treatment, a 2:1 majority held that the need for the Secretary of State to conduct further research in this area rendered such difference in treatment justifiable.

In the Supreme Court, Lord Kerr, with whom all the other justices agreed, gave the main judgment. The Court determined that the appellant's claim fell within the ambit of Article 8, which is unsurprising in light of the earlier reasoning of the Court of Appeal and a similar approach recently adopted at Strasbourg in *Ratzenböck and Seydl v Austria* [2017] ECHR 947. More importantly, the Court rectified the earlier erroneous view, stemming from *M v Secretary of State for Work and Pensions* [2006] UKHL 11, that an adverse effect was needed before an infringement could fall within its ambit. Whilst not developing the point further than merely saying that no detriment needs to be established or engaging with Arden LJ's novel attempt in the Court of Appeal to distinguish *M* based on negative and positive obligations, this move finally brings the domestic position in line with that at Strasbourg (see Fenton-Glynn, 2016).

The key focus of the case was justification. The Secretary of State's approach was comprised of two strands, the first of which was that any change to the law in this sensitive area of social policy fell squarely within the remit of Parliament. This necessitated a 'significant measure of discretion' to be afforded to both the government and Parliament as to the timing of any legislative change (para. 27). The second strand was that after the introduction of same-sex marriage in March 2014, the government was presented with a choice of either phasing out or extending civil partnerships to different-sex couples. In these circumstances, a 'sensible course' was to undertake further research as '[m]omentous decisions of this type need…time for proper inquiry and consideration' (para. 25).

The Supreme Court systematically dismantled the Secretary of State's arguments. Citing *In re G (Adoption: Unmarried Couple)* [2009] 1 AC 173, the Court emphasised that the margin of appreciation does not apply at a domestic level and even if a domestic equivalent did in fact operate it must be drawn narrowly in light of the fact that distinctions were based on sexual orientation. Adopting this rigorous approach, the Court accepted that the government *knew* that

the effect of introducing same-sex marriage was inequality between same- and different-sex couples. Distinguishing the position in *Schalk and Kopf v Austria* (2010) 53 EHRR 20 where the Austrian legislature, responding to changing societal views, introduced registered partnerships to *remove* discrimination against same-sex couples, the Court found that Parliament in England and Wales had instead deliberately created a new inequality 'where none had previously existed' (para. 36). Thus, as Lord Kerr bluntly stated: 'to create a situation of inequality and then ask for the indulgence of time - in this case several years - as to how that inequality is to be cured is, to say the least, less obviously deserving of a margin of discretion' (para. 36).

The Court then adopted the four-stage test designed to establish whether an interference with a qualified Convention right can be justified. First, it needed to be assessed whether the legislative objective (legitimate aim) was sufficiently important to justify limiting a fundamental right. Here, the Secretary of State actually conceded that the difference in treatment could not be justified but sought, in Lord Kerr's opinion, 'tolerance of the discrimination' which unsurprisingly 'cannot be characterised as a legitimate aim' (para. 42). Second, a finding that the aim was not legitimate meant that there inevitably was no rational connection between the measure and the objective behind it. Third, less intrusive means were available whilst further research on civil partnerships was being undertaken such as deferring the introduction of same-sex marriage, extending civil partnerships to different-sex couples or pausing all access to the civil partnership scheme. For Lord Kerr, '[e]ach of these options would have allowed the aim to be pursued with less, indeed no, discriminatory impact' (para. 49). Fourth, a fair balance was not struck between the rights of the individual and the interests of the community. Denying different-sex couples rights for an 'indefinite period' and with an end still not in sight has 'far reaching consequences for those who wish to avail of them – and who are entitled to assert them – now' (para. 52). Ultimately, Lord Kerr wished to 'make it unequivocally clear that the government had to eliminate the inequality of treatment *immediately*' (para. 50). Phasing out or extending civil partnerships the moment same-sex marriage was introduced were options but taking time to evaluate which path to take 'could never amount to a legitimate aim *for the continuance of the discrimination*' (para. 50). Resultantly, the Supreme Court issued a declaration that relevant sections of the Civil Partnership Act 2004 precluding access to different-sex couples were incompatible with Articles 8 and 14 of the ECHR.

Three points can be made as to the significance of the Supreme Court's decision in *Steinfeld and Keidan*. First, the judicial reasoning is rigorous, succinct and, at times, surprisingly forthright suggesting that the Supreme Court found the Secretary of State's arguments far from persuasive. For example, Lord Kerr stated, in a strikingly acerbic manner, that the government *knew* that it was perpetrating unequal treatment but had approached the issue with 'at best, an attitude of some insouciance' (para. 33). Similarly, Lord Kerr remarked that public consultations on the future of civil partnerships had not only been initiated for reasons 'unconnected with the government's perceptions of its obligations under ECHR' (para. 34), but also had asked the wrong questions (see generally Scherpe and Hayward, 2017). Thus, interviewing current same-sex civil partners to better understand their views on civil partnership and marriage was 'at best, of dubious relevance to the question of whether the continuing discrimination against different sex couples can be defended' (para. 53).

Second, the decision to issue a declaration of incompatibility is important and can be juxtaposed against a recent reluctance of the Supreme Court to use this particular device. It goes without saying that a declaration does not oblige action and Steinfeld and Keidan remain

unable to register a civil partnership. Indeed, Lord Kerr was particularly keen to stress that a declaration merely acts as a formal record of an incompatibility with the Convention (para. 61). However, the significance of *Steinfeld* lies not necessarily in the fact a declaration was issued but rather the accompanying language and overall tenor of the judgment. Lord Kerr believed that the Court should not feel 'in any way reticent' about issuing a declaration and even went so far to say that the particular circumstances of the case meant it would be 'wrong' to refuse to do so (para. 61). It is thus clear that the Supreme Court sought, and in the strongest terms possible, to motivate the government to act whilst simultaneously respecting the constitutional boundaries created by the Human Rights Act 1998. That message has been received by the government as Theresa May PM announced at the Conservative Party Conference in October 2018 that different-sex civil partnerships will be introduced, albeit without providing a timetable for reform. The move was justified on the basis of protecting couples 'who want to commit, want to formalise their relationship but don't necessarily want to get married' (see Oppenheim, 2018).

Third, whilst the Supreme Court left open as potential reform options both phasing out and extension of the regime to different-sex couples, it is now clear that the government is favouring the latter course of action. This choice is to be welcomed especially in light of recent statistics showing continued support for same-sex civil partnerships in spite of the availability, since March 2014, of same-sex marriage (see Office for National Statistics, 2018). However, with Theresa May PM framing the move as one where relationship commitment is to be recognised through formalisation, there is a real risk that future reform might further marginalise cohabiting couples that do not wish to marry or enter a civil partnership. *Steinfeld* has clearly helped pave the way for civil partnerships becoming available to all, but it is hoped that it might also prompt a wider review of the regulation of adult relationships, especially in relation to introducing much-needed legal protections for cohabitants.

References

Bendall, C. (2017). Court of Appeal rules against civil partnerships for different sex couples…for now. *Journal of Social Welfare and Family Law*, 39, 354-356.

Fenton-Glynn, C. (2016). Opposite Sex Civil Partnerships and the Ambit of Article 8. *Family Law*, 46 (Last Orders).

Hayward, A. (2017). Justifiable Discrimination - The Case of Opposite-Sex Civil Partnerships. *Cambridge Law Journal*, 76(2), 243-246.

Oppenheim, M. (2018). Straight couples to be allowed civil partnerships after law changed by government, Theresa May says. *The Independent*, 2 October 2018. Retrieved October 25, 2018 from https://www.independent.co.uk/news/uk/politics/civil-partnerships-straight-couples-law-theresa-may-european-convention-human-rights-a8564726.html

Office for National Statistics. (2018) Statistical bulletin: Civil partnerships in England and Wales: 2017. Retrieved October 25, 2018 from https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/civilpartnershipsinenglandandwales/2017

Scherpe, J.M. and Hayward, A. (2017). *The Future of Registered Partnerships: Family Recognition beyond Marriage?* Cambridge: Intersentia.

Wintemute, R. (2016). Civil partnership and discrimination in R (Steinfeld) v Secretary of State for Education. *Child and Family Law Quarterly*, 28 365-381.