



27 June 2018

PRESS SUMMARY

R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for International Development (in substitution for the Home Secretary and the Education Secretary) (Respondent) [2018] UKSC 32
On appeal from [2017] EWCA Civ 81

JUSTICES: Lady Hale (President), Lord Kerr, Lord Wilson, Lord Reed, Lady Black

BACKGROUND TO THE APPEALS

Under the Civil Partnership Act 2004 (CPA), only two people of the same sex may enter into a civil partnership. The Marriage (Same Sex couples) Act 2013 (MSSCA) made marriage of same-sex couples lawful. The CPA was not repealed when the MSSCA was enacted. Consequently, same-sex couples wishing to formalise their relationship have a choice as to whether to enter into a civil partnership or to marry. This choice is not available to different-sex couples. The appellants are a different-sex couple in a committed long-term relationship, which they wish to formalise. They have genuine ideological objections to marriage based upon what they consider to be its historically patriarchal nature. They wish instead to enter into a civil partnership, which they consider would reflect their values and give due recognition to the equal nature of their relationship. They sought judicial review of the respondent's continuing decision not to make changes to the CPA to allow different-sex couples to enter into civil partnerships.

The issue was whether the bar on different-sex couples entering into civil partnerships breaches the appellants' rights under article 14 (the prohibition on discrimination) together with article 8 (the right to respect for private life) of the European Convention on Human Rights (ECHR). The High Court and Court of Appeal dismissed their claim.

It is now accepted by the respondent that there is an inequality of treatment between same-sex and heterosexual couples, and that this inequality engages article 14 read in conjunction with article 8 of the ECHR. The respondent also accepts that the inequality therefore requires justification from the date it first began (ie. on the coming into force of the MSSCA). The principal issue before the Supreme Court was therefore whether justification of the inequality includes consideration of the period of time during which the respondent could investigate how best to eliminate the inequality or whether the justification must be directed exclusively to the very existence of the discrimination.

JUDGMENT

The Supreme Court allows the appeal. Lord Kerr gives the judgment with which all the other Justices agree.

REASONS FOR THE JUDGMENT

When Parliament enacted the MSSCA, it consciously decided not to abolish same-sex civil partnerships or to extend them to different-sex couples, even though it was recognised at the time that this would bring about an inequality of treatment between same-sex partners and those of different sexes, and that this inequality would be based on the sexual orientation of the two groups. It was decided that further investigations were required, and the government concluded that it should not

take a final decision on the future of civil partnerships until societal attitudes to them became clearer after same-sex marriages had taken root [7]. Government consultations since the introduction of the MSSCA have failed to produce a consensus as to how, or if, the legal position relating to civil partnerships should change. The respondent concluded that it was proportionate to obtain more data in order to decide whether there was a need to preserve civil partnerships [9].

The court rejects the respondent's argument that European Court of Human Rights (ECtHR) case law requires a wide margin of appreciation in relation to the timing of legislative change to recognise different forms of relationship, and that a significant measure of discretion should be accorded to Parliament in its decision as to when the timing of legislative change in the field of civil partnerships should occur. Although a measure of latitude should be permitted to Parliament, the concept of a "margin of appreciation" as applied by the ECtHR has no application in domestic law – a national court must confront the interference with an ECHR right and decide whether it is justified [27-28]. In as much as there is a margin of discretion analogous to that applied by the ECtHR, in cases of unequal treatment on grounds of sexual orientation, the margin is narrow [32]. It is reasonable that the legislature should be allowed time to reflect on what should be done when dealing with an inequality that it has come to recognise due to evolving societal attitudes. By contrast, to create a situation of inequality and then ask for time – in this case several years – to determine how that inequality is to be cured is less obviously deserving of a margin of discretion. [36]

There is a well established four stage test to determine whether interference with a qualified ECHR right can be justified: (a) is the legislative objective (legitimate aim) sufficiently important to justify limiting a fundamental right; (b) are the measures which have been designed to meet it rationally connected to it; (c) are they no more than are necessary to accomplish it; and (d) do they strike a fair balance between the rights of the individual and the interests of the community? [41].

To be legitimate, the aim must be intrinsically linked to the discriminatory treatment. In this case, it is not. Tolerance of discrimination while the respondent determines how best to remedy it cannot be characterised as a legitimate aim [42]. The government had to eliminate the inequality of treatment immediately when the MSSCA came into force. This could have been done either by abolishing civil partnerships or by instantaneously extending them to different-sex couples. If the government had chosen one of these options, it might have been theoretically possible to then conduct research which could have influenced its longer term decision as to what to do with civil partnerships. Taking time to evaluate whether to abolish or extend could never, however, amount to a legitimate aim for the continuance of the discrimination as it is not connected to the justification for discrimination [50].

Even if the interference with the appellants' rights in this case could be regarded as a legitimate aim, a fair balance between their rights and the interests of the community has not been struck. The interests of the community in denying civil partnerships to different-sex couples who do not wish to marry are unspecified, whereas the consequences of this denial for such couples may be far-reaching. A couple may, for example, suffer serious fiscal disadvantage if one of them dies before their relationship is formalised. There is no end point in sight for the present inequality of treatment [52].

The court has discretion as to whether to make a declaration of incompatibility and must decide whether it is appropriate to do so in a particular case. It should be noted that a declaration of incompatibility does not oblige the government or Parliament to do anything, and in this case, the court should not feel reticent about making such a declaration. The court therefore makes a declaration that sections 1 and 3 of the CPA, to the extent that they preclude a different-sex couple from entering into a civil partnership, are incompatible with article 14 taken in conjunction with article 8 of the ECHR [54-62].

References in square brackets are to paragraphs in the judgment

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:
<http://supremecourt.uk/decided-cases/index.html>