In The Supreme Court of Bermuda

CIVIL JURISDICTION

2014: No. 308

BETWEEN:-

(1) A
(2) B

Plaintiffs

-and-

(1) DIRECTOR OF CHILD AND FAMILY SERVICES
(2) ATTORNEY GENERAL

Defendants

RULING

(In Chambers)

Date of hearing: 19th January 2015
Date of ruling: 3rd February 2015

Mr Peter Sanderson, Wakefield Quin Limited, for the Plaintiffs
Ms Shakira Dill, Attorney General's Chambers, for the Defendants

Introduction

1. The Plaintiffs are an unmarried same-sex couple. They are raising a child together who was at the date of the hearing almost nine months old. They love the child and would like to adopt him. But they have been advised by the Department of Child and Family Services ("DCFS") that they must each make a separate application for adoption and that their respective applications will be processed separately by the DCFS and considered separately by the Family Court.

2. The Plaintiffs are unable to make a joint application for adoption because they are unmarried. They cannot marry in Bermuda because they are a same-sex couple, and if they were to get married elsewhere, as is their intent, their marriage would not be recognised under Bermudian law. Although both Plaintiffs are living in Bermuda, only one of them is a resident of Bermuda as that term is defined within the 2006 Act. The Plaintiffs are concerned that this may be an obstacle to the non-resident Plaintiff's application to adopt.

The Adoption Act 2006 ("the 2006 Act")

3. Section 2(3) of the 2006 Act provides that a resident of Bermuda is a person who, under the Bermuda Immigration and Protection Act 1956, (a) possesses Bermudian status; (b) is deemed to possess Bermudian status or is the spouse of a person who possesses Bermudian status; or (c) holds a permanent resident's certificate.

4. Section 25 of the 2006 Act sets out various grounds which give the court jurisdiction to make an adoption order. The grounds are alternatives not cumulative. One of them is that the applicant is a resident of Bermuda.

5. Section 28(1) of the 2006 Act prohibits the Plaintiffs from making a joint application for adoption. This provides that subject to subsection (2), which is not material:

> no application shall be made for the adoption of a child by more than one person except in the case of a joint application by a married couple.

6. Section 28(3) of the 2006 Act adds the qualification that, in order to apply to the court to adopt a child, a married couple must have been living together for a continuous period of not less than one year immediately prior to their application.

7. The Plaintiffs find the situation thoroughly unsatisfactory. Throughout the adoption process their suitability to adopt the child will be assessed separately when in reality they will be raising the child as a couple. They submit that this is artificial and demeaning, and means that their adoption applications will be processed and determined on a false premise. To take just one aspect of the adoption procedure, the completion by the DCFS of a home study report, this will involve an unnecessary duplication of both costs – two Home Study fees of $2,295.00 rather than one – and activities, such as interviews and meetings, which could conveniently be undertaken jointly. To cap it all, it is not at all clear whether the Family Court would have jurisdiction to make separate but concurrent adoption orders in favour of both Plaintiffs. Those, at any rate, are the Plaintiffs' concerns.

Relief sought

8. The Plaintiffs have issued an originating summons in which they seek, amongst other remedies, a declaration that sections 2(3) and 28 of the 2006 Act must be read so as to be compatible with the Human Rights Act 1981 ("the 1981 Act") and thereby allow committed same-sex couples/resident same-sex partners of Bermudians to apply for adoption. As this is purely a matter of statutory interpretation the Court has previously directed that it be tried as a preliminary issue.

Human Rights Act 1981

9. The Plaintiffs' application is brought pursuant to section 30B of the 1981 Act, which is to be read in conjunction with section 29 of that Act. The sections provide:

> **Power of Supreme Court**
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> 29 (1) In any proceedings before the Supreme Court under this Act or otherwise it may declare any provision of law to be inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless such provision expressly declares that it operates notwithstanding this Act.
>
> (2) The Supreme Court shall not make any declaration under subsection (1) without first hearing the Attorney-General or the Director of Public Prosecutions.
>
> **Primacy of this Act**
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> 30B (1) Where a statutory provision purports to require or authorize conduct that is a contravention of anything in Part II, this Act prevails unless the statutory provision specifically provides that the statutory provision is to have effect notwithstanding this Act.
>
> (2) Subsection (1) does not apply to a statutory provision enacted or made before 1st January 1993 until 1st January 1995.

10. The 2006 Act does not contain any provision that either section 2(3) or section 28 are to operate or have effect notwithstanding the 1981 Act.

11. Part II of the 1981 Act is headed "*Unlawful Discrimination*". Within Part II, section 5 provides:

> **Provision of goods, facilities and services**
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> (1) No person shall discriminate against any other person due to age or in any of the ways set out in section 2(2) in the supply of any goods, facilities or services, whether on payment or otherwise, where such person is seeking to obtain or use those goods, facilities or services, by

refusing or deliberately omitting to provide him with any of them or to provide him with goods, services or facilities of the like quality, in the like manner and on the like terms in and on which the former normally makes them available to other members of the public.

(2) The facilities and services referred to in subsection (1) include, but are not limited to the following namely—

. . . . .

the services of any business, profession or trade or local or other public authority.

12. "*Discrimination*" is defined at section 2 of the 1981 Act, which provides in material part:

(2) For the purposes of this Act a person shall be deemed to discriminate against another person—

(a) if he treats him less favourably than he treats or would treat other persons generally or refuses or deliberately omits to enter into any contract or arrangement with him on the like terms and the like circumstances as in the case of other persons generally or deliberately treats him differently to other persons because—

. . . . .

(ii) of his sex or sexual orientation;

(iii) of his marital status; …

(b) if he applies to that other person a condition which he applies or would apply equally to other persons generally but—

(i) which is such that the proportion of persons of the same race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status, religion, beliefs or political opinions as that other who can comply with it is considerably smaller than the proportion of persons not of that description who can do so; and

(ii) which he cannot show to be justifiable irrespective of the race, place of origin, colour, ethnic or national origins, sex, sexual orientation, marital status, disability, family status,

> religion, beliefs or political opinions of the person to whom it is applied; and
>
> (ii) which operates to the detriment of that other person because he cannot comply with it.

13. Where direct discrimination is alleged, ie discrimination contrary to section 2(2)(a) of the 1981 Act, the court is required to engage in a factual inquiry as to whether discrimination on a prohibited ground has taken place. If it has, then that is an end of the matter: the discrimination was unlawful.

14. However, where indirect discrimination is alleged, ie discrimination contrary to section 2(2)(b) of the 1981 Act, the court is required to undertake a more complex inquiry. This includes consideration of whether the allegedly discriminatory condition was justifiable. If it was justifiable it will not be discriminatory.

15. Section 2(2) of the 1981 Act is to be contrasted with the prohibition of discrimination to be found in article 14 of the European Convention on Human Rights ("the Convention"). Under the jurisprudence of the European Court of Human Rights ("the ECHR") the justifiability test applies to both indirect and direct discrimination. As the Grand Chamber ruled in STEC v United Kingdom (2006) 43 EHRR 47 at para 51:

> A difference of treatment 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. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment.

16. "*Services*" are not defined within the 1981 Act. However in Marshall v Deputy Governor [2011] 1 LRC, PC, Lord Phillips, giving the judgment of the Board, accepted at para 15 that section 6 of the 1981 Act, which prohibits discrimination by employers, must be given an interpretation that is

generous and purposive. By parity of reasoning the same approach would apply equally to the other provisions of the 1981 Act, including section 5.

17. In Applin v Race Relations Board [1975] AC 259, the House of Lords held that the provision by a couple of private individuals of foster care facilities to children in local authority care was a service within the meaning of section 2 of the Race Relations Act 1968 ("the 1968 Act"): the section did not define the meaning of "services" but gave a non-exhaustive list of examples. Lord Morris observed at 274 E that the range and sweep of the examples was very wide.

18. Applin was applied in Conwell v Newham London Borough Council [2000] 1 WLR 1, in which the Employment Appeal Tribunal held that under section 20 of the Race Relations Act 1976, which was in substantially similar terms to section 2 of the 1968 Act, "*services*" included the decisions and activities of a local authority concerning children looked after by them.

19. In Catholic Care (Diocese of Leeds) v Charity Commission [2013] 1 WLR 2105, the Upper Tribunal (Tax and Chancery Chamber) held that discrimination in the provision of adoption services fell within the ambit of section 29 of the Equality Act 2010, which prohibited discrimination in the provision of services in general.

20. Applying a generous and purposive approach to the construction of section 5 of the 1981 Act, I am satisfied that it prohibits discrimination in the provision of adoption services.

21. Under the 2006 Act, adoption services are provided by the DCFS, which processes applications for adoption, and the court, which decides them. The prohibition against discrimination in the provision of adoption services applies to them both. The DCFS is clearly a public authority. It is unnecessary for me to decide whether, in the context of the provision of adoption services, the court is too. Section 5 of the 1981 Act provides that "*no person*" shall discriminate unlawfully in the provision of services, and "*person*" is apt to include the members of a court or tribunal.

Section 2(3) of the 2006 Act

22. I can deal with section 2(3) quite briefly. It would not prevent the court from making an adoption order in favour of the non-resident Plaintiff as section 25(a) of that Act provides that the court has jurisdiction to make an adoption order if, as in the present case, the child to be adopted is a resident of Bermuda or was born in Bermuda. The DCFS has acknowledged this in an affidavit of its Acting Supervisor. She confirms that, for the non-resident Plaintiff, residency is not an issue and that the DCFS will complete a home study report with respect to him.

23. The Acting Supervisor stated that if the non-resident Plaintiff's work permit were not renewed the home study would have additional components as it would be necessary to explore his future plans. She added that this might involve liaising with overseas jurisdictions to verify information relating to overseas. The same considerations would no doubt apply to a resident of Bermuda within the meaning of the 2006 Act if he were living abroad or intending to do so. I am satisfied that these additional components would not involve treating the non-resident Plaintiff less favourably than a resident applicant, or treating him differentially on prohibited grounds. There is therefore nothing on the face of section 2(3) to engage sections 29 or 30B of the 1981 Act.

Section 28 of the 2006 Act

24. As to section 28 of the 2006 Act, the Plaintiffs allege that it discriminates against them directly on ground of marital status in that it does not permit them to apply to adopt as a couple, and indirectly on the ground of sexual orientation in that it is not open to them to become eligible to adopt as a couple by getting married.

25. In my judgment, "*marital status*" includes both the state of being married and the state of being unmarried. If one is a status, so too is the other. See

Re P and others (adoption: unmarried couple) [2009] 1 AC 173 HL, *per* Lord Hoffmann at paras 7 – 8 and Baroness Hale at para 107. Permitting a joint application by a married couple but not an unmarried couple is discriminatory in that it involves treating the unmarried couple less favourably than the married couple by providing adoption services to the one couple but not the other.

26. For the reasons given by the Plaintiffs and summarised above, I therefore reject the Defendants' submission that processing the Plaintiffs' applications separately, with the possibility of a separate adoption order in the case of each Plaintiff, would not constitute less favourable treatment. It would, however, constitute a refusal to provide them with adoption services of a like quality, in the like manner, and on the like terms on which the DCFS normally makes them available to other members of the public, namely applicants who are married couples.

27. It is in any case doubtful whether section 28(1) of the 2006 Act would permit the court to entertain two applications for the adoption of the same child. The argument that it would involves a strained construction of the statutory language to which a court would likely only have recourse if it were necessary to avoid applying that section in an unlawfully discriminatory way. As it would not achieve that end, there is no good reason to construe the section in this way.

Whether discrimination justifiable

28. As I am satisfied that section 28 of the 2006 Act discriminates directly against unmarried couples in breach of section 5 of the 1981 Act I am not required to go on and consider whether such discrimination is justifiable. But I shall do so anyway. I am satisfied that it is not justifiable. As Lord Hoffmann stated in Re P at paras 18 and 20:

> It is one thing to say that, in general terms, married couples are more likely to be suitable adoptive parents than unmarried ones. It is altogether another to say that one may rationally assume that no unmarried couple can be suitable adoptive parents. Such an irrebuttable presumption defies everyday experience. The Crown suggested that, as they could easily marry if they chose, the very fact that they declined to do so showed that they could not be suitable adoptive parents. I would agree that the fact that a couple do not wish to undertake the obligations of marriage is a factor to be considered by the court in assessing the likely stability of their relationship and its impact upon the long term welfare of the child. Once again, however, I do not see how this can be rationally elevated to an irrebuttable presumption of unsuitability.
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> . . . . .
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> The judge and the Court of Appeal both emphasised that the question of whether unmarried couples should be allowed to adopt raised a question of social policy and that social policy was in principle a matter for the legislature. That is true in the sense that where questions of social policy admit of more than one rational choice, the courts will ordinarily regard that choice as being a matter for Parliament … But that does not mean that Parliament is entitled to discriminate in any case which can be described as social policy. The discrimination must at least have a rational basis. In this case, it seems to me to be based upon a straightforward fallacy, namely, that a reasonable generalisation can be turned into an irrebuttable presumption for individual cases.

29. This extract from Lord Hoffmann's speech illustrates that the requirement in section 20 of the 2006 Act that only a married couple can adopt jointly discriminates against the Plaintiffs on two levels: directly, as partners in an unmarried couple, and indirectly, as partners who are in a same-sex couple and thus under Bermuda law unable to marry although they wish to do so.

30. Lord Hoffmann noted at para 16 that a blanket prohibition on adoption by unmarried couples contradicted one of the fundamental principles in the statutory instrument under consideration by the House, namely that the court was obliged to consider whether adoption "*by particular ... persons*" would be in the best interests of the child. It might be that the best interests of the child required it to be adopted by the unmarried appellant couple.

31. Similarly, section 3 of the 2006 Act requires that in making a decision about the adoption of a child under the Act, *"the best interests of the child shall be the paramount consideration*", and that, when determining those interests, the matters to which decision-maker shall have regard include: "*the relationship that exists between the child and each person to whom the custody of the child is or might be entrusted*". It would defeat this objective if the decision-maker were unable to make an adoption order in favour of an unmarried couple even where it would be in the best interests of the child to do so.

32. In concluding that the prohibition on adoption by unmarried couples is not justifiable, I decline to follow the reasoning of the majority of the ECHR in Gas v France (2014) 59 EHRR 22. The applicants were a same-sex couple who had entered into a civil partnership. They were raising the second applicant's daughter together. The first applicant applied under the Civil Code for a "*simple adoption order*" with respect to the child, to which the second applicant had given her formal consent. Had the applicants been married, which French domestic law did not permit, the adoption order would have conferred joint parental responsibility on them both. But as they were unmarried, an adoption order would have vested parental responsibility in the first applicant alone. The domestic courts rejected the application for adoption on the grounds that it would for that reason be contrary to the child's best interests.

33. The applicants appealed to the ECHR on the ground that, contrary to art 14 of the Convention, they had been subjected to discriminatory treatment based on their sexual orientation, in breach of their right under art 8 of the Convention to respect for their right to private and family life. They alleged that, as a same-sex couple, they had been subjected to an unjustified difference in treatment compared with different-sex couples, whether married or not.

34. The majority noted at para 58 that for an issue to arise under art 14 there must be a difference in the treatment of persons in "*relevantly similar*

situations". They held at para 68 that married couples and unmarried couples were not in a relevantly similar situation as marriage conferred a "*special status*" on those who enter it which gives rise to social, personal and legal consequences.

35. I do not understand how that is supposed to provide a rational basis for prohibiting same-sex couples from adopting, and the majority did not find it necessary to explain the point any further. As Paul Johnson stated in a trenchant criticism of the decision in The Modern Law Review[1], "*the Court's approach to the question of 'analogous situation' in this case will strike many people as perverse or obtuse*". This strand of the majority's reasoning would in any case be inapplicable in the context of Bermuda as section 2(2) of the 1981 Act expressly prohibits discrimination on grounds of marital status.

36. The majority went on to find at para 69 that, for purposes of simple adoption, French domestic law made no distinction between unmarried same-sex and unmarried different-sex couples. Thus the first applicant had not been directly discriminated against on grounds of sexual orientation as her application for a simple adoption order would have been treated no differently if she had been part of a different-sex couple. The majority rejected at paras 70 – 71 the applicants' allegation of indirect discrimination on the ground that as a same-sex couple they were unable to marry. I find the Court's reasoning with respect to direct discrimination more persuasive than its reasoning with respect to indirect discrimination.

[1] (2012) 75(6) MLR 1136 at 1147.

37. In concluding that the statutory prohibition on adoption by the Plaintiffs is unlawful, I note with satisfaction that the position of this Court is consistent with that taken not only by the courts in the United Kingdom[2], but by the courts of Canada[3], Gibraltar[4] and South Africa[5] as well.

Miscellaneous issues

38. There are a couple of issues which arose during the course of argument which I should briefly address.

39. First, and for the avoidance of doubt, an adoption process in which an adoption order was only possible in favour of one of the Plaintiffs would be discriminatory in that it would reduce the other Plaintiff to second class status and deprive the child of the benefit of two legal parents. See Re P *per* Baroness Hale at para 97, summarising the arguments in favour of amendments permitting adoption by unmarried couples to the Adoption and Children Bill in England and Wales.

40. Second, and for the further avoidance of doubt, an adoption process in which unmarried different-sex couples were eligible to adopt but unmarried same-sex couples were not (or *vice versa*) would be directly discriminatory on the grounds of sexual orientation. In light of the express prohibition on discrimination on grounds of sexual orientation contained in section 2(2) of the 1981 Act this proposition does not require the support of any case law.

41. Support is nonetheless to be found in X and others v Austria (2013) 57 EHRR 14 at para 153. One of the partners in a same-sex couple wished to adopt the other partner's child without severing the legal relationship between the child and her mother. Under Austrian domestic law, this was

[2] Re P, above.
[3] Re K Adoption (1995) Can LII 10080 (ON CJ).
[4] P v HM AG for Gibraltar (2013) 35 BHRC 136, SC.
[5] Du Toit v Minister for Welfare and Population Development [2003] 2 LRC 670, Const Ct.

permissible in the case of a different-sex couple but not in the case of a same-sex couple. The ECHR found that there had for that reason been a violation of art 14 in conjunction with art 8 of the Convention.

Conclusion

42. Pursuant to section 29 of the 1981 Act, I find that section 28 of the 2006 Act authorizes or requires direct discrimination against unmarried couples because of their marital status, and indirect discrimination against same-sex couples because of their sexual orientation. So as to remedy this situation, and again pursuant to section 29 of the 1981 Act, I declare the word "*married*" in subsections 28(1) and 28(3) of the 2006 Act to be inoperative.

43. Accordingly, a joint application to adopt a child may be made by an unmarried couple, whether same-sex or different-sex, provided that they have been living together for a continuous period of not less than one year immediately before their application. To address a concern raised by the Defendants, I consider that the one year requirement renders the meaning of a "*couple*" sufficiently certain to be workable for the purposes of this section.

44. It follows that the Plaintiffs are entitled to make a joint application for adoption. I therefore direct that the DCFS should treat their respective applications as a joint application and proceed accordingly.

45. I make no order with respect to section 2(3) of the 2006 Act as the Plaintiffs have not established that it authorizes or requires the doing of anything prohibited by the 1981 Act.

46. Although it is not for me to comment on the merits of the Plaintiffs' application for adoption, it is evident from the material before me that they take their responsibilities as caregivers for the child very seriously.

47. If any party wishes to address me as to costs they may do so by filing a written notification with the Registry no later than 7 days after the date of this ruling. Otherwise, as the Plaintiffs were the successful party, the Defendants will pay the Plaintiffs' costs of and occasioned by this hearing, to be taxed on a standard basis if not agreed.

DATED this 3rd day of February, 2015

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Hellman J