Neutral Citation Number: [2017] EWCA Civ 81

Case No: C1/2016/0713

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM**
**Queen's Bench Division (Administrative Court)**
**Andrews J**
**[2016] EWHC 128 (Admin)**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/02/2017

**Before:**

**LADY JUSTICE ARDEN**
**LORD JUSTICE BEATSON**
and
**LORD JUSTICE BRIGGS**

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**Between:**

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| **Rebecca Hannah Steinfeld & Charles Robin Keidan** | **Appellants** |
| **- and -** | |
| **Secretary of State for Education** | **Respondent** |

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**Karon Monaghan QC and Sarah Hannett** (instructed by **Deighton Pierce Glynn)** for the **Appellants**
**Dan Squires QC** (instructed by **the Government Legal Department**) for the **Respondent**

Hearing dates : 02-03 November 2016

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# Approved Judgment

# LADY JUSTICE ARDEN:

## BACKGROUND TO THIS APPEAL

### The bar on civil partnership for opposite-sex couples

1. The Civil Partnership Act 2004 ("the CPA") created the civil partnership ("CP"), which is a means whereby same-sex partners can obtain formal legal recognition of their relationship outside marriage. A CP has substantially the same legal incidents as marriage except for the name. More recently, the Marriage (Same Sex Couples) Act 2013 ("the 2013 Act") has been passed which enables same-sex couples the alternative option of entering into marriage.

2. There is, however, a bar ("the bar") on opposite-sex couples entering into a CP (section 3(1)(a) of the CPA). So same-sex couples have two options for obtaining legal recognition of their relationship whereas opposite-sex couples have only one.

### The Government's position on the future of CPs

3. Since same-sex marriage was introduced, the number of new CP formations has gone down, and the number of CP dissolutions has gone up. The government's position as explained by Mr Dan Squires QC, for the Secretary of State, is that:

> A decision has been taken by the Government, following two public consultations and debate in Parliament, not at this stage to seek to persuade Parliament to extend civil partnerships to opposite-sex couples, abolish them or phase them out. Instead it has decided to wait to see how extending marriage to same-sex couples (made possible by the [2013 Act]) impacts on civil partnerships before making a final decision as to their future.

### Consultations and statistics

4. The Secretary of State has filed evidence about two recent public consultations concerning the future of civil partnerships, and provided us with evidence in the form of official statistics about the use of CPs since the 2013 Act came into force. I have summarised the key parts of this evidence in the Appendix to this judgment.

### Appellants' reasons for preferring CP to marriage

5. The appellants, Rebecca Steinfeld and Charles Keidan, are a young couple in a committed long-term relationship. They wish to formalise their relationship, but they have deep-rooted and genuine ideological objections to marriage based upon what they consider to be its historically patriarchal nature. They consider that the status of civil partnership would reflect their values and give due recognition to the equal nature of their relationship. Ms Steinfeld and Mr Keidan in good faith consider that marriage does not reflect the way in which they understand their

commitment to each other or wish their relationship to be seen. Ms Steinfeld states in her witness statement that it is very important to them to have a civil partnership as the legal framework within which to raise their child as a CP would give their child a stable environment in which to grow up. They want their child to see the relationship as one of total equality reflecting the equal independent contribution which both parties make. They also desire the financial benefits of marriage and civil partnership, for example the rights of inheritance and relief from inheritance tax on death. This would protect their child in the case of their premature death. Moreover, they want their relationship to have the public recognition that registration as a civil partnership would bring. A witness statement in support from Deborah Mann, on behalf of herself and her partner of seventeen years, puts the reason for wanting to enter in to a CP as follows:

> the term 'civil partnership' reflects the pragmatism, respect, loyalty, friendship and teamwork that is at the core of our relationship, added to which the secular, un-solemnised process of forming a civil partnership suits us perfectly.

6. There is another witness statement in support from Fiona Millar, who has been in a relationship with her partner for thirty-five years. She has three adult children. She states that she wants to enter a CP to gain the same protection under the law as married or civil partnered couples:

> We have chosen not to get married for thirty-five years on principle. I do consider marriage to be a patriarchal institution and unnecessary for me to feel either committed or secure in my relationship. …I believe that many young cohabitees with children, where the property rights are not as clearly set out as they might be, are being left without the chance of protection at a time when their children are most vulnerable. The law should protect these families in the same way as it would protect families of same sex couples who opt for civil partnerships or indeed of married couples.

7. According to the Office for National Statistics ("ONS"), there were some 3,172,000 opposite-sex cohabiting couple families in the UK in 2016. They were the fastest growing family type over the last 20 years, with couples possibly choosing cohabitation as an alternative or precursor to marriage (*Families and Households in the UK:* 2016). As to civil partnerships, there were some 47,000 civil partnerships in existence at the end of 2015 (as opposed to some 48,000 at the end of 2014). In the first five years following the introduction of CPs, some 79,000 CPs were formed, far exceeding the number (10-20,000) forecast in the regulatory impact assessment on the CPA (*Civil Partnerships in the UK: 2013*, ONS).

8. On 1 October 2014, the appellants gave notice to the Chelsea Register Office ("the Office") that they wished to enter a civil partnership. The Office replied that they were prevented from entering into a CP. In these proceedings, Ms Steinfeld and Mr Keidan have been given permission to seek (a) judicial review of the continuing decision of the Secretary of State not to put forward changes to the CPA, and (b) a declaration of incompatibility under the Human Rights Act 1998 in respect of section 3(1)(a) of the CPA. The real issue is whether and if so, how, the European

Convention on Human Rights ("the Convention") applies to the Secretary of State's position, as set out in paragraph 3 above.

## Relevant Convention rights

9. The appellants rely on Article 14 taken with Article 8 of the Convention. These Articles provide:

> ***Article 14***
>
> ***Prohibition of discrimination***
>
> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> ***Article 8***
> ***Right to respect for private and family life***
>
> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

## Judgment of the High Court: Andrews J

10. Andrews J heard the judicial review proceedings. The question before her was whether, following the 2013 Act, the bar violated the rights of the appellants under Article 14 taken with Article 8. In her thoughtful and comprehensive judgment of 29 January 2016, she dismissed the appellants' claim for judicial review. The judge did not have the statistical information for 2015, which has since become available and which I have summarised in paragraphs 8 to 12 of the Appendix to this judgment.

11. In summary, Andrews J held that on the authorities the bar did not fall within the scope or (as it is often put) the "ambit" of Article 8. The appellants could marry and thus enter into a legal relationship according full protection to all the core values of Article 8. The judge concluded: "This is not a case where [the appellants] cannot achieve formal state recognition of their relationship, with all the rights, benefits

and protections that flow from such recognition: on the contrary it is open to them to obtain that recognition by getting married." (Judgment, paragraph 37). She also held that any interference with their private life was even more tenuous as there is no evidence that they were subjected to humiliation, derogatory treatment or any other lack of respect for their private lives (Judgment, paragraph 38). "The only obstacle to [the appellants] obtaining the equivalent legal recognition of their status and the same rights and benefits as a same-sex couple is their conscience." (Judgment, paragraph 39). There was, she held, no indication in the cases from the European Court of Human Rights ("the Strasbourg Court") that there was interference with the core values of Article 8 in these circumstances.

12. Andrews J further held that, even if she was wrong about the ambit of Article 8, the Secretary of State was justified under Article 14 in maintaining the bar until more years' data was available on the formation and dissolution of CPs. This would put the Secretary of State in a better position to evaluate the impact of the 2013 Act on CPs before taking any legislative steps, and the appellants were not disadvantaged (judgment, paragraph 86). The policy of "wait and see" served the legitimate aim of avoiding the unnecessary disruption and wastage of resources (Judgment, paragraph 87). Moreover, there was no consensus, either domestically or within the Convention States, as to the appropriate course to take. In those circumstances, the Secretary of State was acting well within the area of discretion afforded to her on the regulation of social matters.

## New private member's bill to amend the CPA

13. Since the judge's judgment, Mr Tim Loughton MP has presented the Civil Partnership Act (Amendment) Bill 2015 to Parliament. The purpose of this Bill is to enable opposite-sex couples to enter a civil partnership. (Mr Loughton had presented an earlier Bill to achieve these objectives, which did not proceed, and in addition he unsuccessfully moved an amendment on similar lines to the Bill which led to the 2013 Act.) On 13 January 2017, the House adjourned the 2015 Bill to second reading on 24 March 2017. The Rt Hon Robert Halfon MP, the Minister for Apprenticeships and Skills at the Department for Education, informed the House that the government would not state its position pending the determination of this litigation, that, at the time of the passing of the 2013 Act, the impact of that Act on CPs could not be predicted, and that any extension of the CPA to opposite-sex couples would require substantial legislative drafting resource and inter-departmental consultation. His speech was interrupted by the adjournment. We are informed that there is unlikely to be any debate on the Bill in March unless more support for it is forthcoming.

# OVERVIEW OF ISSUES AND SUMMARY OF MY CONCLUSION

## The issues in brief

14. As explained, the ultimate issue on this appeal is whether the bar on opposite-sex couples entering CPs is compatible with Convention rights. The Convention does not guarantee the right to obtain legal recognition of a couple's relationship in any particular form. The appellants' case is that the bar is discriminatory against them on the grounds of sexual orientation since it enables same-sex couples, but not

opposite-sex couples, to form a civil partnership. Under Strasbourg jurisprudence, the appellants must show that the difference in treatment falls within the scope or "ambit" of some Article of the Convention other than Article 14. The appellants contend that in this case there is a potential violation of Article 14 taken with Article 8.

15. So the first issue ("**Issue 1**") is whether the bar is within the "ambit" of Article 8 of the Convention.

16. The second issue ("**Issue 2*")*** is whether any potential violation of Article 14 taken with Article 8 is justified by the government's policy of "wait and see" in relation to the impact of same-sex marriage on the need for CPs.

## My overall conclusion: the appellants are right

17. To summarise, for the detailed reasons given below, I conclude that the bar potentially violates the appellant's rights under Article 14 taken with Article 8.

18. On Issue 1 (ambit), I consider that the appellants establish that their complaint is within the ambit of Article 14 taken with Article 8. *Oliari* shows that there is a positive obligation to respect the family life which opposite-sex couples share. For them not to have the right to enter civil unions when same-sex couples do have that right in my judgment falls within the scope of that obligation. Discrimination does not cease because an opposite-sex couple can marry and so avoid the need for a civil union. This conclusion is in accordance with domestic case law.

19. That means that the Secretary of State must justify the discrimination. In my judgment she cannot do this on the evidence in this case. The Secretary of State argues that a policy of "wait and see" is necessary so that data can be collected. Her concern is to conserve public resources. In my judgment, the law requires that she should show that her policy is proportionate and strikes a fair balance between the interests of the appellants (and other opposite-sex couples who also wish to enter a CP) and those of the rest of the community. In my judgment, she cannot do this for a number of reasons, in particular because her policy of "wait and see" what happens to CPs now same-sex marriage is available is open-ended in time. Her policy does not address questions other than the numbers of CP formations and dissolution. It does not therefore address the important social question whether opposite-sex couples should have the right in question.

## My analysis will largely follow the structure of the reasoning in *Oliari v Italy*

20. Counsel's complex and thorough submissions range over a large number of domestic and Strasbourg cases. I have concluded that it is in the main simplest to explain my analysis by taking the most recent case mentioned in counsel's submissions, *Oliari v Italy* (Apps ns 18766/11 and 36030/11, 21 July 2015). This was not cited to the judge. It brings together a number of the relevant principles, and will enable me to draw together counsel's submissions. I will consider first the position under Strasbourg case law and then whether that case law is overridden by authority binding on us in this jurisdiction.

21. *Oliari* does not cover every point in issue in this case. I will need to refer to other Strasbourg cases, and to domestic law, because Mr Squires submits that both Strasbourg and domestic law requires applicants to show adverse impact. As I understand his submission, adverse impact means some physical injury or financial loss as opposed to some loss of the legal right to do something (viz. to enter a CP) which can be achieved by exercising some other right (here, the right to enter into marriage).

## Outline of the *Oliari* case

22. *Oliari* is a decision of a Chamber of the Strasbourg Court. Italy has implemented the decision and there is no pending appeal to the Grand Chamber. It is, therefore, a final decision of the Strasbourg Court.

23. The applicants in *Oliari* were a number of cohabiting same sex couples. Their complaint was that, despite several rulings of the Italian Constitutional Court that they had a constitutional right to have their relationships recognised by the law, the Italian state had failed over some thirty years to provide a legal means for them to obtain this recognition. The Strasbourg Court held that there was no Convention obligation on a state to extend the legal institution of marriage to same-sex couples and so the Italian state's failure in that regard did not violate Articles 8, 12 (the Convention right to marry) or 14 taken with 8. Nonetheless, there was, subject to justification, in the circumstances a potential violation of Article 8 because, as same-sex couples had no right to marry under Italian law, they had no means of obtaining legal "recognition of their status and guaranteeing to them certain rights relevant to a couple in a stable and committed relationship" ([167]).

24. The Strasbourg Court considered both the question whether Article 14 taken with Article 8 was engaged (relevant to Issue 1 in this case, the ambit issue) and also the question whether the action of the Italian state was justified (Issue 2 in this case, the justification issue). The relevant parts of the extensive reasoning of the Strasbourg Court in *Oliari* answer a number of the submissions made to us. I will set out the relevant part of the reasoning under the analysis of the relevant Issue.

# DETAILED ANALYSIS OF ISSUE 1: IS THE BAR WITHIN THE AMBIT OF ARTICLE 8?

25. In the paragraphs which follow under this Issue, I reach the following conclusions. The bar falls within the ambit of Article 8 under Strasbourg case law. Under Strasbourg case law, couples in a stable relationship enjoy "family life". States have a positive obligation to ensure respect for family life, and the registration of civil unions is a means of, or modality for, promoting family life. Applicants do not have to show adverse effect. Under this Issue, I must also consider whether domestic decisions binding on this Court compel a different conclusion. In my judgment they do not. The House of Lords required adverse impact to be shown where there was a potential violation of a negative obligation under Article 8, but not in the case of a positive obligation to ensure respect for private life.

## *Oliari :* where the complaint is under Article 14 taken with 8, there must be "private or family life" for Article 8 purposes to come within the "ambit" of Article 8 and no adverse effect need be shown

26. In *Oliari*, the Strasbourg Court held at the outset that for the purposes of a complaint under Article 14 taken with Article 8, the applicants did not need to show that the action of the state violated their rights under Article 8, but only that their complaint fell within the "ambit" or scope of Article 8. This is a well-established principle of Strasbourg case law:

> 102 As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence, since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for instance, *E.B. v. France* [GC], no. 43546/02, § 47, 22 January 2008; *Karner v. Austria*, no. 40016/98, § 32, ECHR 2003-IX; and *Petrovic v. Austria*, 27 March 1998, § 22,*Reports* 1998-II).

27. The Strasbourg Court made it clear that the relationship of a stable cohabiting same-sex couple qualifies as "private or family life" and so falls within the "ambit" of Article 8:

> 103 It is undisputed that the relationship of a same-sex couple, such as those of the applicants, falls within the notion of "private life" within the meaning of Article 8. Similarly, the Court has already held that the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life" (see *Schalk and Kopf,* cited above*,* § 94). It follows that the facts of the present applications fall within the notion of "private life" as well as "family life" within the meaning of Article 8. Consequently, both Article 8 alone and Article 14 taken in conjunction with Article 8 of the Convention apply.

28. The holding about same-sex couples enjoying family life represents a comparatively recent development in the case law of the Strasbourg Court. Indeed, the Strasbourg Court has now gone further and held that same-sex couples need not always cohabit to have family life (*Vallianatos v Greece* (2014) 59 EHRR 12, at [75]). The same principles must apply to unmarried opposite-sex couples. I need not therefore consider on this issue the other Strasbourg case law cited to us (*Schalk v Austria* (2011) 53 EHRR 20, *Petrovic v Austria* (2001) 33 EHRR 14 and *Pajić v Croatia*, Application no. 68453/13, 23 February 2016).

29. Mr Squires submits that *Oliari* is not an authority on the question whether the test of "ambit" under Strasbourg jurisprudence requires adverse impact to be shown. I do

not accept that submission. The Strasbourg Court in *Oliari* specifically rejected the argument that to bring their application the applicants had to show that they suffered any loss as a result of not being able to enter into a civil union:

> **B. Victim status**
> 70 Although not explicitly raised as an objection to the applications' admissibility, the government submitted that the applicants had not indicated in what way they had suffered any actual damage, and the reference to the injury of the applicants was only abstract (inheritance rights, assistance to the partner, sub-entry into economic relationships acts). They pointed out that the court could only judge upon specific circumstances of a case and not make evaluations going beyond the scope of the applications.
>
> 71 The court considers it appropriate to deal with the argument at this stage. It notes that the applicants are individuals past the age of majority, who, according to the information submitted, are in same-sex relationships and in some cases are cohabiting. To the extent that the Italian Constitution as interpreted by the domestic courts excludes same-sex couples from the scope of marriage law, and that because of the absence of any legal framework to that effect the applicants cannot enter into a civil union and organise their relationship accordingly, the court considers that they are directly concerned by the situation and have a legitimate personal interest in seeing it brought to an end (see, mutatis mutandis, *Vallianatos v Greece* (2013) 36 BHRC 149, para 49, and by implication, *Schalk v Austria*(2010) 29 BHRC 396).

## Article 8 obligation of respect may be a positive obligation

30. Article 8 imposes an obligation on the state to "respect" private or family life. This may entail not just an obligation not to arbitrarily interfere with family life, but also in some contexts a positive obligation to "ensure effective respect for the rights protected by Article 8" (*Oliari*, [159]). This is an important positive obligation as the result in *Oliari* shows. However, it does not go as far as Ms Karon Monaghan QC, for the appellants, contends when she writes in her skeleton argument that "*Oliari* established that there was a positive obligation under Article 8 to provide a form of legal recognition for couples". The decision in *Oliari* must be read against the background that the Italian Constitutional Court had concluded that the Italian state had breached a constitutional right of the applicants (see e.g. [71] set out above).

31. It is well-established that the boundaries of Article 8 are unclear and liable to shift in accordance with changing social attitudes within the Convention States. The Strasbourg Court made this point in the following paragraph:

> 161 The notion of "respect" is not clear-cut, especially as far as positive obligations are concerned: having regard to the diversity of the practices followed and the situations obtaining

> in the Contracting States, the notion's requirements will vary considerably from case to case (see *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 72, ECHR 2002-VI). Nonetheless, certain factors have been considered relevant for the assessment of the content of those positive obligations on States (see *Hämäläinen,* cited above, § 66). Of relevance to the present case is the impact on an applicant of a situation where there is discordance between social reality and the law, the coherence of the administrative and legal practices within the domestic system being regarded as an important factor in the assessment carried out under Article 8 (see, *mutatis mutandis*,*Christine Goodwin*, cited above, §§ 77-78; *I. v. the United Kingdom* [GC], no. 25680/94, § 58, 11 July 2002, and *Hämäläinen*, cited above, § 66). Other factors relate to the impact of the alleged positive obligation at stake on the State concerned. The question here is whether the alleged obligation is narrow and precise or broad and indeterminate (see *Botta v. Italy*, 24 February 1998, § 35, *Reports* 1998-I) or about the extent of any burden the obligation would impose on the State (see *Christine Goodwin,* cited above, §§ 86-88).

32. In *Oliari*, the Court considered whether the alternative of a cohabitation agreement would be adequate, but it rejected that option because such an agreement would fail to provide, for example, maintenance obligations and inheritance rights. In any event, such an agreement would not provide legal recognition of the applicants' relationship ([169]). The same is true of cohabitation agreements under English law and Mr Squires has not suggested that they provide a satisfactory alternative in this case.

## Civil unions are a "modality" for ensuring respect for family life

33. The Strasbourg Court considered whether the complaint in *Oliari* fell within the scope of Article 8 and held that, since same-sex couples could not marry, the applicants had an interest in the Italian state's failure to provide a means for obtaining legal recognition of their relationship:

> 174 In view of the above considerations, the Court considers that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance. Further, the Court has already held that such civil partnerships have an intrinsic value for persons in the applicants' position, irrespective of the legal effects, however narrow or extensive, that they would produce (see *Vallianatos*, cited above, § 81).

> This recognition would further bring a sense of legitimacy to same-sex couples.

34. The provision of a means of legal recognition for civil unions is one of the means or (as it is put) "modalities" by which a state fulfils its positive obligation to respect the relationship between committed couples. The expression "modalities" was used by the Strasbourg Court in *Petrovic,* and quoted by Lord Nicholls (with whom the majority agreed) in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557:

> 10 Unlike article 1 of the 12th Protocol, article 14 of the Convention does not confer a free-standing right of non-discrimination. It does not confer a right of non-discrimination in respect of all laws. Article 14 is more limited in its scope. It precludes discrimination in the "enjoyment of the rights and freedoms set forth in this Convention". The court at Strasbourg has said this means that, for article 14 to be applicable, the facts at issue must "fall within the ambit" of one or more of the Convention rights. Article 14 comes into play whenever the subject matter of the disadvantage "constitutes one of the modalities" of the exercise of a right guaranteed or whenever the measures complained of are "linked" to the exercise of a right guaranteed: *Petrovic v Austria* (1998) 33 EHRR 307, 318, 319, paras 22, 28.

## Under Strasbourg case law the appellants' complaint is not ruled out by the fact they could marry

35. In this case it is open to the appellants to marry ("the marriage option"). Mr Squires submits that the marriage option means that there is no violation in this case (I refer to this below as the "'can-marry' submission"). This submission is made on the basis of domestic law, which I will consider below. At this stage I am considering only Strasbourg jurisprudence.

36. Mr Squires submits that, in *Oliari,* personal interests close to the core of Article 8 were clearly infringed because a same-sex couple could neither marry nor enter a civil union.

37. In my judgment, the marriage option would not prevent a violation of Article 14 taken with Article 8 under Strasbourg case law. Non-discrimination is an important principle. As Lord Nicholls held in *Ghaidan v Godin-Mendoza* at [9]: "Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment." Non-discrimination requires that the rights of same-sex couples and opposite-sex couples are the same here unless the difference is justified. Because of the non-availability of CPs, the position of same-sex and opposite-sex couples is treated differently in a relevant respect. Accordingly, the availability of the option of civil or religious marriage is not a good answer to the appellants' appeal.

38. The situation, submits Ms Monaghan, is similar to that which arose in *Vallianatos v Greece* where the Greek government proposed to introduce a form of civil union but to restrict it to opposite-sex couples. Mr Squires disagrees.

39. As I see it, in that case, the Strasbourg Court found that the proposed measure was within the ambit of Article 14 taken with Article 8. It is true that the Greek government did not dispute that the complaint was within Articles 14 and 8, but the Court specifically examined whether this was so and decided that as the same-sex couple enjoyed "family life" together for Article 8 purposes, they were within the ambit of Article 8 (see [73]-[74]). This was enough. The issue was whether the Greek State was entitled, from the standpoint of Articles 14 and 8 of the Convention, to enact a law introducing, alongside the institution of marriage, a new registered partnership scheme for unmarried couples that was limited to different-sex couples and thus excluded same-sex couples. The difference in treatment was held to be discriminatory unless it could be objectively justified. The Greek government argued (among other matters) that the same-sex couple could achieve rights through a cohabitation agreement. As already explained, the Strasbourg Court rejected that argument not because the rights given by law were more extensive but because the applicants would not then have the benefit of legal recognition:

> 81…even if it were to be considered valid, it does not take account of the fact that the civil partnerships provided for by Law no 3719/2008 as an officially recognised alternative to marriage have an intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive, that they would produce. As the court has already observed, same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples. Accordingly, the option of entering into a civil union would afford the former the only opportunity available to them under Greek law of formalising their relationship by conferring on it a legal status recognised by the state. The court notes that extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law but on the basis of the legal rules governing civil unions, thus having their relationship officially recognised by the state. ([81])

40. In my judgment, the Strasbourg Court would reject the "can-marry" submission too. The appellants have rejected marriage on the basis of opinions that they are entitled to hold. Marriage is not an effective option for them, and Convention rights have to be interpreted so as to be practical and effective and not theoretical and illusory. The appellants cannot be forced to marry. Cohabitation does not alone give them the legal recognition or the rights that they could obtain by entering into a CP. On this analysis, in Strasbourg jurisprudence, the "can-marry" submission is relevant to justification and not to the ambit question.

41. The Strasbourg Court rejected the argument that the applicants in *Vallianatos* had to show adverse effect: it was enough that they were denied the opportunity to obtain legal recognition of their relationship under the new law applying to opposite-sex couples only:

> 49 As to the other applicants, the court notes that they are individuals of full age, who, according to the information submitted to it, are in same-sex relationships and in some cases cohabit. To the extent that, as a result of s 1 of Law no 3719/2008 which excludes same-sex couples from the scope of the Law, they cannot enter into a civil union and organise their relationship according to the legal arrangements laid down by that law, the court considers that they are directly concerned by the situation and have a legitimate personal interest in seeing it brought to an end. Accordingly, it concludes that the individuals in the present applications should be considered as 'victims' of the alleged violation within the meaning of art 34 of the convention.

42. *Schalk* is similarly against the Secretary of State's submission. That was a complaint about the failure to introduce civil unions for same-sex partners but Austria introduced such unions in the course of the proceedings. The applicants could still complain. The Strasbourg Court put aside the question of any compensation for the state's late action and held that it was sufficient that the state had not accepted that it had breached Article 8, a matter which (if compensation was not considered) did not cause any loss to the applicants.

43. Mr Squires also relies on *Petrovic* but it is unnecessary to consider this further case as I have already cited sufficient authority to demonstrate that adverse impact in terms of financial damage or physical injury is not required by the Strasbourg Court.

44. It follows that, subject to any binding domestic authority to the contrary, the appellants in this case do not have to show that they are deprived of any other means of obtaining legal recognition of their relationship for the purpose of showing that their complaint falls within the "ambit" of Article 8.

## The Secretary of State's submission on the name "marriage"

45. Mr Squires submits that this Court is concerned with legal rights and not "labels". This is said because civil partnership is equivalent to marriage in terms of legal rights: the appellants have on his submission no complaint because the only difference lies in the title of the institution. The appellants do not accept this because on their case the institution of marriage has associations, but that is not the point here. I agree with Mr Squires that we are concerned with legal rights, and not (for example) ideological matters, but that does not necessarily make names (or as Mr Squires put it, labels) irrelevant. Mr Squires' argument works in reverse. The 2013 Act merely gave same-sex couples the same rights as they could obtain by entering CPs but through an institution with the name of "marriage". To same-sex couples, the name "marriage" was important as removing the implication that their relationship was less worthy than that of opposite-sex couples. The appellants hold a view about the term "marriage" being patriarchal and inconsistent with equality

between the sexes. The presence in Parliament of a proposal to extend CPs to opposite-sex couples suggests that the appellants are not alone in their view. If the name of an institution for recognition of their relationship is treated by Parliament as significant for same-sex couples, the name of another institution for that purpose may have significance for other couples too.

## Does domestic case law override Strasbourg case law on the ambit issue?

46. The next question is whether we are precluded from following the Strasbourg Court's approach to the ambit of Article 8 in *Oliari* by decisions of the House of Lords interpreting the Strasbourg Court's requirements. If so, then the doctrine of precedent applies and we are bound to apply the domestic case law in preference to that of the Strasbourg Court. In my judgment, the passages from the speeches in these cases are distinguishable. We are then able to take the Strasbourg case law into account, and there is no reason why we should not follow and apply it in this case.

THE SECRETARY OF STATE'S SUBMISSION ON AMBIT – ADVERSE IMPACT REQUIRED

47. This submission constitutes a very important part of the Secretary of State's submissions on Issue 1, and it will be necessary to consider the case law at some length. This submission is grounded in the point that it was and is always open to the appellants to marry.

48. Mr Squires' fundamental submission is that there [is] no "personal interest close to the core of [a substantive Convention right] … infringed by the difference in treatment complained of", and thus no interference by the State within the "ambit" of Article 8. The words quoted come from the speech of Lord Bingham in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, with which all the members of the House agreed, where he held:

> 13 In *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, [2006] 4 All ER 929, the House had recent occasion to review the Strasbourg jurisprudence on the applicability of art 14, and attempted to distil the essence of the relevant principles. Although different members of the House used different language, and the outcome vividly illustrated the difficulty which may arise in applying the principles to a concrete case, none of these opinions was criticised as inaccurate or incomplete, and I do not think any purpose will be served by repeating those opinions or citing passages from them. Plainly, expressions such as "ambit", "scope" and "linked" used in the Strasbourg cases are not precise and exact in their meaning. They denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed. This calls, as Lord Nicholls said in *M*, at para 14, for a value judgment. The court is required to consider, in respect of the Convention right relied on, what value that substantive right exists to protect.

49. Lord Hope made the same point in *R (Countryside Alliance and others) v Attorney General* **[**2008] 1 AC 719:

> 60 As Lord Bingham of Cornhill said in *R (Clift) v Secretary of State for the Home Department* [2007] 1 AC 484, para 13, expressions such as "ambit" are not precise and exact in their meaning. As he put it "They denote a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed." That will be so if, for example, the state, having set up an institution such as a school or other educational establishment in unilingual regions, takes discriminatory measures within the meaning of art 14 read with the right to education in art 2 of the First Protocol which are based on differences in the language of children attending these schools: see *Belgian Linguistic Case (No 2)* (1968) 1 EHRR 252, para 32. *Clift's* case provides another example closer to home. It was held that a scheme which had been set up by legislation which gave the right of early release of prisoners fell within the ambit of the right to liberty in art 5 of the Convention. Differential treatment of prisoners otherwise than on the merits gave rise to a potential complaint of discrimination under art 14.

50. Mr Squires contends that in *M* v *Secretary of State for Works and Pensions* ("SSWP") [2006] 2 AC 91 the House of Lords decided that the "ambit" requirement was not met unless the measure infringed (in a discriminatory way) some right or interest of the complainant which was close to the core values of the right in question, and the infringement had an adverse impact on him. The judge accepted this submission and held that the appellants failed to establish that they were within the ambit of Article 8 because the bar had no adverse impact on them because of the marriage option.

51. In *M v SSWP,* the mother of a child had separated from the father and was living with her same-sex partner. She had to make a larger contribution for child benefit for the child than the father, who also had caring responsibilities but was in an opposite-sex relationship. The mother claimed that the regulations for child benefit violated Article 14 taken with Article 8. There was no difficulty in showing discrimination on the grounds of sexual orientation. The central issue in the House of Lords was whether she could establish that her claim was within the ambit of Article 8. The majority of the House held that it was not (see per Lord Walker, with whom Lord Bingham and Lord Mance agreed, Lady Hale dissenting). The mother's same-sex relationship did not at that date entitle her to say that that relationship was "family life" under Article 8. So she had to rely on private life or family life with her children or the father's family life with them. Those facts alone make it evident that, in designing the regulations and imposing the enhanced contribution on the mother, the state was not seeking to promote respect for her private life. The regulations were about families. The majority did not consider that these promoted

respect for her family life with her children or the father's family life with his family.

52. Lord Bingham gave the first speech. He first agreed with Lord Walker but also gave reasons of his own. He held:

> 4 It is not difficult, when considering any provision of the Convention, including article 8 and article 1 of the First Protocol ("article 1P1"), to identify the core values which the provision is intended to protect. But the further a situation is removed from one infringing those core values, the weaker the connection becomes, until a point is reached when there is no meaningful connection at all. At the inner extremity a situation may properly be said to be within the ambit or scope of the right, nebulous though those expressions necessarily are. At the outer extremity, it may not. There is no sharp line of demarcation between the two. An exercise of judgment is called for. Like my noble and learned friend in para 60 of his opinion, I cannot accept that even a tenuous link is enough. That would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind.
>
> 5 Like Kennedy LJ in the Court of Appeal, I do not think the enhanced contribution required of Ms M impairs in any material way her family life with her children and former husband, or her family life with her children and her current partner, or her private life. No doubt Ms M has less money to spend than if she were required to contribute less (or would do so, but for the discretionary adjustment to which my noble and learned friend refers in para 46 of his opinion). But this does not impair the love, trust, confidence, mutual dependence and unconstrained social intercourse which are the essence of family life, nor does it invade the sphere of personal and sexual autonomy which are the essence of private life. I regard the application of a rule governing a non-resident parent's liability to contribute to the costs incurred by the parent with care, even if it results in the non-resident parent paying more than she would under a different rule, as altogether remote from the sort of abuse at which article 1P1 is directed.

53. It is convenient to take the speech of Lord Walker next. He examined the Strasbourg case law on Article 8 in the context of private life and found that "the unique feature" of Article 8 in that context was that:

> 83…it is concerned with the failure to accord *respect*. To criminalise any manifestation of an individual's sexual orientation plainly fails to respect his or her private life, even if in practice the criminal law is not enforced (*Dudgeon v United Kingdom* 4 EHRR 149 and *Norris v Ireland* 13 EHRR 186); so does intrusive interrogation and humiliating discharge from the armed forces (*Smith v United Kingdom* 29 EHRR 493

> and *Lustig-Prean v United Kingdom* 29 EHRR 548). Banning a former KGB officer from all public sector posts, and from a wide range of responsible private-sector posts, is so draconian as to threaten his leading a normal personal life (*Sidabras v Lithuania* 42 EHRR 104). Less serious interference would not merely have been a breach of article 8; it would not have fallen within the ambit of the article at all.

54. He concluded that:

> 86 Ms M's stronger argument (as regards family life) depends on her present relationship with her same-sex partner. ..
>
> 87 … I am content to assume that the unit consisting of Ms M, her new partner and (especially when living with them) their children by their former marriages should be regarded as a family for article 8 purposes. I would also accept that the complicated formulae employed by the 1991 Act and the Regulations are intended to strike a fair balance between the competing demands (on often limited financial resources) of the children (when living away from the new home) and the new household. To that extent the legislation is intended, in a general sort of way, to be a positive measure promoting family life (or, it might be more accurate to say, limiting the damage inevitably caused by the breakdown of relationships between couples who have had children). But I do not regard this as having more than a tenuous link with respect for family life. I do not consider that this way of putting Ms M's case brings it within the ambit of respect for family life under article 8.
>
> 88 In my opinion Ms M's case on respect for private life also fails, for similar reasons. There has been no improper intrusion on her private life. She has not been criminalised, threatened or humiliated. The tribunal respectfully recorded that she and her partner "were living in a very close, loving and monogamous relationship". Her complaint is that the state has calculated her liability to contribute to her children's maintenance under a formula which is different from (and on the particular facts of her case, more onerous than) that which would have been used if she had been in a heterosexual relationship. The link with respect for her private life is in my view very tenuous indeed.

55. Mr Squires submits that both Lord Walker and Lord Bingham considered that there had to be an adverse impact on the applicant of the measure said to fall within the ambit of Article 8, and, in addition, Lord Bingham considered that, for an act to fall within the ambit of Article 8, it had to be an interference with the core values or certain core values falling within Article 8, including “love, trust, confidence, mutual dependence and unconstrained social intercourse” which are at the essence of family life and the “sphere of personal and sexual autonomy” which forms the foundation of private life.

56. Lord Nicholls (who gave the second speech) concurred in the result but considered that the calculation of child support payments was within the ambit of Article 8. He would have allowed the appeal had the Strasbourg jurisprudence treated the relationship between a same-sex couple as family life. Lord Mance agreed. As it is the reasoning of Lord Bingham, which incorporates that of Lord Walker, which achieved the support of the majority of the House in *Clift*, it is his speech and that of Lord Walker which are binding on us. Mr Squires principally relies on those speeches. In the circumstances it is not necessary to set out extracts from the illuminating speeches of Lord Nicholls, Lord Mance or Lady Hale.

57. Likewise, Mr Squires relies on *Wilkinson v Kitzinger* [2007] I FLR 295. Mr Squires submits that, unlike the same-sex couple in *Wilkinson*, the appellants can enter into a marriage. They cannot argue that marriage is not recognised around the world or is regarded as being of lesser value than a civil partnership.

THE APPELLANTS' SUBMISSION: DOMESTIC AUTHORITIES DO NOT MEAN THAT THEY HAVE TO SHOW ADVERSE IMPACT OF SOME TANGIBLE KIND BECAUSE THEY CANNOT ENTER A CP

58. Ms Monaghan essentially relies on the fact that the grant of legal recognition of a couple's relationship is, as I have explained, under Strasbourg case law one of the modalities whereby the state fulfils its positive obligation to ensure respect for family life. So, she submits, *M v SSWP* is distinguishable. She submits that, while there may be some doubt whether, when a state imposes an obligation on a separated parent who is not the sole carer to contribute to the maintenance of children of the couple, it is promoting family life, it is clearly doing so when it provides legal recognition for couples who are committed to each other. This submission is therefore another way of putting the point that the promotion of civil unions for those who enjoy a family life for Convention purposes is within the ambit or scope of Article 8. Basing herself on her "modalities" argument, Ms Monaghan submits that the measure in issue in *M v SSWP* would have come within Article 8 as one of the means by which the state demonstrated its respect for family life were it not for the fact that at that time the Strasbourg Court did not recognise that same-sex couples enjoyed "family life". She submits that the alternative test of connection to Article 8 values has to be applied in context. The closer the measure to the core of the values protected by Article 8 the less impact has to be shown.

59. Moreover, Ms Monaghan submits, there is impairment and humiliation in this case. Opposite-sex couples who do not wish to marry do not have the same right to legal recognition for their relationship as same-sex couples and they lose some very valuable rights.

MY CONCLUSIONS ON WHETHER THERE IS BINDING HOUSE OF LORDS AUTHORITY THAT ADVERSE IMPACT IS REQUIRED

60. In my judgment, the various strands in Mr Squires' argument must be separated out. I will deal with his complex arguments in turn.

*(1) "Personal interests close to the core values of" Article 8 include the right to obtain legal recognition of a couple's relationship*

61. Lord Bingham's phrase "personal interest close to the core values" of a Convention right is a synthesis of the approach of the Strasbourg Court. In Strasbourg jurisprudence, the core or very essence of a right represents the limits to the state's power to qualify or justify a departure from a right. The core of a right is ascertained by identifying the values at stake. It means that the Convention is only concerned with disputes about discrimination which are "of moment" and not peripheral issues. In addition to be able to complain to the Strasbourg Court, the applicant must, under Article 34 of the Convention, be a victim of a violation of a Convention right. He must therefore have a personal interest in the violation. Lord Bingham's list of matters which he said were the essence of family life, namely love, trust, confidence, mutual dependence and unconstrained social intercourse, is a list by reference to a term derived from Strasbourg jurisprudence. That list should not therefore be treated as tied to the meaning which the Strasbourg Court gave to family life at the time of the *M* judgment. The meaning of the "core values" of family life must be read accordingly.

62. On that basis, I have no doubt that we are not prevented by *M v SSWP* from holding that the legal recognition of a couple's relationship will in general be regarded as of moment and a matter in which that couple has a personal interest. This represents the current state of Strasbourg case law. Thus, for example, in *Oliari*, the Strasbourg Court made it clear that the need for legal recognition and the conferral of important rights were "facets of an individual's existence and identity" ([177]). It also described the applicants' interests as "momentous" ([185]). Moreover, the Strasbourg Court recognised that civil unions had an "intrinsic value" for cohabiting same-sex partners [174], set out in paragraph 32 above. The legal recognition which a civil union gave would of itself "further bring a sense of legitimacy to same-sex couples." ([174]).

*(2) M v SSWP does not mean that adverse impact is needed in this case*

63. Article 8 contains both negative and positive obligations and the House of Lords had to deal with both types of obligation.

64. This distinction is most evident in the speech of Lord Walker. In my judgment, in paragraphs 87 and 88 Lord Walker drew a distinction between the positive and negative obligations in Article 8. In paragraph 87, Lord Walker addressed the positive obligation to promote family life. In relation to this obligation, the test of ambit was whether the link was too tenuous. By contrast, Lord Walker's reference in paragraph 88 of his speech to Ms M not being "criminalised, threatened or humiliated" is in the context of a negative obligation not to interference with private life. Family life did not apply. Lord Nicholls make a similar distinction in his speech, particularly at paragraph 17, but, in contrast to Lord Walker, he speaks of adverse impact in the context of positive obligations.

65. I can restrict my observations to the speeches of Lord Bingham and Lord Walker. In my judgment, by agreeing with Lord Walker, Lord Bingham agreed with what Lord Walker had said in paragraph 87 about positive obligations. In his own speech, however, he dealt only with negative obligations (of which Lord Walker gave examples in paragraph 83 of his judgment).

66. In my judgment, in paragraphs 4 and 5 of his speech (paragraph 52 above), Lord Bingham was dealing only with the negative obligation in Article 8 to desist from any lack of respect for family or private life. He identified certain core values falling within Article 8, as mentioned in paragraph 55 above. He held that the further a situation was removed from "infringing" those core values, the weaker the connection becomes until a point is reached when there is no meaningful connection with Article 8 at all. In *M*, there was no impairment with family life or the core values which were the essence of family life.

67. In my judgment, that is why Lord Bingham only required there to be an adverse impact in the context of the negative obligations in Article 8. On the case of positive obligations, the test is whether the link was too tenuous. The link in *M* was on any basis extremely tenuous for the reasons which Lord Bingham and other members of the House explained.

68. That is not the situation in this case. The positive obligation spelt out in *Oliari* is to "ensure effective respect for the rights protected by Article 8" (*Oliari*, [159]). It is clear from *Oliari*, *Vallianatos* and *Schalk* that a couple whose claim depends on that positive obligation in circumstances where the state has failed to set up a system for recognising their relationship is within the ambit of Article 8. In my judgment, the only test with which this Court needs to be concerned is this case is the test of link and whether the appellants' claim was too tenuous.

69. This Court does not need to get into the question whether the tests laid down in *M v SSWP* accord with Strasbourg case law in other circumstances. It is clearly one view of the Strasbourg case law that, provided a complainant has victim status, any question about the intensity of the link or impairment fall to be made in the context of justification not in relation to ambit, but that is likely to be a matter for the Supreme Court and not this Court. This was one of the points made by Lady Hale in her dissenting judgment ([111]).

*(3) Wilkinson v Kitzinger is not binding and depends on a narrow view of family life*

70. The judge held that she was bound as a matter of judicial comity to follow and agreed with the reasoning of Sir Mark Potter P in *Wilkinson v Kitzinger*. In that case, Sir Mark Potter P accepted that for a violation to be within the ambit of Article 8 the measure had to demonstrate lack of respect for family life, relying principally on paragraph 88 of the speech of Lord Walker in *M v SSWP* (see [84], [88] and [107] of the judgment of Sir Mark Potter P). As explained, I do not consider that that is the correct interpretation of *M v SSWP.*

71. For the reasons already given in paragraphs 26 to 45 above, Strasbourg jurisprudence does not in my judgment have the effect that the marriage option prevents the appellants, subject to justification from establishing a potential violation of Article 14 taken with Article 8.

*(4) So Strasbourg case law on ambit as explained above should be applied*

72. In general, as Lord Nicholls said in *M* (at 29]), it would be:

> highly undesirable for the courts of this country, when giving effect to Convention rights, to be out of step with the Strasbourg interpretation of the relevant Convention article.

73. In my judgment, for the reasons given above, *M* does not prevent this Court from applying current Strasbourg jurisprudence on the question of the ambit issue. I see no reason not to follow what Lord Nicholls said about the undesirability of being out of step with Strasbourg. I would therefore apply the Strasbourg jurisprudence which I have analysed in this judgment. On that basis, I would hold that the appellants succeed on the ambit issue.

## Conclusion on Issue 1

74. The appellants have established that their claim falls within the ambit of Article 8. The bar constitutes a difference in treatment on the grounds of their sexual orientation. They have therefore established a potential violation of Article 14 of the Convention, taken with Article 8. The remaining question is whether the Secretary of State can establish that the difference in treatment is justified.

# DETAILED ANALYSIS OF ISSUE 2: IS THE POTENTIAL VIOLATION JUSTIFIED?

75. The question of justification must be considered on the basis that the appellants have established that, subject to justification, their claim falls within the ambit of Article 14 taken with Article 8. This is important because it means that the Secretary of State has to show that the potential violation of the appellants' rights will be removed by the steps she proposes to take. Justification involves questions of law and fact. I start with the questions of law, then illustrate the approach of the courts by reference to *Oliari* and then consider the facts in this case.

## Justification: legal aspects

### (1) GENERAL PRINCIPLES AND BURDEN OF PROOF

76. For justification to be established, the retention of the bar must both serve a legitimate aim and be proportionate. In *Oliari* the complaint was based solely on Article 8 so for a statement of the test for justification where a complaint is based on Article 14 taken with Article 8 I take *Schalk*. Then I will return to track the reasoning in *Oliari*, which is instructive for the purposes of understanding and analysing the arguments in this case.

77. In *Schalk*, the Strasbourg Court summarised the overriding principles of justification. It adopted a strict standard: the measures had to be suitable to achieve the aim in question, and the discrimination had to be necessary. The Strasbourg Court also stated that the burden of proof in matters of justification is on the state:

> 85 In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It

> must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions in issue (see *Karner*, § 41, and *Kozak*, § 99, both cited above). According to the case-law cited above, the burden of proof in this regard is on the respondent Government. It is therefore for the Greek Government to show in the instant case that it was necessary, in pursuit of the legitimate aims which they invoked, to bar same-sex couples from entering into the civil unions provided for by Law no. 3719/2008 (see, to similar effect, *X and Others v. Austria*, cited above, § 141). (*Vallianatos*).

MARGIN OF APPRECIATION (OR DISCRETION) AVAILABLE TO THE STATE UNDER STRASBOURG CASE LAW

78. The Strasbourg Court in *Schalk* pointed out that a "margin of appreciation" (margin of discretion) is granted to a Convention State in assessing when circumstances justify differences in otherwise similar situations and in making decisions when a measure is one of "economic or social strategy":

> 96 The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such 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 States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).

79. Another situation in which the Strasbourg Court allows a wide margin of appreciation is where (as now) there is no consensus among Convention States as to whether a state should provide any means of registering a civil union and where (as here) the state has to balance the conflicting interests of the general public and the Convention rights of a section of the public. The Strasbourg Court made this point in *Oliari*:

> 162 In implementing their positive obligation under Article 8 the States enjoy a certain margin of appreciation. A number of factors must be taken into account when determining the breadth of that margin. In the context of "private life" the Court has considered that where a particularly important facet of an individual's existence or identity is at stake the margin allowed to the State will be restricted (see, for example, *X and Y*, cited

> above, §§ 24 and 27; *Christine Goodwin*, cited above, § 90; see also *Pretty v. the United Kingdom*, no. 2346/02, § 71, ECHR 2002-III). Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *X, Y and Z v. the United Kingdom*, 22 April 1997, § 44, *Reports* 1997-II; *Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I; and *Christine Goodwin*, cited above, § 85). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (see *Fretté*, cited above, § 42; *Odièvre v. France*[GC], no. 42326/98, §§ 44-49, ECHR 2003-III; *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78, ECHR 2007-V; and *S.H. and Others*, cited above, § 94).

80. However, as this last citation indicates, serious reasons are required to justify discrimination on the grounds of sex or sexual orientation. The present case falls into that category. The Strasbourg Court thus held in *Schalk*:

> 97 On the one hand, the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Karner*, cited above, § 37; *L. and V. v. Austria*, cited above, § 45; and *Smith and Grady*, cited above, § 90). On the other hand, a wide margin of appreciation is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for instance, *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 52, ECHR 2006-VI).
>
> 98 The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see *Petrovic*, cited above, § 38).

DOMESTIC CASE LAW RECOGNISES THE SECRETARY OF STATE'S AREA OF JUDGMENT

81. There are many authorities on this point. Notably Lord Hope in *R v DPP ex parte Kebeline* [2000] 2 AC 326, 381 held that, in matters such as proportionality, difficult choices may have to be made by the executive or legislature between individual rights and the society's needs and that in some circumstances the courts recognise that there is an "area of judgment" within which it will defer on democratic grounds to the considered opinion of the decision-maker or legislature. Mr Squires also referred to *R*

*(JS) v SSWP* [2015] 1 WLR 1449 at [63], [92]-[93] per Lord Reed and to *R (Countryside Alliance) v Attorney General* [2008] 1 AC 719, [45] per Lord Bingham.

82. Lord Hope entered a relevant qualification to his holding in *Re G (Adoption: Unmarried Couple)* [2009] AC 173, at [48], which is relevant here:

> Cases about discrimination in an area of social policy, which is what this case is, will always be appropriate for judicial scrutiny. The constitutional responsibility in this area of our law resides with the courts. The more contentious the issue is, the greater the risk is that some people will be discriminated against in ways that engage their Convention rights. It is for the courts to see that this does not happen. It is with them that the ultimate safeguard against discrimination rests.

A "FAIR BALANCE" MUST BE STRUCK BETWEEN THE INTERESTS OF THE COMPLAINANTS AND THOSE OF THE GENERAL PUBLIC

83. When, as in the last citation from *Oliari*, the Strasbourg Court refers to striking a balance, it means of course striking a fair balance. In *Oliari*, the Strasbourg Court described the application of fair balance as follows:

> 175 The Court reiterates that in assessing a State's positive obligations regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Having identified above the individuals' interests at play, the Court must proceed to weigh them against the community interests.

84. Two points are significant. First, the Strasbourg Court specifically makes the point that the obligation in question is a positive obligation of the state, and to be defined by reference to the fair balance. Second the Strasbourg Court does not include words "so far as possible" or words to that effect. In other words, there is no express requirement in this passage to strike the balance so that it ensures respect for the right to the maximum extent. On the other hand, it is clear from paragraph 85 of the judgment in *Schalk* (quoted at paragraph 77 above) that the measure must be suitable and that it must be necessary to exclude the group in question.

85. The obligation on the decision-maker to strike a fair balance similarly applies when a domestic court determines whether a particular measure is proportionate.

## ***Oliari*** **illustrates the scrutiny to be applied to an issue of justification**

86. In *Oliari*, the Italian state sought to justify its delay in introducing a system for same-sex civil unions on the basis that the question was a social question and the Italian state was seeking to establish consensus in society. The Italian government:

> 176 …considered that "time was necessarily required to achieve a gradual maturation of a common view of the national

> community on the recognition of this new form of family". They also referred to "the different sensitivities on such a delicate and deeply felt social issue" and the search for a "unanimous consent of different currents of thought and feeling, even of religious inspiration, present in society". At the same time, they categorically denied that the absence of a specific legal framework providing for the recognition and protection of same-sex unions attempted to protect the traditional concept of family, or the morals of society. The Government instead relied on their margin of appreciation in the choice of times and the modes of a specific legal framework, considering that they were better placed to assess the feelings of their community.

87. As to the margin of appreciation, the Strasbourg Court noted that the breadth of that margin depended on a number of factors. It accepted that the case involved sensitive moral or ethical issues but it also noted that the applicants were not asking for highly controversial rights (which would no doubt include such matters as the right to adopt children or to assisted reproduction, which were not given to same-sex partners in *Schalk*) ([177]).

88. The Strasbourg Court stressed that the Italian state was usually better placed to assess the community interests but noted that in response to a survey carried out by the Italian Institute for Statistics some 62.8% of respondents thought that same-sex couples living as though they were married should have the same rights as a married opposite-sex couple ([144], [179]).

89. The Strasbourg Court noted that there was growing acceptance in Convention States of civil unions for same-sex couples but it was only just a majority of states. The Strasbourg Court also noted similar developments in other parts of the world.

90. The Strasbourg Court noted with concern that the Italian state had not implemented the decision of the Constitutional Court and regarded this as undermining the authority of the judiciary ([184]). In addition, the attitude of the Italian government left the applicants in a state of uncertainty "which has to be taken into account" ([184].

91. In all the circumstances, the Italian state had exceeded its margin of appreciation. It had violated the applicants' rights under Article 8 by failing to "fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions" ([185]).

92. The result in *Oliari* is not exceptional. The Strasbourg Court also rejected the justification offered by the Greek Government in *Vallianatos* for limiting civil union to opposite-sex couples. This was based on the existence of cohabitation agreements and a desire to protect children. Cohabitation agreements were not adequate because they did not confer official recognition or confer important rights, for example as to inheritance. The desire to protect children did not make it necessary to exclude same-sex couples since the new civil union would be available to childless opposite-sex couples.

## Justification relied on in this case: the need to await data

93. The Secretary of State relies on a very different form of justification in this case from that relied on in *Oliari.* I have quoted it in paragraph 3 of this judgment. The Secretary of State has decided not to put forward legislative proposals at this stage either to remove the bar or to abolish CPs. She is waiting to see how same-sex marriage impacts on CPs and for this purpose wants to have "more years' data". Mr Squires has argued the case on the basis that that data is annual data of the same kind as the 2015 statistical bulletin. We have not been told of any other source of information apart from ONS statistics. Mr Squires submits that if CPs were extended to opposite-sex couples now but it was decided to abolish them in a few years' time, the exercise will be "disruptive, unnecessary and extremely expensive". He also contends that the cost of extending CPs to opposite-sex couples will be considerable, but that expense cannot without more be relied on as justification because if it were good justification discrimination would rarely have to be removed. In respectful disagreement with my Lords, I find it difficult to conclude on the evidence that the Secretary of State's policy is any wider than that which I have set out in paragraph 3 above.

## The Secretary of State's discretionary area of judgment in this case

94. Mr Squires submits that a wide margin must be allowed for the Secretary of State's decision. He puts forward two reasons.

95. First, he submits that the decision of the Secretary of State falls within the area of discretionary judgment (or margin of appreciation) in which the courts must defer to the judgment of the Secretary of State. In addition to the authorities cited above, Mr Squires submits that *Schalk* supports the Secretary of State's case. The Strasbourg Court held that Austria did not exceed its margin of appreciation in the timing of the introduction of civil unions for same-sex couples.

96. Second, Mr Squires submits that, as illustrated by *Schalk,* the Strasbourg Court recognised that the timing of legislative change is a matter of social strategy, and therefore attracts a wide margin of appreciation where there is no consensus among the other European states. Mr Squires submits that *Vallianatos* applied the same test, and was decided on the basis that Greece had departed from the trend within the Convention States.

97. Ms Monaghan argues that we are not concerned with the margin of appreciation which the Strasbourg Court gives to national authorities because this Court is a domestic court. She submits that under domestic law there would be strict scrutiny.

98. I agree with Ms Monaghan's submission though in my judgment the standard would be strict scrutiny even if Strasbourg jurisprudence was applied. This is because of the importance of the prohibition of discrimination and the grounds on which discrimination is sought to be justified. This case is in critical respects not about the Secretary of State making judgments on social or moral issues (such matters would in any event be for Parliament in this case), but, for the reasons I will endeavour to give below, about the measures which the Secretary of State has put in place to discharge the responsibility of determining how to resolve the issue of discrimination to which the bar gives rise. As that is not a question of social or

moral judgment, but of waiting to see whether the use of CPs by same-sex couples justifies their retention, this Court can examine the measures critically to see if a fair balance is achieved.

99. The closest case law (in terms of factual context) is to be found in the jurisprudence of the Strasbourg Court. In *Vallianatos*, for example, Greece sought to justify its potential violation of Article 14 taken with Article 8 by introducing civil unions for opposite-sex couples on two grounds, first that rights could be obtained by a cohabitation agreement and second on the ground that the new measure was to protect children. The Strasbourg Court scrutinised the reasons given for the distinction and rejected them, finding them all within its competence to assess. Lord Hope indicated in *Re G* that a domestic court would adopt a similar approach. I therefore do not consider that *Vallianatos* supports Mr Squires' argument.

100. In my judgment, *Schalk* is materially different because in this case civil partnerships are already part of the law of England and Wales, and the issue is how discrimination in their availability should be brought to an end. The Secretary of State is not in the same position as Austria in *Schalk*. Austria could claim to be part of the emerging consensus on civil unions and thus its delay in introducing a system of civil unions was excusable and not in violation of the Convention. Here, the Secretary of State is considering the possibility of removing the future use of civil partnerships altogether.

101. Moreover, the practice of other Convention States does not give the Secretary of State some further margin. As I point out in the Appendix, the UK is, according to the information provided to us, the only Convention State which enables same-sex couples to enter civil partnerships and not opposite-sex couples. It is the only Convention State which gives same-sex couples two options of obtaining legal recognition but opposite-sex couples only one.

## The aim of the Secretary of State's policy is legitimate

102. Mr Squires submits that the policy of the Secretary of State is "to wait and see" what effect same-sex marriage has on CPs before making her decision. So the Secretary of State's policy is that set out in the statement of the Government Equalities Office in the 2015 statistical bulletin (see the Appendix to this judgment) that "to fully evaluate the impact of the introduction of [same-sex marriage] more years of data are required". Mr Squires submits that the Secretary of State's "wait and see" policy is justified by the proper and legitimate desire on the part of the Secretary of State to conserve public resources and that must be a legitimate aim. He makes the point, which is clearly right, that the bar was not a potential violation of the rights of the appellants on enactment and it only became a potential violation when same-sex couples were given the right to marry.

103. Ms Monaghan submits that the Secretary of State cannot show any legitimate aim as regards *opposite-sex* couples, since the purpose of the delay in making a decision is not for their benefit but for the good of public resources and same-sex couples. She further submits that the effect of the delay on opposite-sex couples is not marginal even in the short-term as the judge suggested (Judgment, [83]).

104. Mr Squires' submission is consistent with the legitimate aim which the judge found, namely "the legitimate aim of avoiding the unnecessary disruption and the waste of time and money that plunging into a programme of legislative reform without waiting is likely to produce." (Judgment, [87]). It plainly does not take account of the interests of the appellants who wish CPs to be available to those of the opposite sex.

105. As the state has the option to eliminate the discrimination in any way it sees fit, it must be entitled to some time to make its choice. This point is made by Lord Hoffmann in the passage from *R (Hooper) v Secretary of State for Work & Pensions* [2005] 1 WLR 1681 at [61], which Beatson LJ cites at paragraph 167 below. (It is to be noted, however, that in *Walden v Liechtenstein* (App 33916/96), on which Lord Hoffmann relied, the Convention-compliant legislative reforms (for removing sex discrimination in the social benefits system with prospective effect) were already in the course of preparation.) I would, therefore, accept that there is a legitimate aim served by the Secretary of State's policy of wait and see.

106. In making her decision the Secretary of State is entitled to have regard to the need to conserve public resources, even if the present situation is discriminatory (see *R(JS)* at [63]). However, the only resources relevant here are the resources unnecessarily incurred if there is a change in the law which has to be reversed. There is bound to be expenditure in terms of preparing legislation, inter-departmental consultation and so on whichever route is taken, so that tranche of resources must be left out of account.

## Submissions on whether the test of proportionality is met in this case

107. The next question is whether the Secretary of State's policy is proportionate (see paragraph 76 above). The Secretary of State's submission is that the statistical data so far obtained (and summarised in paragraphs 8 to 12 of the Appendix to this judgment) is not enough and that this justifies a policy of "wait and see". The 2014 consultation responses do not show that there is public support for extending CPs to opposite-sex couples. The statistics show that there has been a considerable fall in the formation of new CPs. The institution of same-sex marriage could lead to a change in attitude of same-sex couples to CPs and of opposite-sex couples, like the appellants, to marriage.

108. These submissions are linked with the Secretary of State's desire to avoid unnecessary expenditure on proposals that have to be changed in the future. As Mr Squires put it in his written submissions:

> 58 It is not known what will happen in England and Wales – whether the introduction of marriage for same-sex couples will see the virtual disappearance of civil partnerships (as has occurred in some jurisdictions), or whether there will be significant numbers who continue to opt for civil partnerships. If civil partnerships, in practical terms, virtually disappear as a relevant institution in a few years' time (both in terms of numbers seeking to enter the institution and the social attitude towards it it) it may well be that the government will seek to

> persuade Parliament to abolish or phase out civil partnerships and not extend them to opposite-sex couples.

109. Ms Monaghan opposes the policy of "wait and see" and submits that no further time should be given. She points to the high support for extending CPs to opposite-sex couples in the 2012 consultation (see paragraphs 2 and 3 of the Appendix). She submits that those responses were positive and should be preferred to those in the 2014 consultation. She submits that, in any event, this is not a "numbers" matter, meaning that the question of removing the potential discrimination to opposite–sex couples involves wider issues than simply the impact of the 2013 Act on the number of CP formations.

## Reasons why the Secretary of State's "wait and see" policy does not strike a fair balance and is not proportionate

110. As I explain below, although I am mindful of the Secretary of State's important and heavy responsibility for conserving public resources, in my judgment, she has not discharged the burden of showing that her policy strikes a fair balance and is proportionate for a number of reasons. For the reasons already given (paragraphs 83 to 85 above), her policy has to take account of the interests of the appellants as well as those of the general community. The interests of the latter militate in favour of having as long as possible in order to get the maximum information that statistics can give in order to reduce the risk of unnecessary resource allocation. The interests of the appellants, on the other hand, is in achieving certainty in the shortest feasible time. One of the relevant factors to be borne in mind (but by no means the only factor) is that the discrimination in this case affects one of the closest relationships which one adult has with another and therefore concerns a very important part of their lives and identity.

(1) THE POLICY OF THE SECRETARY OF STATE IS OPEN-ENDED

111. The need to conserve public resources, important as it is, does not prevent the Secretary of State from indicating why the statistics currently available are not enough, what is still needed and her projections (updated from time to time as appropriate) as to the length of further time needed to obtain that. There is no evidence about the adequacy of the statistics. Indeed, there is no evidence at all from any statistician, whether a government statistician or a statistician from the ONS, which has been prepared for the purposes of these proceedings. So the Secretary of State needs to address the question of what statistics might reasonably be expected to show and when.

112. There is, moreover, no evidence as to what number of CP formations would be regarded as insignificant. Mr Squires speaks about their "virtual disappearance" (paragraph 110 above). It is a reasonable assumption that that the annual aggregate figure for formations would have to be single or (low) double figures.

113. There is also no evidence from the Secretary of State as to the number of years' data which the Secretary of State is currently expecting to receive before she is in a position to make her decision. Mr Squires invited us to identify the appropriate number of years but I do not consider that that is an exercise a court could undertake, certainly in the total absence of expert evidence. We have the statement

in the Scottish consultation document which estimates that reliable evidence should be available after five years from the introduction of same-sex marriage, i.e. 29 March 2019 (see paragraph 14 of the Appendix), but it has not been adopted and justified by the Secretary of State's evidence even in the broadest of terms. Mr Squires was prepared to limit the data to five years (which I took to mean that the government would first have at least five years' statistics before making a decision), but he gave no reason why it should be five years rather than (say) two, three or four years.

114. To recap, I have already observed that Convention rights must be practical and effective, not theoretical and illusory (see also *Oliari*, [159], above). It is not consistent with that approach that there should be a policy which is completely open-ended. Such a policy does not meet the requirement of proportionality. It is not shown to be a proportionate means of bringing the discrimination against the appellants to an end.

(2) THE POLICY IS DIRECTED ONLY TO OBTAINING INFORMATION ABOUT SAME-SEX COUPLES ATTITUDE TO CPS

115. Of course, a decision on an important matter, like possible legislative change in relation to the availability of CPs, must be as evidence-based as possible, but, in the absence of explanation it is difficult to see how that position can be achieved by seeking information about one group alone. The data sought is about CP formations and dissolutions. Only same-sex couples can enter into these.

116. There is a critical difference between a policy of wait and see (or evaluate) expressed in general terms, and the policy of the Secretary of State as placed before this Court and set out in paragraph 3 of this judgment. A policy which is confined to assessing the impact of same-sex marriage on CPs is not in my judgment apt to strike a balance between the competing interests of opposite-sex couples and those of the rest of the community. The recent drop in the number of CP formations is likely to mean that the institution of same-sex marriage is becoming more accepted. But it cannot be necessarily a gauge of the opinion as to the acceptability of CPs for other couples. There may be different considerations at play for opposite-sex couples.

(3) THE POLICY DOES NOT ADDRESS ALL OF THE IMPORTANT ISSUES LIKELY TO ARISE ON ANY LEGISLATIVE CHANGE TO THE CPA

117. Some of the most important issues involved in striking the fair balance between the appellants and the interests of the rest of society are not addressed by the policy. The "wait and see" policy is only about obtaining numbers of actual CPs formations and dissolutions. It does not, therefore, address the wider issues involved in the balancing of the rights of opposite-sex couples with those of the community at large, such as whether as a matter of public policy opposite-sex couples should have the freedom to have a legal framework of their choice, just as same-sex couples currently do, and indeed whether opposite-sex couples should have the possibility of doing so even if CPs are only used to a relatively small extent, if at all, by same-sex couples for whom they were originally created.

118. A further and perhaps obvious point under this head is that statistics have their limits. The information that they give is historical, and yet the Secretary of State is intending to rely on them as an indicator about the future use of CPs. We know that the number of CPs formed in the first five years was a considerable underestimate (see paragraph 7 above) so it fair to assume that it is extremely difficult to forecast the number of CPs that will be formed in the future. People may not be prepared to answer surveys about that sort of matter.

119. Mr Squires submits that the more inclusive use of marriage following the 2013 Act may lead to a change in the attitude of unmarried opposite sex couples with views like those of the appellants. However, the collection of data about CPs will not provide any means of securing that information.

(4) THE POLICY IS NOT RESPONSIVE TO THE FACT THAT THE STATISTICS MAY ALREADY PROVIDE SOME IMPORTANT INFORMATION

120. The Secretary of State already has two, if not three, years of statistics: 2013, 2014 and 2015. I have thought to include 2013 because people thinking of entering into a civil partnership would have known of the possibility of same-sex marriage in 2013 so the statistics for 2013 will already show the impact of the introduction of same-sex marriage. The statistics for CP formations and dissolutions in 2014 and 2015 certainly show a substantial fall of 85% from 2013 in the number of new CPs being formed (from 5,646 in 2013 to 891 in 2015).

121. However, the information is not all one-way. It is correct that there has been, not surprisingly, a dramatic fall in the number of formations due to the introduction of same-sex marriage. But the information shown by the statistics is also consistent with the reasonable assumption that the decline at least for one large group is levelling off. That group is the 50+ age group, both men and women. In this group, there is a substantial rise from 19% in 2013 to 48% in 2015 in the number of formations as a percentage of the total number of formations for all age groups. The figures for each year for 50+ age group shown by the ONS statistics are 1,038 CPs for 2013, 524 for 2014 and 427 for 2015. There would appear to be a slowing down or potential stabilising of the number of formations in this group, and the numbers for this group are clearly not insignificant.

122. The Secretary of State's requirement for "many years' data" has, as it seems to me, to address or take account of the information which can already be drawn from the available statistics and which might well reduce the usefulness of further years. One can always look for more data, but it will not always provide more information. There is no information as to why this number of CP formations in the 50+ age group is happening: if there was a known reason, it might be possible to take a view as to whether it would or would not continue.

123. In a sentence, the currently available statistics do not appear to predict with any degree of certainty that the number of CPs will reduce to an insignificant level within the foreseeable future so that public resources could be saved by abolishing CP formations for the future.

(5) THE POSSIBLE IMPACT ON PUBLIC RESOURCES MUST REALISTICALLY ESTIMATED

124. It may also be that the impact on resources at risk has not been properly identified. As I have explained, the resources involved in extending CPs have to be left out of account so far as they duplicate resources that would in any event otherwise have to be spent in abolishing CPs for the future. If CPs are extended to opposite-sex couples, there would, moreover, be no obligation under the Convention to abolish them if there are no or few same-sex couples who want to form CPs at some future date. So it is not inevitable that cost of reversing legislative changes would have to be borne by the public purse if same sex-couples did not use CPs in future.

CONCLUSION ON PROPORTIONALITY

125. In the circumstances I do not consider that the Secretary of State has made good her claim that any potential violation of Convention rights is justified in order to give more time for the production of statistical data about the formation and dissolution of CPs.

126. It is true that the passage of time in this case pales in comparison with the thirty-year delay in *Oliari*, and in addition there is no decision here of a constitutional court declaring that the appellants have a constitutional right to have CPs extended to them. But the reason for the decision not to take action in this case is quite different. Every delay has to be assessed on its own facts.

127. The consultation documents indicate that the "can-marry" submission may have carried some weight in the Secretary of State's approach. I have explained at paragraph 40 above why in my judgment there is, subject to justification, a potential violation of the appellants' rights even though they are in a position to marry.

## THE APPROPRIATE FORM OF ORDER IS TO MAKE DECLARATIONS

128. In my judgment, the appropriate form of order is to make the declarations in answer to the Issues as set out in paragraph 132 below.

129. This form of order leaves it open to the Secretary of State to reconsider her policy, and/or, either now or at a later time, as appropriate, to promote a suitable change to the CPA. There is no question of micro-management of the policy, but the policy must be proportionate. Even on the approach of Beatson and Briggs LJJ, the time available is limited. Mr Squires submits that the appellants' position is that Parliament must immediately extend civil partnerships to opposite sex couples. This is not correct because Ms Monaghan in her written submissions states that, as she puts it, Parliament might decide to level up or level down. The decision is a matter for Parliament.

130. Ms Monaghan also asks the Court to make a declaration that the bar is incompatible with the appellants' Convention rights in accordance with section 4 of the Human Rights Act 1998. A declaration of incompatibility does not have the effect of amending the bar from the CPA: section 4 of the 1998 Act states expressly that 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." If this Court were to

make a declaration of incompatibility, no opposite-sex couple would be able to enter into a CP unless and until Parliament decided to change the law to that effect.

131. The Civil Partnership Act (Amendment) Bill 2015 is currently before Parliament. It is clear that Parliament will be informed of this Court's judgments. It is entirely a matter for Parliament to decide whether any change to the bar should be made. In addition, as the Secretary of State is likely to wish to consider the appropriate policy for the future, taking account of the points in this Court's judgments. In those circumstances, I would not make a declaration of incompatibility.

132. For the reasons given above, I would allow this appeal in part, and to declare (1) in the answer to Issue 1, that the bar is within the ambit of Article 8 of the Convention of the Convention, and (2) in answer to Issue 2, that the potential violation of the appellants' rights is not justified by the Secretary of State's policy of "wait and see" as set out in paragraph 3 of this judgment.

## APPENDIX TO JUDGMENT OF LADY JUSTICE ARDEN

## Public consultations on the future of civil partnerships 2011 and 2013

## Statistics about the formation/dissolution of CPs after the 2013 Act

1. The evidence filed on behalf of the Secretary of State consists of evidence about two public consultations about the future of civil partnerships, and official statistics which show that the popularity of CPs has declined since same-sex couples have been able to marry. There is also some evidence about civil unions in other Convention States.

THE TWO CONSULTATIONS

2. Before the 2013 Act, the government carried out a public consultation which (among other matters) asked respondents whether they agreed with the government's decision not to extend CPs to opposite-sex couples: *Equal civil marriage: a consultation* issued by the Government Equalities Office (GEO) in March 2012. The response to this consultation was (we are informed) the largest ever response to a public consultation exercise. The number of responses was over 228,000.

3. Question 6 asked whether respondents agreed or disagreed with the option of keeping civil partnerships once civil marriages are available to same-sex couples. 66% agreed that civil partnerships be retained, 20% disagreed and 14% did not know. In answer to question 8, 24% agreed that civil partnerships should not be opened up to opposite-sex couples, 61% disagreed with that and thought civil partnerships should be made available to opposite-sex couples and 15% did not know. This information is taken from *Equal marriage: the Government's response,* published in December 2012.

4. The 2013 Act required the Secretary of State to carry out a further consultation (*Civil Partnership Review (England and Wales): a consultation* (Department for

Culture, Media and Sport, January 2014). The analysis of responses, *Civil Partnership Review (England and Wales) – Report on Conclusions,* (Department for Culture, Media and Sport, June 2014) has been published but (as we were informed) it has not been debated in Parliament. There were only about 11,500 responses to this consultation exercise. The responses also showed a change in view. A three-quarters majority of respondents opposed the extension of CPs to opposite-sex couples, and a majority also opposed bringing the option of forming a CP for same-sex couples to an end. (Less than one-third of respondents supported the abolition of civil partnerships). Since then, the Secretary of State has been waiting to see if the statistics for the formation and dissolution of CPs post- the 2013 Act would enable her to take a decision, which would by inference involve a decision either to remove the option for same-sex partners or (if that was required by law) to extend CPs to opposite-sex couples.

5. The analysis of responses concluded that:

> experience with the introduction of civil partnership indicate that it would take some time for people to use to the introduction of the new system where marriage is open to same-sex couples alongside civil partnership. From December 2014 couples in a civil partnership will be able to convert their relationship to a marriage. In time official statistics will be available to show the long term trend on the numbers of marriages, civil partnerships and conversions. Given the lack of consensus on the way forward, the government will not be making any changes.

6. The statistical bulletin, *Civil Partnerships in England and Wales, 2014* issued by the ONS on 20 October 2015 summarised the effect of the consultation as follows:

> Several important organisations thought it was too soon to consider making changes to civil partnership legislation and that this should wait until the impact of extending marriage to same sex couples is known. Other organisations, in contrast, put forward a case for opening up civil partnerships to opposite sex couples now, for example because civil partnership and marriage were different relationships and all couples should have equal access to both. Given the lack of consensus on the way forward, the government decided not to make any changes to the Civil Partnership Act 2004.

7. In the same bulletin, the Government Equalities Office (GEO), a government arm which reports to the Secretary of State, is said to be using the statistics as follows:

> With the introduction of marriages to same sex couples in 2014, GEO will be monitoring the number of these marriages along with civil partnerships to determine the future of legislation on civil partnerships. GEO use the data to inform ministers and to make forecasts, for example estimating the number of civil partnership conversions into marriage in each area of the UK and overall costs.

OFFICIAL STATISTICS

8. The latest statistics were published by the ONS on 12 September 2016, in a bulletin entitled *Civil Partnerships in England and Wales: 2015*.

9. The principal relevant conclusion of this statistical bulletin is that in 2015 the number of civil partnerships formed in England and Wales by same-sex couples decreased to 861, from 1,683 in 2014 and 5,646 in 2013. This represents a decrease of 49% compared with 2014, and a decrease of 85% since 2013. The ONS states this decrease results from the introduction of marriages of same-sex couples on 29 March 2014.

10. The bulletin also states that most civil partnerships are formed by those aged 50 and over. Following the introduction of marriages of same-sex couples, the percentage of civil partnership formations taking place at older ages has increased. Almost half (48%) of all persons entering a civil partnership in 2015 were aged 50 and over. This compares with 19% in 2013, prior to the introduction of marriages of same sex couples. For the first time, the most popular age for men and women to form a civil partnership was 65 and over in 2015.

11. The bulletin also states that there were 1,211 civil partnership dissolutions granted in England and Wales in 2015, compared with 1,061 in 2014; an increase of 14%. Female couples accounted for 57% of all dissolutions in 2015.

12. The bulletin includes a statement from the GEO, as follows:

> Government Equalities Office (GEO) considers that it is too early to fully evaluate the impact of the introduction of marriage for same sex couples on civil partnerships – more years of data are required. GEO will therefore continue to monitor the number of civil partnership formations taking place in England and Wales.

13. The Secretary of State's evidence gives no indication of the period required to "fully evaluate" the impact of the introduction of same-sex couples or what such full evaluation would be designed to show.

SCOTLAND

14. There is also a consultation paper, *Review of civil partnership,* issued by the Scottish government in September 2015. This indicates that after five years following the introduction of same-sex marriage, reliable evidence would be available about the number of same-sex couples who nevertheless wished to enter into CPs. The analysis of the responses to this document does not disclose whether respondents favoured the termination of CPs or their extension to opposite-sex couples. Consultees were given three options: no change, so that civil partnership would remain available for same-sex couples only; stopping new civil partnerships being registered at some date in the future; or introducing opposite-sex civil

partnership in Scotland. The consultation document states that the Scottish government is not persuaded that opposite-sex civil partnership should be introduced in Scotland, although this consultation invites views on this position. It is said that the Scottish government is of the view that demand would be low; there would be costs; and opposite-sex couples seeking to enter into a registered relationship have the option of marrying.

EVIDENCE AS TO CIVIL UNIONS IN THE MEMBER STATES OF THE COUNCIL OF EUROPE

15. There is some evidence about the availability of civil unions in the other member states of the Council of Europe (which are the Convention States). In particular, within the Council of Europe, only some 8 countries offer civil unions. Of those, some have made civil unions available to both same-sex couples and opposite-sex couples, for example, Belgium, Estonia, France and Greece. Several countries, namely Denmark, Finland, Iceland, Ireland, Norway and Sweden, have introduced same-sex marriage and at the same time abolished civil unions for same-sex unions. The UK is only the Convention State which has introduced same-sex marriage but retained civil unions for same-sex couples only.

# Lord Justice Beatson:

## I. Overview:

133. The creation of a legal status for same-sex couples by the Civil Partnership Act 2004 ("the 2004 Act") in the form of "civil partnerships" together with the provision nine years later in the Marriage (Same-Sex Couples) Act 2013 ("the 2013 Act") of the status of marriage for same-sex couples constitute the background to this appeal. The result of the legislation is that same-sex couples can choose to be either in a civil partnership or a marriage, but, because section 1 of the 2004 Act requires that civil partners must be "two partners of the same sex" and section 3(1) provides that two people are not entitled to register as civil partners of each other if "they are not of the same sex", different-sex couples do not have this choice. During the consideration by Parliament of what became the 2013 Act, the future of civil partnership, including the possibility of opening that status to different-sex couples was debated. Parliament decided not to do so but, in section 15 of the 2013 Act, required the Secretary of State to arrange for a review of the operation and future of the 2004 Act "to begin as soon as possible and include a full public consultation".

134. Rebecca Steinfeld and Charles Keidan ("the appellants") are a different-sex couple with a young child. They claim that the inability of different-sex couples to enter into a civil partnership is incompatible with their rights under the European Convention on Human Rights ("the ECHR"). They have what Andrews J accepted (see [2016] EWHC 128 (Admin) at [2]) are "deep-rooted and genuine ideological objections to the institution of marriage, based upon what they consider to be its historically patriarchal nature". I also proceed on the basis that their objections are sincere, observing only that my approach to the resolution of the issues in this case in sections 2 and 3 of this judgment does not depend on addressing the question whether marriage has escaped from its historic origins and hallmarks, and whether civil marriage and the words used when registering a marriage is legitimately open to criticisms such as those of the appellants. I therefore do not consider those matters.

135. On 23 December 2014 the appellants filed an application for judicial review challenging two decisions. The first was the decision of the relevant Registrar to refuse to register notice of their intention to enter into a civil partnership. The second was the Secretary of State for Education's decision not to make or promote changes to the 2004 Act to remove the prohibition on different-sex couples entering into a civil partnership. Permission was only granted in respect of the challenge to the Secretary of State's decision. Following a two-day hearing, that challenge was dismissed by Andrews J on 29 January 2016.

136. The appeal against Andrews J's order involves two questions. The first is whether the relevant provisions of the 2004 Act fall within the ambit of Article 8 of the ECHR so that the prohibition of discrimination contained in Article 14 is engaged. The second question, which only arises if a positive answer is given to the first question, is whether, in the circumstances of this case, which have been summarised by Arden LJ in her judgment, the potential breach of the appellants' rights under the ECHR is justified; that is the interference is in pursuit of a legitimate aim and is proportionate.

The particular circumstances I have in mind are the rationale for introducing the status of civil partnership in 2004, and the Secretary of State's desire to evaluate the impact of the 2013 Act on civil partnerships before taking any further legislative steps.

137. On the first question, I agree with Arden LJ that the 2004 Act falls within the ambit of Article 8 for the purposes of Article 14 and that there is no need for those in the position of the appellants to show an adverse impact beyond the lack of respect caused by preventing different-sex couples from entering into civil partnerships. Because we are differing from the judge on this question, and in view of the excellence of the arguments before us I will briefly give the reasons for my conclusion on that question.

138. On the second question, I consider that the discrimination in the present arrangements with one legal regime for different-sex couples but two legal regimes for same-sex couples will ultimately be unsustainable. I, however, consider that at this point in time the Secretary of State's decision to evaluate the impact of the 2013 Act on civil partnerships before taking any further legislative steps to eliminate the difference of treatment between same-sex couples and different-sex couples is justified. The Strasbourg court has recognised that in a context which can be regarded as one of evolving rights a State is entitled to a certain flexibility as to the timing of the introduction of legislative changes and the content of those changes: see e.g. *Schalk and Kopf* v *Austria* (2011) 53 EHRR 20 at [105].

**II. Within the ambit of Article 8?**

139. As to the ambit of Article 8, in my judgment the jurisprudence of the European Court of Human Rights now recognises that a measure concerning the regulation of a same-sex or different-sex relationship falls within it, and does so without the requirement to show an adverse impact. This is because the 2004 and 2013 Acts are close to the core values that Article 8 protects; namely "respect for family life".

140. It was submitted on behalf of the Secretary of State that the decisions relied on by the appellants, in particular *Schalk and Kopf* v *Austria* and *Oliari v Italy* (Application Nos. 1876611/11 and 36030/11, 21 July 2015) do not assist them. Mr Squires QC maintained that those cases are examples of cases where Article 8 together with Article 14 was held to be applicable where same-sex couples have no option to marry or enter into any type of civil union with a legal status. It is, he submitted, only in such cases that personal interests close to the core of Article 8 are clearly infringed. The judge accepted this, emphasising at [42] that *Schalk's* case and *Vallianatos* v *Greece* (2014) 59 EHRR 12 "concerned the scenario where there was plainly a detrimental effect upon the enjoyment of family life bought about by the denial of *any* form of State recognition of a same-sex relationship". I consider that this focus on detriment and devaluation of the relationship under consideration is erroneous. First, the Strasbourg jurisprudence does not provide authority for the proposition that a detrimental impact or adverse effect is required in order to engage Article 8 for the purposes of Article 14. Secondly the domestic case law of the United Kingdom, some of which predates recent Strasbourg developments, does not require that a detrimental impact or adverse effect is shown.

141. It is clear that is it not necessary to show a breach of Article 8 in order to establish that a disadvantage falls "within the ambit" of Article 8 for the purposes of engaging

in Article 14: see for e.g. *Zarb Adami* v *Malta* [2007] 44 EHRR 3 at [7] and *Petrovic* v *Austria* (1998) 33 EHRR 307 at [22]. In *Schalk* and *Kopf* v *Austria, Vallianatos v Greece*, and *Oliari* v *Italy* the European Court of Human Rights has recognised that, even absent a legal status, stable and committed same-sex relationships amount to family life. In the light of this it must in principle follow that stable and committed different-sex relationships amount to family life whether or not the couple have married. It must in principle also follow that the disadvantage such couples face when compared with same-sex couples falls within the ambit of family life within Article 8.

142. The submission on behalf of the Secretary of State that the Strasbourg cases to which I have referred do not assist because they involve situations in which there was at the material time no legal status at all for same-sex couples and thus situations in which there was an adverse effect on such couples does not in my judgment reflect the reasoning in fact deployed in those cases. In *Schalk's* case (at [94]) it was held that "the relationship of the applicants, a co-habiting 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". In *Vallianatos's* case (at [81]), the court stated that civil partnerships "as an officially recognised alternative to marriage have an intrinsic value for applicants irrespective of the legal effects, however narrow or extensive, that they would produce". Earlier in its judgment the court found that the measures, in that case making provision for civil partnerships for different-sex couples only fell squarely within the ambit of Article 8 and stated (at [73]) that "in view of the rapid evolution in a considerable number of Member States regarding the granting of legal recognition of same-sex couples, it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple [could not] enjoy "family life" for the purposes of Article 8".

143. *Oliari's* case is less straight-forward because the court (at [167]) referred to the fact the applicants in that case were unable to have access to a specific legal framework capable of providing them with recognition of their status and guaranteeing them rights relevant to a couple in a stable and committed relationship. At [173], the court observed that there was in Italy a conflict between the social reality of the applicants in that case and their relationship, and the law which gave them no official recognition. The concern with adverse effect is perhaps the result of the fact that the court (at [187]) found that there was a breach of the positive obligation on Italy to adopt a measure to ensure respect for the applicants' private and family life by providing a legal framework allowing them to have their relationship recognised and protected, and thus a breach of Article 8 alone.

144. The court stated (see [188]) that in view of its finding under Article 8 it considered that it was not necessary to examine whether there was also a violation of Article 14 in conjunction with Article 8. However, on the question of the ambit of Article 8, what the court said was wholly consistent with the broader approach to the question of "ambit". The court stated (at [103]) that the relationship of a same-sex couple such as the applicants fell within the notion of "family life", and (at [174]) approved the statement in *Vallianatos's* case which I set out earlier in this judgment.

145. It is for these reasons that I consider that the judge erred in assuming (see judgment, [49]) that the court in *Vallianatos* was proceeding on the assumption that the measure in that case fell within the ambit of Article 8. The court's analysis was that granting legal recognition to couples falls well within the notion of private and family life and

its recognition of the intrinsic value of a civil partnership (in that case for same-sex couples as well as different sex couples) didn't depend on any further adverse effect.

146. A further example of the way the jurisprudence of the European Court of Human Rights has developed in this area, and has developed rapidly, is the decision since that of the judge below in *Pajic* v *Croatia* (2016) ECHR 68453/13, 23 February 2016. In *Pajic*'s case the court held that a same-sex couple who had been in a relationship for two years but did not co-habit were in a relationship within the ambit of Article 8 for the purposes of Article 14 by reason of the existence of their relationship alone: see [61] - [68].

147. For these reasons, I also consider that the answer to the question of whether the appellants are within the ambit of Article 8 so as to engage Article 14 is not affected by the fact that they could marry. I respectfully agree with what Arden LJ has stated in her judgment which I have seen in draft. What is important here is the difference of treatment of different-sex couples who only have one way of achieving legal recognition of their status, and same-sex couples, who have two ways of doing so, and as Briggs LJ has stated, the fact that those different-sex couples who share the beliefs of the appellants are in practice unable to obtain state recognition of their relationship with the consequent advantages of that recognition.

148. The next question is whether this court is bound by the approach of the courts in this jurisdiction to come to a different conclusion as to the meaning of "within the ambit". On behalf of the Secretary of State it is submitted that the effect of *M* v *Secretary of State for Work and Pensions* [2006] 2 AC 91 and *R (Clift)* v *Secretary of State for the Home Department* [2007] 1 AC 484 is that "within the ambit" of a substantive article such as Article 8 requires an adverse impact because of the references to "impairment", "intrusion" and "infringement". He relied in particular on Lord Bingham's statement in *Clift's* case at [13] "a situation in which a substantive Convention right is not violated, but in which a personal interest close to the core of such a right is infringed", but see also Lord Bingham at [5], and Lord Walker at [88] of *M's* case. Arden LJ has analysed the domestic case law in her judgment and has concluded that this court is not prevented by the decision in *M* v *Secretary of State for Work and Pensions,* on which *Clift* is based from finding that the legal recognition of a couple's relationship has an intrinsic value and that, absent such legal recognition no further adverse impact is needed for a case to fall within the ambit of Article 8.

149. There was no consensus in *M* v *Secretary of State for Work and Pensions* as to the approach to be taken to the "ambit" question. But in my judgment the fundamental explanation for the approach to "ambit" in *Clift's* case and *M* v *Secretary of State for Work and Pensions* is that, at the time of those decisions the European Court of Human Rights did not regard same-sex relationships as "family life". The judge (at [30]) considered that in *M's* case only Lord Mance (at [127]) regarded that to be the key factor. In fact, Lord Nicholls, a member of the majority and Baroness Hale, in her dissenting judgment, also considered that if the State chooses to legislate in support of or to promote family life that measure falls within the ambit of Article 8: see Lord Nicholls at [27] and Baroness Hale at [109]-[110]. It is therefore only Lord Bingham and Lord Walker whose conclusions did not depend on same-sex relationships not at that time being recognised as family life.

150. It is true that Lord Bingham's language in *Clift's* case reflects the *ratio* in that case but, in my judgment, the language of impairment, intrusion and infringement were used to show how closely related to the values protected by Article 8 a measure has to be in the context of a substantive breach of Article 8 and whether the matter is sufficiently close to the core values protected by Article 8. If there is only a tenuous link to those core values that does not suffice. But in this case the measures in the 2004 and 2013 Acts are undoubtedly related to the core values of private and family life as shown by the Strasbourg jurisprudence which I have discussed. Accordingly, I do not consider that the domestic authorities can be regarded as requiring an additional requirement of concrete adverse impact other than deprivation of one of the means by which the State makes provision to recognise and protect those core values.

151. For these reasons I consider that the judge erred in concluding that she was bound by *Clift* and *M* v *Secretary of State for Work and Pensions* to require an adverse effect, and that the reasoning in those cases would not have been different in the light of the modern Strasbourg jurisprudence.

## III. Justification:

152. I therefore turn to the second issue, whether the approach to what to do about the discriminatory measures pursues a legitimate aim and whether that approach is at the present time proportionate. The judge (at [61]) correctly characterised the question as "whether the Government's decision not to immediately extend civil partnerships to different-sex couples (or to immediately abolish or phase them out) but instead, to maintain the status quo and wait and see what the impact on civil partnerships of the extension of marriage to same-sex couples will be, before deciding how to address the situation, is objectively justifiable".

153. In his oral submissions on behalf of the Secretary of State, Mr Squires identified four options available to the Secretary of State as to how to proceed. These were: (1) to extend civil partnerships to different-sex couples; (2) to abolish civil partnerships altogether; (3) to phase out civil partnerships (i.e. abolish same-sex civil partnerships but retain existing civil partnerships); or (4) to maintain the *status quo*. Mr Squires made it clear at the hearing that maintaining the *status quo* is not being considered by the Government. He stated that it is considering which of the first three options is best. He submitted that, because this case involves "questions of social or economic policy" in an area in which there is no consensus among Council of Europe members, a wide margin of appreciation or discretion is appropriate. He relied on *R v DPP, ex p Kebeline* [2000] 2 AC 326, at 381 and *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 at [92] – [95].

154. On behalf of the appellants, Ms Monaghan QC submitted that the UK is an outlier in having two legal regimes for same-sex couples but only one regime for different-sex couples. Four Member States of the Council of Europe which had the status of civil partnership abolished that status once they permitted same-sex marriage, and two Member States have civil partnerships conferring equivalent rights to marriage open to same and different-sex couples: see the Appendix to Arden LJ's judgment. Ms Monaghan also maintained that the Secretary of State had a period to consult, draft and debate prior to the enactment of the 2013 Act, and in any event, she has not identified a date by which a decision on the future of civil partnerships will be taken.

155. Although the questions of legitimate aim and proportionality overlap, I first consider whether the Secretary of State is pursuing a legitimate aim in maintaining the status quo while considering which of the three options to adopt. The judge (at [79]) summarised the aim as:

> "to avoid the unnecessary expenditure of large amounts of taxpayers' money as well as the disruption and the potential waste of time and effort that could be caused by immediate legislative change [to the 2004 Act], by taking a reasonable amount of time to make up its mind about when, and how best to deal with the situation."

She considered this was a legitimate aim, as did the written submissions filed on behalf of the Secretary of State. In his oral submissions, Mr Squires accepted that the aim of saving the cost of taking steps to address the difference in treatment straight away is not a sufficient justification but nevertheless submitted that the Government was entitled to the time needed to undertake a proper assessment of the optimum way to proceed.

156. I consider that the aim of the Secretary of State in seeking time to undertake a proper assessment and form her policy is legitimate. Mr Squires' position on cost saving was realistic. I attach greater importance to the difficult and sensitive policy issues involved and the impact of any decision on the public at large than to possible wasted expenditure, although the need to conserve public resources is a factor which the government is entitled to have regard to in deciding on the way forward to eliminate a situation which is discriminatory: see Lord Reed in *R (JS) v Secretary of State for Work and Pensions* at [63], a passage referred to by my Lady. On the legitimacy of some time for consideration of the way forward, see, for example, the statements of Lord Hoffmann in *R(Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, in the context of discrimination between men and women in the payment of widow's pension. Lord Hoffmann stated (at [62]) that he understood that "if one has a form of discrimination which was historically justified but, with changes in society, has gradually lost its justification, a period of consultation, drafting and debate must be included in the time which the legislature may reasonably consider appropriate for making a change" and that "[u]p to the point at which that time is exceeded, there is no violation of a Convention right". [1]

157. I also observe that, in considering the time that will be needed, it should not be forgotten that in *Hooper's* case the government knew the lawful policy outcome it wished to achieve and the need for time to consult and draft concerned only the method of achieving that outcome. Where, as in the present case, the discrimination that is complained about is the result of a step designed to extend rights to couples whose relationships which, until the 2004 Act came into force had no legal status, and there are a number of different lawful policy outcomes that would eliminate the discrimination, the resolution of the position is more complex and may take longer.

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[1] This was part of his discussion of *Walden v Liechtenstein* (Application No 33916/96, 16 March 2000) where, in the interests of maintaining legal certainty, the Strasbourg court refused to quash the discriminatory law for a period of six months. Lord Hoffmann (at [61]) considered *Walden's* case to be a puzzling decision because there was no suggestion that the discrimination under consideration in that case was ever justified.

158. In my view, at present, the Secretary of State's position is objectively justified. The future of the legal status of civil partnerships is an important matter of social policy that government is entitled to consider carefully. At the hearing the Secretary of State's approach was described as a "wait and see" approach, although it would be more accurate to describe it as a "wait and evaluate" approach. Whatever term is used to describe the approach, it would not have been available to the Secretary of State prior to the enactment and coming into force of the 2013 Act. This is because it would not have been possible at that time to determine how many people would continue to enter into civil partnerships or want to do so because they share the appellants' sincere objections to marriage. The relevant start date for consideration is thus 13 March 2014 when the provisions extending marriage to same-sex couples came into force.

159. It is true that the approach of the Secretary of State seems to characterise the issue by reference to the demand by same-sex couples for civil partnerships and to give little if any weight to the support (see paragraphs 2 and 3 of the Appendix to Arden LJ's judgment) for extending the status to different-sex couples that was given in the responses to the 2012 consultation; that is to demand by different-sex couples. But the fact that the appellants consider the government should have gone about the process of deciding on the way forward by some different route, or that it might have done so, does not mean that it was not pursuing a legitimate aim in deciding that the time was not ripe for the determination of policy as to how to eliminate the difference of treatment between same-sex couples and different-sex couples. This is particularly so in the light of the way policy on this subject has evolved. As I have stated, the first stage was the removal by the 2004 Act of one form of discrimination (the absence of any form of legal status for same-sex couples). The second stage was the creation by the 2013 Act of a second legal status for such couples which in turn created a form of discrimination against different-sex couples, but with the legislative decision imposing a statutory duty to review the position of civil partnerships.

160. In this case we are thus concerned with evolving legislation and policy, and with the decision of the legislature in 2013 to make no change to the category of civil partnership, but, by enacting provision for a review of civil partnerships, to recognise that policy in this area remains in a state of evolution. The provisions of the 2004 Act which are the subject of this challenge could not have been the subject of a challenge on the grounds advanced in these proceedings before the 2013 Act. In so far as we are concerned with the effect of recent legislation, the statement of Lord Bingham in *R (Countryside Alliance) v Attorney General* [2007] UKHL 52; [2008] AC 719, which was approved by Lord Reed *R (JS) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449 at [92] – [95] is instructive. Lord Bingham said that, where the decision that is impugned had been taken recently by a majority of the country's democratically elected representatives, "[t]he democratic process is liable to be subverted if, on a question of moral and political judgment, opponents of the Act achieve through the courts what they could not achieve in Parliament". In my judgment, this is equally the case where it is manifestly clear on the face of the legislation that it is not the last word and that the executive and legislative branches of the state will be considering the next stage, as Parliament is currently doing.

161. I do not consider that the discrimination in the *status quo* can be maintained for long. It was accepted by Mr Squires in oral argument that the *status quo* cannot be maintained indefinitely, but that, in my view, is too relaxed an approach. It is even

more relaxed than is warranted by the judge's conclusion on this aspect of the case. She (at [83]) referred to "denying an alternative route to state recognition in the short term", and it was that which she considered was justified and proportionate. I consider it clear that the Government will need to make a decision to eliminate the current discriminatory position and to do so within a reasonable timescale. I acknowledge and understand the appellants' frustration with the uncertainty surrounding when the Government will make its decision. But I also note that less than three years have passed since the material provisions of the 2013 Act creating a second legal status for same-sex couples and thus the discrimination came into force, and there is at present a Bill before Parliament considering the issue.

162. It is not the role of the court to set a deadline for compliance and the function of the court is certainly not to micro-manage areas of social and economic policy, particularly in sensitive areas such as this where changes will affect society as a whole. It is the court's role to say whether or not the discriminatory measure and the Government's decision to undertake a proper assessment of the optimum way forward in the light of the demand by couples (whether same-sex or different-sex) for civil partnerships as well as marriage is objectively justified *now*. I therefore do not think it is appropriate to set a deadline for the Government or to give any concrete indication as to when the discriminatory measure will no longer be justified. I do, however, note that as time passes it will become increasingly difficult to persuade the court that there is still a need to "wait and see" or that an approach to civil partnership primarily based on the demand for that status by same-sex couples alone is justifiable. The Government will have to decide whether to abolish the status of civil partnership or extend it to different-sex couples and it is for the Government and for Parliament to decide how to keep the matter under active review.

163. It will be apparent that, save for placing less emphasis on the arguments based on the saving of expenditure, and more emphasis on the Secretary of State's need for time to complete a proper assessment of the optimum way of removing the discrimination, I agree with the judge's conclusion (at [83]) that:

> "Given the marginal practical impact that denying an alternative route to state recognition in the short term is likely to have on opposite-sex couples, and the continued availability of marriage, it cannot really be said that maintaining the status quo until there is better evidence available about the impact of same-sex marriage on civil partnerships is a disproportionate means of saving the expenditure of unnecessary time and public resources and the disruption that making uninformed immediate legislative changes would entail".

**Conclusion,**

164. In my opinion, the judge erred in finding that the civil partnership regime in the 2004 Act does not fall within the ambit of Article 8. I, however, agree with the judge that the discrimination between the position of same-sex couples who now have the choice of two legal regimes recognising their relationship and different-sex couples who have only one legal regime is at present justified. It is, in my judgment, justified by the Government's legitimate aim of undertaking a proper assessment of the optimum way forward in the light of the demand by couples (whether same-sex or different-

sex) for civil partnerships as well as marriage, and *inter alia* avoiding unnecessary expenditure of taxpayers' money as well as wasted time and effort in making a change that might have to be reversed.

165. I would therefore dismiss this appeal.

## Lord Justice Briggs

166. I would also dismiss this appeal. Like Arden and Beatson LJJ I consider that the judge was, notwithstanding a careful analysis, wrong on the first issue. I find myself in almost complete agreement with Beatson LJ as to the reasons why.

167. To my mind the essence of the difference in treatment which engages Article 14 is not that all same-sex couples have two ways of obtaining state recognition of their relationship, whereas all different-sex couples have only one, although that is of course true. Both ways confer substantially the same benefits. They make the same promises to each other, in the same public building, before the same public official. The fact that different–sex couples can only obtain them by one route does not of itself infringe their human rights on grounds of differential treatment, any more than those of a disabled person in a wheel-chair who can only access a building by a ramp, whereas the able-bodied person can use the ramp or an adjacent staircase.

168. The significant difference in treatment arises from the fact that there is a special group of couples for whom marriage is simply not an available alternative, because of their sincerely held view that marriage has not escaped its supposedly patriarchal origins, even though there are many couples who either disagree, or do not regard them as an obstacle to getting married. That special group includes both same-sex couples and different-sex couples. The same-sex couples can still obtain state recognition of their relationship by civil partnership. The different-sex couples cannot obtain state recognition of their relationship at all.

169. Thus within the special group of those for whom marriage is simply not an option, there is differential treatment on the grounds of sexual orientation because only the same-sex couples within the group can obtain any form of state recognition of their relationship, with all the very important social and economic (including fiscal) advantages which that brings. This is why, in my view, the "can marry" argument is misconceived.

170. Turning to the second issue, I agree with Beatson LJ in his analysis of what the question is, namely whether what he calls the current "wait and evaluate approach" of the Secretary of State is objectively justified. In my view it is.

171. The combined effect of the Acts of 2004 and 2013 has been to bring about a revolution in the state's approach to the recognition and (because of the fiscal advantages) encouragement of stable family relationships between couples wishing to make a long-term commitment to each other, after it had been confined to different-sex couples since the origins of legal memory, and within what is recognisably western society for two thousand years. In this country Parliament has pragmatically approached this change in two stages, first by making a state-recognised relationship

of civil partnership available to same-sex couples with substantially the same legal and economic consequences as marriage, but at a time when society may not have been ready to acknowledge that their relationship could be called marriage. Nine years later Parliament decided that society was ready to do so, and enshrined that acknowledgment in law.

172. This left unfinished business, as Parliament recognised, namely what to do with the civil partnership which, still less than ten years old, had until then fulfilled what may now seem to many to have been an essentially transitional purpose, originally designed to alleviate the disadvantages which then affected same-sex couples, but do not now. As the materials placed before the court show, there is not yet any general public consensus, or even majority view, as to whether to do away with civil partnership (or close it to new members) or to extend it to same-sex couples. There appears currently to be a clear majority against doing either, when the public has been consulted about the two main choices as separate questions, without being told, as we have concluded, that the current impasse cannot lawfully be allowed to continue indefinitely.

173. I can well understand the frustration which must be felt by the Appellants and those different-sex couples who share their view about marriage, about what they regard as the Government's slow progress on this issue. Some couples in their position may suffer serious fiscal disadvantage if, for example, one of them dies before they can form a civil partnership. This is a factor in the proportionality balance, and because this is a case of differential treatment on the basis of sexual orientation, that balance must command anxious scrutiny. But against the background of a serious but unresolved difficulty which affects the public as a whole, and the practicable impossibility of some interim measure, such as temporarily opening civil partnership to different-sex couples when the eventual decision may be to abolish it, I am unable to regard the Secretary of State's current policy of "wait and evaluate" as a disproportionate response.

174. It is to be noted that one possible conclusion of the present frustrating period of delay for those who hold sincere beliefs like the those of the Appellants, is that their perceived temporary disadvantage will become permanent, if Parliament's decision is that civil partnership should be wound down by being closed to new members, or abolished. But at that stage their permanent disadvantage will not result from differential treatment. Neither same-sex or different-sex couples holding those beliefs would be able to obtain state recognition of their relationship. It has not been suggested in this appeal that this would of itself infringe their rights under Article 8 on its own.

175. I am far from saying that every aspect of the internal reasoning behind the Secretary of State's "wait and evaluate" policy is beyond criticism. My Lady and my Lord make telling criticisms of aspects of it. But like Beatson LJ I do not regard micro-management of the Government's detailed thinking about this policy as being part of the business of the courts. The justifiable question is whether a policy of "wait and evaluate" is proportionate, and therefore justifiable, at present. In my view, for the reasons given by my Lord, it is.