[2009] UKPC 52
Privy Council Appeal No 0028 of 2009

JUDGMENT

Nadine Rodriguez (Appellant) *v* (1) Minister of Housing of the Government (2) The Housing Allocation Committee (Respondents)

From the Court of Appeal of Gibraltar

before

Lord Phillips
Lady Hale
Lord Collins
Sir Jonathan Parker
Sir Henry Brooke

JUDGMENT DELIVERED BY

LADY HALE

ON

14 December 2009

Heard on 21 October 2009

Appellant
Rabinder Singh QC
Karon Monaghan QC
Professor Aileen McColgan
John Restano

(Instructed by Myers, Fletcher & Gordon)

Respondents
James Neish QC
Michael Llamas

(Instructed by Penningtons Solicitors LLP)

LADY HALE:

1. Gibraltar is a small place and affordable housing is in short supply. At issue are the policies of the Housing Allocation Committee, the statutory body which is responsible for the allocation of Government housing. Their policy is to grant joint tenancies to couples only if they are married to one another or have a child in common. This inevitably excludes same sex couples who can neither marry nor have children together. Is such a difference in treatment unconstitutional?

The history

2. The appellant is the tenant of a modest Government flat. She lives there with her same sex partner. They have been in a relationship together for 21 years. It is a loving, monogamous, permanent, sexually intimate and financially inter dependent relationship. The appellant is the home maker and her partner is the bread winner. They are unable to marry or enter into a civil partnership in Gibraltar and do not satisfy the residence requirements either to enter a civil partnership in the United Kingdom or to marry in Spain. If they were married, the appellant's partner would have a statutory right to be granted a new tenancy of the flat when the appellant tenant died, under the successor to section 12 of the Housing (Special Powers) Act 1972, which was the legislation in force at the time of these events. To provide her partner with long term security in the event of her death, the appellant applied to the Committee in October 2006 for them to be granted a joint tenancy.

3. In February 2007, the Committee refused that application, although they were prepared to accept an application from the appellant's partner for separate accommodation in her own name. The reason they eventually gave in March 2007 was that "only parents, spouses or children may be included". The position was later explained in more detail in the witness statement of Dr Ron Coram, the Principal Housing Officer of the Ministry of Housing:

> "Applications for joint tenancies are generally approved if the application is made by a married partner, parent, adult child or common law partner of the tenant. The protection of the family and in particular children is considered of prime importance. . . In the case of common law partners approval is only granted if the common law partner of the tenant and the tenant have at least one minor child in common living with them . . . The reason for granting joint tenancies to common law partners with children in common is to protect the interests of the children by

> providing each of the parents with equal tenancy rights and in the spirit of protection of the family. . . . Similar applications by common law heterosexual partners who do not have children in common are not favourably considered."

The appellant's request was refused on the basis of that policy and "in the absence of any circumstance which would warrant departure from that policy".

4. She applied to the Supreme Court of Gibraltar for a declaration that the refusal to grant a joint tenancy was unlawful on four grounds: first, discrimination, contrary to sections 1 and 14 of the Constitution and/or the common law principle of equality; second, unjustified interference with the privacy of the home, contrary to section 7 of the Constitution; third, fettering the Committee's discretion; and fourth, the inadequacy of the Committee's reasons. In December 2008, Dudley J found that there was no discrimination: the proper comparator was not a married couple but an unmarried opposite sex couple and viewed from that perspective the Committee had not discriminated on the basis of sexual orientation. However he quashed the decision on the ground that the Housing Allocation Committee had unlawfully fettered their discretion. The Committee promptly reconsidered their decision, but concluded in February 2009 that "they must abide by departmental policies".

5. The appellant's appeal to the Court of Appeal was heard shortly after this and judgment given in April 2009. By a majority, the appeal was dismissed. After reviewing the authorities at some length, Sir Paul Kennedy concluded that the policy "did not discriminate against the appellant, because the preference which it gave to married couples was a positive preference of a kind which the law regards as acceptable in circumstances such as these, and which did not require further justification". Sir Murray Stuart-Smith delivered a short concurring judgment and Sir William Aldous dissented.

The Constitution

6. Section 1 of the Constitution of Gibraltar (Annex 1 to the Gibraltar Constitution Order 2006) is declaratory and explanatory:

> "It is hereby recognised and declared that in Gibraltar there have existed and shall continue to exist without discrimination by reason of any ground referred to in section 14(3), but subject to respect for the rights and freedoms of others and for the public interest, each and all of the following human rights and fundamental freedoms, namely –

> (a) the right of the individual to life, liberty, security of the person, the enjoyment of property and the protection of the law;
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> (b) freedom of conscience, of expression, of assembly, of association and freedom to establish schools; and
>
> (c) the right of the individual to protection for his personal privacy, for the privacy of his home and other property and from deprivation of property without adequate compensation,
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> and the provisions of this Chapter shall have effect for the purpose of affording protection to the said rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."

It would appear, therefore, although nothing turns upon the point in this case, that the substance of the rights there listed is protected, not by section 1, but by the later sections which spell them and their limitations out in more detail. Section 1 does however insist that they exist without discrimination on the prohibited grounds.

7. Section 7 deals with protection for privacy of home and other property, "home" clearly having an expansive meaning in this context. The effect is very similar to article 8 of the European Convention on Human Rights (ECHR), save that the list of legitimate aims is longer and the burden of proving that a law or act done under a law is not "reasonably justifiable in a democratic society" lies upon the person claiming that her rights have been violated. The material provisions for our purposes are:

> "(1) Every person has the right to respect for his private and family life, his home and his correspondence. …
>
> (3) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision –

(a) in the interests of defence, the economic well-being of Gibraltar, public safety, public order, public morality, public health, town planning, the development or utilisation of mineral resources, or the development or utilisation of any other property in such a manner as to promote the public benefit; . . .

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

Section 1, of course, has already provided that the right to protection for the privacy of the home, exists without discrimination on any ground referred to in section 14(3).

8. Section 14 deals with protection from discrimination on prohibited grounds:

"(1) Subject to subsections (4), (5) and (7), no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to subsections (6), (7) and (8), no person shall be treated in a discriminatory manner by any person acting in the performance of any public function conferred by any law or otherwise in the performance of the functions of any public office or any public authority.

(3) In this section, the expression 'discriminatory' means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, caste, place of or social origin, political or other opinions or affiliations, colour, language, sex, creed, property, birth or other status, or such other grounds as the European Court of Human Rights may, from time to time, determine to be discriminatory, whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages that are not accorded to persons of another such description."

9. Most of the exceptions set out in subsections (4) and (5) are not relevant to this case. However subsection (4) might be relevant:

> "(4) Subsection (1) shall not apply to any law so far as that law makes provision – …
>
>> (e) whereby persons of any such description as is mentioned in subsection (3) may be subjected to any disability or restriction or may be accorded any privilege or advantage that, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is consistent with the provisions of the European Convention on Human Rights."

10. Subsection (6) provides that subsection (2) shall not apply to anything expressly or by necessary implication authorised to be done by laws which are excepted from subsection (1) by subsections (4) or (5). Subsection (7) is relevant to our case:

> "(7) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision whereby persons of any such description as is mentioned in subsection (3) may be subjected to any restriction on the rights and freedoms guaranteed by sections 7 . . . , being such a restriction as is authorised by section 7(3) …"

11. These provisions do not enjoy the clarity and simplicity of the equivalent provisions in the ECHR. No doubt there are very good reasons for this. But there are at least two good reasons for thinking that they are intended to provide at least a similar level of protection as is provided under the ECHR. The first is that the United Kingdom extended the protection of the ECHR to Gibraltar (by declaration of 23 October 1953), so that it would be surprising if Gibraltarians were to enjoy a lesser level of protection for their fundamental human rights under their Constitution than they do under the ECHR. The second is that the Constitution refers to the ECHR in several places. These include section 18(8)(a), which provides that a "court or tribunal determining a question which has arisen in connection with a right or limitation thereof set out in this Chapter *must* take into account" the jurisprudence of the European Court and Commission of Human Rights and the decisions of the Committee of Ministers "whenever made or given, so far as, in the opinion of the court or tribunal, it is relevant to the proceedings in which that question has arisen". However, the Board is interpreting the Constitution of Gibraltar, not the ECHR, so that the reasons for restraint in the interpretation of the "convention rights" under the United Kingdom's Human Rights Act 1998 does not apply: cf *R (Ullah) v Special Adjudicator* [2004] UKHL 26, [2004] 2 AC 323, para 20. It is now common ground that in at least one respect the Constitution goes further than the ECHR.

12. The parties are agreed on two points. First, it is not in dispute that sexual orientation is now among the grounds found to be discriminatory by the European Court of Human Rights (see *Salgueiro da Silva Mouta v Portugal* (1999) 31 EHRR 1055) and is thus included in the list of prohibited grounds in section 14(3). Second, it is not now in dispute that section 14(2) provides a free-standing protection from discriminatory treatment. Unlike article 14 of the ECHR, it is not limited to discrimination in "the enjoyment of the rights and freedoms set forth" in the ECHR. Dudley J was inclined to this view in the Supreme Court of Gibraltar, as was the Privy Council in the case of *Cerisola v HM Attorney General for Gibraltar* [2008] UKPC 18, [2008] 5 LRC 111, at paras 35, 36. The Attorney General now concedes the point. But in any event it does not arise because he also concedes that the case comes within the ambit of the protection of the "privacy of the home" in sections 1 and 7 of the Constitution.

13. The parties are also agreed on three other points, although these do not emerge as clearly from the wording of section 14. Both have proceeded on the basis that there must be read into section 14(3) the now well-established approach of the European Court of Human Rights to the prohibition of discrimination under article 14 of the ECHR. A recent statement of long-established principles appears in *Korelc v Slovenia* (Application No 28456/03) (unreported) 12 May 2009, para 83:

> "the Court reiterates that according to its established case law discrimination means treating differently, without an objective and reasonable justification, 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."

14. To this Mr Singh QC on behalf of the appellant would add, and the Board does not understand Mr Neish to disagree, the well-known principle from *Thlimmenos v Greece* (2000) 31 EHRR 411, para 44:

> "The right not to be discriminated against . . . is also violated when states without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

In other words, just as like cases must be treated alike, unlike cases must be treated differently.

15. Mr Singh also drew our attention to the unequivocal acceptance by the European Court of Human Rights of the principle of indirect discrimination in the recent case of *DH v Czech Republic* (2007) 47 EHRR 59, para 194: "Where it has been shown that legislation produces such a discriminatory effect . . . it is not necessary . . . to prove any discriminatory intent on the part of the relevant authorities". Again, Mr Neish does not disagree. Section 14(1) of the Constitution expressly covers a law which is discriminatory either "of itself" or "in its effect". It would be surprising if section 14(2) did not also cover treatment by public officials which is discriminatory either of itself or in its effect.

16. The parties are not agreed on two points. First, has there been discriminatory treatment at all? Second, if there has, can such discriminatory treatment be justified?

Discriminatory treatment

17. The simple proposition that like cases must be treated alike (and that unlike cases must be treated differently) begs the inevitable question. How do we identify which cases are alike and which are unlike? When are people in a relevantly similar situation? There are times when the European Court of Human Rights surmounts this hurdle with ease and other times when it does not. Thus in the recent case of *Burden v United Kingdom* (2008) 47 EHRR 857, the majority of the Grand Chamber held that two sisters living together were not in an analogous situation to civil partners because marriage and civil partnership were different forms of relationship from siblingship. The problem with that analysis is that the *ground* for the difference in treatment, the lack of marital or civil partnership status, is also the reason why the person treated differently is said not to be in an analogous situation. This can be dangerous. If the ground for the difference in treatment were a difference in sex, it would not be permissible to say that a man and a woman are not in an analogous situation because men and women are different. Hence in *Burden*, Judge Björgvinsson said that the comparison should focus, not on the differences in legal framework, but on the differences in the nature of the relationship as such. He and Judge Bratza concluded that the difference in treatment was justified.

18. The Board considers that the same result would be reached in all these cases, whatever the route taken, but in construing the Constitution of Gibraltar it prefers the approach of Judges Björgvinsson and Bratza. It would be unfortunate if discrimination in constitutional and human rights law were to get bogged down in the problems of identifying the proper comparator which have so bedevilled domestic antidiscrimination law in the United Kingdom. There is no need for it to do so, because in constitutional and human rights law both direct and indirect discrimination can be justified, whereas in our domestic anti-discrimination law direct discrimination can never be justified. In *R (Carson) v Secretary of State for Work and Pensions* [2005] UKHL 37, [2006] 1 AC 173, at para 3, Lord Nicholls of Birkenhead preferred

to keep the formulation of the relevant issues under article 14 as simple and non-technical as possible:

> "the essential question for the court is whether the alleged discrimination, that is, the difference in treatment of which complaint is made, can withstand scrutiny. Sometimes the answer to this question will be plain. There may be such an obvious, relevant difference between the claimant and those with whom he seeks to compare himself that their situations cannot be regarded as analogous. Sometimes, where the position is not so clear, a different approach is called for. Then the court's scrutiny may best be directed at considering whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim is appropriate and not disproportionate in its adverse impact."

19. In this case we have a clear difference in treatment but not such an obvious difference between the appellant and others with whom she seeks to compare herself. The appellant and her partner have been denied a joint tenancy in circumstances where others would have been granted one. They are all family members living together who wish to preserve the security of their homes should one of them die. The difference in treatment is not directly on account of their sexual orientation, because there are other unmarried couples who would also be denied a joint tenancy. But even if, as Dudley J found, these are the proper comparator, the effect of the policy upon this couple is more severe than on them. It is also more severe than in most cases of indirect discrimination, where the criterion imposed has a disparate impact upon different groups. In this case, the criterion is one which this couple, unlike other unmarried couples, will never be able to meet. They will never be able to get married or to have children in common. And that is because of their sexual orientation. Thus it is a form of indirect discrimination which comes as close as it can to direct discrimination. Indeed, Mr Singh puts this as a *Thlimmenos* case: they are being treated in the same way as other unmarried couples despite the fact that they cannot marry or have children in common. As Ackermann J put it in the South African Constitutional Court decision in *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [2000] 4 LRC 292, at para 54, the impact of this denial "constitutes a crass, blunt, cruel and serious invasion of their dignity".

20. Mr Neish seeks to meet this argument by relying on the line of cases in the European Court of Human Rights which have upheld special privileges for married couples (and latterly civil partners). In some of these the Court has said that married and unmarried hetero-sexual partners are not in an analogous situation: see in particular the admissibility decisions in *Shackell v United Kingdom* (Application No 45851/99) (unreported) 27 April 2000, citing *Lindsay v United Kingdom* (1986) 9 EHRR CD 555, and the recent decision in *Serife Yigit v Turkey* (Application No

3976/05) (unreported) 20 January 2009, privileging civil over religious marriages in Turkey. In *Burden v United Kingdom* (2008) 47 EHRR 857, the Grand Chamber observed at para 63:

> "In *Shackell*, the Court found that the situations of married and unmarried heterosexual cohabiting couples were not analogous for the purposes of survivors' benefits, since 'marriage remains an institution which is widely accepted as conferring a particular status on those who enter it'. The Grand Chamber considers that this view still holds true."

21. Finally, Mr Neish relies upon the admissibility decision in *Courten v United Kingdom* (Application No 4479/06) (unreported) 4 November 2008, in which the survivor of a same sex relationship complained that he had had to pay inheritance tax upon the couple's home. His partner had died before the Civil Partnership Act 2004 came into force and so they were unable to escape that liability by entering into a civil partnership. The Court relied on *Shackell*, *Lindsay*, and *Burden*, pointing out:

> "The Court has had previous occasion to remark that, notwithstanding social changes, marriage remains an institution that is widely accepted as conferring a particular status on those who enter it and, indeed, it is singled out for special treatment under article 12 of the Convention. It has held, for example, that the promotion of marriage, by way of limited benefits for surviving spouses, cannot be said to exceed the margin of appreciation afforded to the respondent Government…"

The Court dealt rather summarily with the argument that the couple were unable to get married at the relevant time by accepting that the United Kingdom could not be criticised for failing to legislate for civil partnerships earlier than it did. This confirms the prescience of the majority of the House of Lords in *M v Department of Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, who reached the same conclusion about the discriminatory treatment of same sex couples under the child support scheme.

22. Mr Singh rightly points out that all these cases concerned taxation and similar benefits within the ambit of article 1 of Protocol 1 rather than within the ambit of article 8. There is a much wider margin of appreciation for Member States in the former context than in the latter. He also points out that the concept of a margin of appreciation has no relevance to a national court interpreting its own laws. However, the Board would observe that the Strasbourg Court's reliance on the margin of appreciation suggests that, despite the references to married and unmarried couples not being in an analogous situation, the Court was in reality finding that to privilege

marriage in the context in question could readily be justified. For the reasons given earlier, the Board also considers it more logical to ask whether distinctions between married and unmarried couples can be justified than to regard the discriminatory status itself as placing them in different situations.

23. Hence, applying the approach of Lord Nicholls in *Carson*, the Board finds that the appellant has been treated in an indirectly discriminatory manner on account of her sexual orientation and turns to the question of justification.

Justification

24. The Board accepts that the ease of justification will vary with the context. It will be easier to justify differential fiscal benefits than differential interferences with the home and family life. In both *Shackell v United Kingdom* and *Mata Estevez v Spain* [2001] ECHR 56501/00 (admissibility) 10 May 2001, the Court did consider whether privileging marriage for fiscal and benefit purposes could be justified and held that in those cases it could. The Court has also required differences in treatment between married and unmarried fathers to be justified: see *McMichael v United Kingdom* (1995) 20 EHRR 205, where the difference was justified and *PM v United Kingdom* (2005) 42 EHRR 1015 and *Sommerfeld v Germany* (2003) 38 EHRR 756, where it was not. And in *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, the House of Lords not only required a difference in treatment between married and unmarried couples in the law of adoption to be justified but also found that it was not: a blanket ban on joint adoption by any unmarried couple irrespective of the best interests of the child was irrational. Indeed, the majority took the view that the Strasbourg Court would not find this to be within the State's margin of appreciation, relying in particular on *EB v France* (2008) 47 EHRR 509, where the denial of adoption to a woman in a same sex relationship could not be justified.

25. The benefit of a justification analysis is that it encourages structured thinking. A legitimate aim of the difference in treatment must first be identified. There must then be a rational connection between the aim and the difference in treatment. And the difference must be proportionate to the aim.

26. No-one doubts that the "protection of the family in the traditional sense" is capable of being a legitimate and weighty aim: see *Karner v Austria* (2003) 38 EHRR 528, para 40. Privileging marriage can of course have the legitimate aim of encouraging opposite sex couples to enter into the status which the State considers to be the most appropriate and beneficial legal framework within which to conduct their common lives. Privileging civil partnership could have the same legitimate aim for same sex couples. But, to paraphrase Buxton LJ in the Court of Appeal's decision in *Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533, [2003] Ch 380, at para 21, it is

difficult to see how heterosexuals will be encouraged to marry by the knowledge that some associated benefit is being denied to homosexuals. They will not be saying to one another "let's get married because we will get this benefit and our gay friends won't". Moreover, as Baroness Hale said in the same case in the House of Lords [2004] UKHL 30, [2004] 2 AC 557, at para 143:

> "The distinction between heterosexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to 'everyone', including homosexuals, by article 8 since *Dudgeon v United Kingdom* (1981) 4 EHRR 149. If it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships . . . Society wants its intimate relationships, particularly but not only if there are children involved, to be stable, responsible and secure. It is the transient, irresponsible and insecure relationships which cause us so much concern."

The aim of discouraging homosexual relationships is equally impermissible under sections 7(1) and 14 of the Constitution of Gibraltar.

27. Of course, the policy does not privilege married couples above everyone else. It also privileges unmarried opposite sex couples who have a child in common. The aim is said to be to protect the children but, if so, it is difficult to understand why it is limited to couples with a child in common, and does not extend to other couples who have undertaken parental responsibility for minor children. The policy also extends to parents and adult children living with the tenant. The aim here must be to protect the family home. But if so, it is difficult to understand why it does not extend to protecting the homes of people whom we now recognise as being members of the same family: see *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27. In short, the suggested aims are incoherent and the means employed are not rationally connected to those aims.

28. In the Board's view, therefore, the discriminatory effect of the policy cannot be justified because it is not rationally related to a legitimate aim. But there is another reason why it cannot be justified.

In accordance with the law

29. Dudley J, having held that there was no discrimination because the appellant and her partner were being treated in the same way as other unmarried couples with no children, went on to observe that once the rights and freedoms protected by the Constitution were engaged, any interference had to be in accordance with the law, and to satisfy a legitimate aim and the principle of proportionality. These concepts are taken from article 8(2) of the ECHR. They do not emerge with the same clarity from sections 7 and 14 of the Constitution. However, the exceptions contained in section 7(3) apply only to things done "under the authority of any law". Similarly the exceptions in section 14(7) apply only to things done "under the authority of any law", and to the extent that the law in question allows restrictions on the rights protected, inter alia, by section 7, only if they are authorised by section 7(3). By this route, therefore, it would appear that the requirement of legality is imported into acts in contravention of the equal right to respect for the privacy of the home protected by sections 7 and 14.

30. If this is so, the Board agrees with both Dudley J and the Court of Appeal, that this policy was not "in accordance with the law" or "under the authority of any law", because it was inaccessible. The evidence of Dr Coram was that it had evolved over time and was not recorded in any codified form. The appellant found out about it when she applied to have her partner added to the tenancy. She was puzzled because she knew of two women who were joint tenants of another flat. She must have been even more puzzled as the statements of the policy evolved over time. She was first told that "only parents, spouses or children may be included" (letter of 6 March 2007). The full extent of the policy only emerged in the witness statement of Dr Coram (dated 5 July 2007) and in the defendant's response to the claim (dated 6 July 2007).

Conclusion

31. In the opinion of the Board, therefore, the appellant is entitled to a declaration that she has been treated in a discriminatory manner, in contravention of her rights under sections 7 and 14 of the Constitution. In reaching this conclusion, the Board is not seeking to dictate to the Housing Allocation Committee exactly what its policy should be. But it should be a policy which does not exclude same sex partners who are in a stable, long term, committed and inter dependent relationship from the protection afforded by a joint tenancy. The Board recognises that, in the small number of such applications which are likely to be made, the Committee will have to make more inquiries than they do in other cases. This is something which public officials are used to doing in the United Kingdom. The Committee may well wish to adopt some simple indicia of interdependence and stability, rather than to embark upon a more intrusive inquiry. The Board would also like to stress that this decision does not oblige Gibraltar to introduce same sex marriage or civil partnership. It would only observe

that this would enable the authorities to continue to grant privileges to those couples who had chosen to enter an officially recognised status and to deny them to those who had declined to do so.

32. For these reasons, the Board will humbly advise Her Majesty that this appeal should be allowed.