HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 11

on appeal from[2004] EWCA Civ 1343

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Secretary of State for Work and Pensions (Appellant)
v.
M (Respondent)

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Walker of Gestingthorpe
Baroness Hale of Richmond
Lord Mance

Counsel

Appellants:
Philip Sales
Daniel Kolinsky
(Instructed by Office of the Solicitor – Department for Work and Pensions)

Respondents:
Karon Monaghan
Ulele Burnham
Garreth Wong
(Instructed by Liberty)

Hearing dates:
5 and 6 December 2005

ON
WEDNESDAY 8 MARCH 2006

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Secretary of State for Work and Pensions (Appellant) *v.* M (Respondent)

[2006] UKHL 11

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the great benefit of reading in draft the opinion of my noble and learned friend Lord Walker of Gestingthorpe. I am in complete agreement with it, and would for the reasons which he gives make the order which he proposes. My noble and learned friend's comprehensive summary of the relevant materials and authorities, for which I am greatly indebted to him, enables me to indicate quite briefly (and with no intention to derogate from his reasoning) why I agree with him.

2. Ms M. the respondent, is the mother of two children who spend the greater part of each week with their father, her former husband from whom she is divorced. Under the Child Support Act 1991 she, as the non-resident parent, is required to contribute to the costs of maintaining the children incurred by the father as the parent with care. The amount of her contribution is calculated according to complex rules laid down in regulations made under the 1991 Act, and are in important respects modelled on rules which have for many years obtained in the administration of social security benefits. According to those rules, in assessing a person's entitlement to benefit, some account has until recently been taken of the income and outgoings of a heterosexual partner with whom an applicant is living, but not of those of a homosexual partner. This may, and often does, work to the benefit of an applicant, but may work to the applicant's disadvantage. It does so in the case of Ms M. She now lives with a homosexual partner. As applied to her, on the facts of her case, the rules result in her being required to pay more towards the maintenance of her children than she would have to pay if she were living with a heterosexual partner.

3. Ms M. does not complain that her rights under article 8 of, or article 1 of the First Protocol to, the European Convention are or have been violated. She claims that her situation falls within the ambit or scope of these provisions and that she is accordingly entitled to complain that her enjoyment of these rights has been the subject of adverse discrimination on the ground of sex, in violation of article 14 in conjunction with either the article or the protocol or both.

4. It is not difficult, when considering any provision of the Convention, including article 8 and article 1 of the First Protocol ("IFP"), 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 paragraph 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 IFP is directed.

6. Even if the child support regime is, in the respect complained of, within the ambit of a Convention right, Ms M's complaint of discrimination is in my view anachronistic. By that I mean that she is applying the standards of today to criticise a regime which when it was established represented the accepted values of our society, which has

now been brought to an end because it no longer does so but which could not, with the support of the public, have been brought to an end very much earlier. Historically, both the law and public opinion withheld their sanction from a relationship between a man and a woman which was not sanctified by marriage or at least regularised by civil ceremony, and homosexual relationships were criminalised or condemned. When extra-marital heterosexual relationships became more generally accepted by the law and public opinion, recognition of homosexual relationships (even of those no longer criminal) was still withheld. Even now there remain bodies of opinion in this country (and much larger bodies of opinion in some other countries) for whom such recognition is still a step too far. But a democratic majority, by enacting the Civil Partnerships Act 2004, has established a new consensus and removed the feature of the old social security and child support regimes of which Ms M. complains. If such a regime were to be established today, Ms M. could with good reason stigmatise the regime as unjustifiably discriminatory. But it is unrealistic to stigmatise as unjustifiably discriminatory a regime which, given the size of the overall task and the need to recruit the support of the public, could scarcely have been reformed sooner.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

7. The Child Support Act 1991 made provision for the payment of maintenance for children whose parents are living apart. The effect of regulations made under the Act was that in some circumstances the payments due from a non-resident parent living with a person of the opposite sex as husband and wife were less than the amounts due from a corresponding non-resident parent living with a person of the same sex. Hence this claim for unlawful discrimination.

8. After the proceedings started the impugned regulations were amended by the Civil Partnership Act 2004. This Act came into force on 5 December 2005. The alleged discrimination no longer exists. The question before the House is whether the law in force until 5 December 2005 violated the claimant's Convention rights.

Article 14 and the claimant's family life

9. The primary claim advanced in the proceedings was that the difference in treatment of same sex couples and heterosexual couples violated the claimant's Convention right under article 14 of the European Convention on Human Rights taken in conjunction with the protection afforded to family life by article 8. Thus the first question for consideration is whether the facts of this case engage article 14 as claimed.

10. This question gives rise to a definitional problem. Article 14 does not create a right independently of the other substantive provisions of the Convention. That is trite law. Instead, article 14 guarantees that 'enjoyment of the rights and freedoms set forth in this Convention' shall be secured without discrimination on the stated grounds.

11. The subject matter thus guaranteed contrasts sharply with the subject matter of article 1 of the twelfth protocol. This article, not yet operative in this country, guarantees the 'enjoyment of any right set forth by law' without discrimination. The language of article 14, and the contrast with the generality of the language of article 1 of the twelfth protocol, might suggest that article 14 is aimed exclusively at the way a state discharges its obligations under the other substantive articles of the Convention.

12. That is not how the European Court of Human Rights has interpreted article 14. Under the Strasbourg jurisprudence it is now well established that article 14 is not so confined. Article 14 has a wider scope than this. This wider interpretation must now be regarded as settled law even though it can give rise to difficulty in identifying the extended boundary of article 14.

13. The extended boundary identified in the Strasbourg jurisprudence is that, for article 14 to be engaged, the impugned conduct must be within the 'ambit' of a substantive Convention right. This term does not greatly assist. In this context 'ambit' is a loose expression, which can itself be interpreted widely or narrowly. It is not a self-defining expression, it is not a legal term of art. Of itself it gives no guidance on how the 'ambit' of a Convention article is to be identified. The same is true of comparable expressions such as 'scope' and the need for the impugned measure to be 'linked' to the exercise of a guaranteed right.

14. The approach of the ECtHR is to apply these expressions flexibly. Although each of them is capable of extremely wide application, the Strasbourg jurisprudence lends no support to the suggestion that any link, however tenuous, will suffice. Rather, the approach to be distilled from the Strasbourg jurisprudence is that the more seriously and directly the discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily will it be regarded as within the ambit of that article; and vice versa. In other words, the ECtHR makes in each case what in English law is often called a 'value judgment'.

15. This approach finds explicit recognition in the context of article 8 in the judgment of the ECtHR in *Sidabras v Lithuania* 27 July 2004. The applicants were former KGB officers. As such they were subject to wide-ranging employment restrictions. The court held that the possible damage to their leading a normal personal life was a factor to be taken into account 'in determining whether the facts complained of fall within the ambit of Article 8 of the Convention': paragraph 49.

16. In one respect the ECtHR jurisprudence has been more specific. Article 14 is engaged whenever the subject matter of the disadvantage comprises one of the ways a state gives effect to a Convention right ('one of the modalities of the exercise of a right guaranteed'). For instance, article 8 does not require a state to grant a parental leave allowance. But if a state chooses to grant a parental leave allowance it thereby demonstrates its respect for family life. The allowance is intended to promote family life. Accordingly the allowance comes within the scope of article 8, and article 14 read with article 8 is engaged: *Petrovic v Austria* (2001) 33 EHRR 14, paras 27-30.

17. The latter principle is in point in the present case. The Child Support Act 1991 is one of the ways the United Kingdom evinces respect for children and the life of the family of which the child is part. In the present case that means primarily the family life of the claimant's children and their resident parent, that is, their father (the claimant's former husband). But, on this, there is an immediate difficulty confronting the claimant: the impugned regulations have no adverse impact on that family life. The adverse impact of which the claimant complains is the adverse impact these regulations have on her as a partner in her family relationship with her new partner. Her complaint is that she is treated differently, and is worse off financially, than she would be if she were living with a man.

18. Quite apart from her relationship with her new partner, the claimant herself enjoys family life with her own children. They come and stay with her for two or three days each week. But, again, this does not assist her. The discrimination of which she complains is not discrimination against her as a non-resident parent. It is discrimination against her as a partner in a same sex relationship. There is no suggestion that the latter discrimination has had any significant adverse impact on her family life with her children.

19. I turn next to the claimant's relationship with her same sex partner. The family life of a child and his parents is not the only family life the Child Support Act 1991 seeks to protect. The statutory formulae for calculating the amounts payable also have regard to the non-resident parent's life with any new 'partner' he or she may have. For instance, the formulae make allowance for the housing costs of the non-resident parent's new household. Affording protection in this way to the non-resident parent's new family life, that is, the family life of the non-resident parent and his or her new partner, is not a primary purpose of the legislation. Nonetheless, it is a feature built into the statutory scheme. By this means the United Kingdom demonstrates its respect for the non-resident parent's new family life. As such this feature of the scheme is, in the language of the Strasbourg jurisprudence, one of the 'modalities of the exercise of a right guaranteed'. Subject to what I shall say later regarding the Convention meaning of 'family', this feature brings this aspect of the statutory scheme within the ambit of article 8.

20. This is where discrimination intruded into the pre-amendment regulations. Under these regulations 'partner' was defined in a way which included a heterosexual partner but excluded a same sex partner. The effect of this was complicated because the statutory formulae are detailed and complex. For present purposes it is sufficient to note that where a non-resident parent is part of a heterosexual couple, whether married or not, a combined approach is taken to the couple as a unit. In contrast, under the pre-amendment scheme where a non-resident parent was part of a same sex couple a different 'stand alone' approach was adopted. The financial consequence of this was that the claimant's liability for child support payment was assessed at a higher amount than would have been the case if her new relationship were heterosexual. The claimant was liable for child support payments of £46.97 per week. Had she and her partner been treated in the same way as an unmarried heterosexual couple her liability would have been only £13 per week. In this way the regulations afforded a different level of respect to same sex family life than heterosexual family life.

Family life and same sex couples

21. I must now retrace my steps a little. Thus far I have referred without elaboration to the family life of the claimant and her same sex partner. I must now consider an important point not yet mentioned: whether a same sex couple can constitute a 'family' for the purposes of article 8.

22. On this the starting point scarcely calls for mention: the fundamental change in social attitudes towards same sex couples in a remarkably short time both in this country and abroad. In this country homosexual offences, some carrying a maximum punishment of imprisonment for life, were re-enacted as recently as 1956. These provisions remained on the statute book until 1967. Today same sex couples can enter into a form of partnership pursuant to the Civil Partnership Act 2004. The change has gone full circle. What was proscribed and punished is now countenanced and approved by law.

23. This change in attitudes towards same sex relationships has been reflected in two recent decisions of your Lordships' House. In *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 the House held that a same sex partner was capable of being a member of the original tenant's 'family' within the meaning of the Rent Act 1977, schedule 1, paragraph 3. *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 concerned the statutory right of a surviving spouse to succeed to the original tenant's tenancy of a flat. The House held that the less secure position of a survivor of a same sex couple, as compared with the survivor of a heterosexual couple, violated article 14 taken in conjunction with the protection afforded by article 8 to respect for the claimant's home. Observations in both those decisions point irresistibly to the conclusion that, depending always on the particular context, under the law of this country as it has now developed a same sex couple are as much capable of constituting a 'family' as a heterosexual couple.

24. The context in which this question arises in the present case is article 8 of the European Convention on Human Rights reproduced as one of the Convention rights in the Human Rights Act 1998. In the Convention itself the meaning of 'family life' in article 8 depends upon the proper interpretation of this phrase in the Convention. In this context the phrase can have only one proper interpretation. In other words, the concept of family life in article 8 is an 'autonomous' Convention concept having the same meaning in all contracting states.

According to the established Strasbourg jurisprudence that meaning does not embrace same sex partners. Under the Strasbourg case law same sex partners still do not fall within the scope of family life.

25. This was reiterated by the ECtHR in *Estevez v Spain*, 10 May 2001. The court noted the growing tendency in a number of European states towards the legal and judicial recognition of stable de facto partnerships between homosexuals. The court considered that, despite this, there was still little common ground between the contracting states. This was an area where the contracting states 'still enjoy a wide margin of appreciation'. The court held that, accordingly, the applicant's relationship with his late partner 'does not fall within Article 8 in so far as that provision protects the right to respect for family life'.

26. This ruling by the ECtHR was unanimous and unequivocal. By the reference to 'margin of appreciation' in this context I do not understand the court to be saying that each contracting state may decide for itself whether the relationship between same sex couples constitutes family life within the Convention. If that were so, the effect would be that, as applied to same sex couples, family life in article 8 would have a different content from one contracting state to another. That would be surprising. Rather, the court was saying that, in the present state of Strasbourg jurisprudence, contracting states are not required by the Convention to accord to the relationship between same sex couples the respect for family life guaranteed by article 8. For the time being the respect afforded to this relationship is a matter for contracting states.

27. This means that, as Strasbourg jurisprudence currently stands, the relevant law of the United Kingdom is not subject to scrutiny by the ECtHR so far as its Convention-compatibility is challenged on the basis that the relationship between a same sex couple constitutes family life within article 8. As confirmed in the *Estevez* ruling, the ECtHR does not at present recognise that the Convention guarantee of respect for family life is applicable to this relationship.

28. The decision in the *Estevez* case is the most recent pronouncement by the ECtHR on this subject. The later case of *Karner v Austria* (2003) 38 EHRR 528 adds nothing. There the court expressly did not decide whether the applicant's case fell within the scope of 'family life' or 'private life': see paragraph 33. The court thus declined to revisit its earlier decisions on this point. The court decided the case on a different basis.

29. In its interpretation of Convention rights your Lordships' House is not bound to follow decisions of the ECtHR. The House is bound only to take these decisions into account. But the House will not depart from a decision of the ECtHR on the interpretation of an article in the Convention save for good reason. It goes without saying that 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.

30. In the present case there is no good reason. The increasingly widespread acceptance in this country that same sex couples may have a family life just as much as heterosexual couples is not an adequate reason. Clearly the law in Strasbourg, as much as the domestic law in this country, is in a state of transition. Assuredly the time will come in Strasbourg when a sufficiently developed consensus among contracting states will make it no longer appropriate for contracting states to have a 'margin of appreciation' on this point. Then the *Estevez* ruling will be overtaken. Clearly also the ECtHR is the court best placed to judge when that time arrives. It is not for the courts of this country to pre-empt that decision.

Article 14 and the claimant's private life

31. The claimant also based her claim on article 14 read in conjunction with the protection article 8 affords to respect for the claimant's private life. I cannot accept this further basis of claim. By adopting the 'single unit' approach with heterosexual couples the statutory formulae set out to respect their family life, not the 'private' life of each of them. The statutory scheme was not one of the 'modalities' of the exercise of the guarantee of the right to respect for private life.

32. True, by treating heterosexual couples and same sex couples differently the pre-amendment scheme drew a distinction based on sexual orientation, and sexual orientation is central to every individual's personality. But, here again, the claim cannot succeed. The purpose for which the statutory scheme drew this distinction was to assess the reasonable amount of child maintenance contributions payable by a non-resident parent. I do not think legislation enacted for that purpose lies within the ambit of the protection afforded to the private life of a non-resident parent. The nature of the discrimination involved here, sexual orientation, cannot be regarded as sufficient in itself to bring a case

within the ambit of the private life heading of article 8. Otherwise every case of discrimination based on sexual orientation would be within the ambit of article 8. It must always be necessary to look at the wider context, including the consequences of the discrimination and the effect these consequences have on the claimant's private life. In this case it is not suggested that the discrimination had any significant adverse impact on the claimant's life-style.

Article 14 and protection of property

33. Nor is article 14 engaged in this case in conjunction with the protection article 1 of the first protocol affords to possessions. A non-resident parent is responsible for contributing to the maintenance of his children. The Child Support Act 1991 and its attendant regulations quantified the amount of that contribution and provided machinery for its collection. That is far outside the scope of article 1 of the first protocol. That is very distant from the type of interference at which article 1 is aimed.

Violation

34. I would hold therefore that article 14 is not engaged in any of the respects claimed. Accordingly it is not necessary to decide whether, had article 14 been engaged, the difference in treatment under the pre-amendment scheme was justified. Had it been necessary to decide this issue I would have agreed with the views expressed on this point by my noble and learned friends Lord Bingham of Cornhill and Lord Walker of Gestingthorpe. I would allow this appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

The respondent's liability under the Child Support Act

35. The Child Support Act 1991 ("the 1991 Act") established a new system intended to improve the assessment, collection and enforcement of payments for the maintenance of children whose parents are living

apart. That system has recently been considered by your Lordships' House in *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] AC 42, and it is unnecessary to repeat the detailed description to be found there. The system is administered by the Child Support Agency ("the CSA"). The CSA is not a separate statutory corporation. It is part of the government department administered by the Secretary of State for Work and Pensions, on whom all the relevant duties, powers and discretions are conferred.

36. As is, sadly, notorious, the CSA has fallen far short of its ambitious aims, and many parents with care of children (such as Mrs Kehoe) have failed to receive, through the CSA, payments which ought to have been made by absent parents. This appeal is concerned with payments which were regularly made to the CSA by Ms M in respect of her two children, now aged 14 and 12. Ms M is (in the statutory shorthand) a "non-resident" (formerly "absent") parent, although her children do in fact spend two and a half days a week with her. Her ex-husband is regarded as the parent with care, as the children spend the rest of the week with him.

37. Since 1998 Ms M has lived with a same-sex partner. Her partner is also a non-resident parent. Since 2001 they have had a jointly-owned house with a mortgage for which they are both responsible. They have a joint bank account. Ms M has complained of a breach of her human rights because in the calculation of her payments under the 1991 Act, and regulations made under that statute, her same-sex partner's contribution to their joint housing costs was treated by the Secretary of State as reducing her (Ms M's) deductible housing costs; if she had been living with a man (whether married to him or not) his contribution to the mortgage would have been treated as part of hers, and her weekly payment would (apart from any special discretionary adjustment) have been significantly smaller. There are some further refinements which come into the calculation, as I shall mention later; but the point on housing costs makes the biggest practical difference.

38. I should at once interpose that the position has now changed radically, as a result of the coming into force on 5 December 2005 (as it happens, the first day of the appeal hearing before your Lordships) of the Civil Partnerships Act 2004 ("the 2004 Act") and subsidiary legislation made under that statute. Your Lordships' decision will not therefore have any prospective effect, and (because of section 28ZC of the 1991 Act as inserted by the Social Security Act 1998) it will have little practical effect for the past either, in relation to the limited issue

actually raised in the appeal. Nevertheless the appeal raises questions of principle of considerable general importance. I shall have to come back to the significance of the 2004 Act.

39. The CSA and the system which it operates are not strictly speaking part of the social security system. The CSA is (as has been explained in *Kehoe*) an official intermediary intended to quantify and enforce a non-resident parent's obligation to support his or her child or children. Nevertheless the CSA system is closely tied in with social security. The parent with care (usually the mother) may be receiving income support or other social security benefits, and in those circumstances the Secretary of State may treat the parent with care as having applied for a maintenance assessment (and the parent with care is obliged to cooperate in the application). Moreover the complex formulae used to calculate a non-resident parent's liability mesh in with, and to some extent reproduce, provisions in the social security legislation.

40. The calculations to be made are to be found in section 11 of and Schedule 1 to the 1991 Act and in regulations, the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 SI 1992/1815 as amended by numerous later statutory instruments ("the Regulations"). These provisions are extremely complex and the complexity is increased by extensive changes made, with effect from 3 March 2003, by the Child Support, Pensions and Social Security Act 2000 (there have also been many other less extensive amendments). The courts below referred to the provisions in force before 3 March 2003, and I shall do the same, treating them (as does the agreed statement of facts and issues) as if they were still in force. The amendments do not affect the principles at issue in this appeal.

41. The essential point for present purposes was set out very clearly by Sedley LJ in the Court of Appeal [2004] EWCA Civ 1343, para 9:

> "The broad effect of the material provisions is to allocate the financial responsibility of separated parents for the maintenance of their children by pooling the absent parent's income and outgoings with those of his or her new partner if, but only if, that partner is of the opposite sex. For same-sex couples this means that the one who is an absent parent is assessed as if living alone, with generally disadvantageous consequences."

The following paragraphs of his judgment explain why that is so. The 1991 Act and the Regulations contain a multiplicity of special definitions: "assessable income," "net income," "exempt income," "disposable income" and "protected income". The non-resident parent's liability depends primarily on his or her assessable income, which is net income less exempt income (para 5 of Schedule 1 to the 1991 Act). There are complex provisions for determining net income (Regulation 7 of and Schedules 1 and 2 to the Regulations) and exempt income, which includes an amount in respect of housing costs (Regulations 9, 14, 15, 16 and 18 of and Schedule 3 to the Regulations). The higher the exempt income the smaller the maintenance assessment will be in respect of any particular level of assessable income. There is also a further mechanism (described by the Child Support Commissioner as a kind of long stop) securing that the non-resident parent's disposable income does not fall below the level of his or her protected income (para 6 of Schedule 1 to the Act and Regulations 11 and 12 of the Regulations).

42. I now come to some definitions in regulation 1(2) of the Regulations which are of central importance to the appeal (all applicable unless the context otherwise requires):

> "'family' means—
>
> …
>
> (a) a married or unmarried couple … and any child or children living with them for whom at least one member of that couple has day to day care …
>
> 'married couple' means a man and a woman who are married to each other and are members of the same household.
>
> 'partner' means—
>
> (a) in relation to a member of a married or unmarried couple who are living together, the other member of that couple . . .
>
> 'unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife."

These definitions are closely similar to, but not identical with, definitions of the same expressions in the Social Security Contributions and Benefits Act 1992, section 137(1).

43. Paragraph 6 of Schedule 1 to the 1991 Act provides as follows:

> "(4) The amount which is to be taken for the purposes of this paragraph as an absent parent's disposable income shall be calculated, or estimated, in accordance with regulations made by the Secretary of State.
>
> (5) Regulations made under sub-paragraph (4) may, in particular, provide that, in such circumstances and to such extent as may be prescribed—
>
> (a) income of any child who is living in the same household with the absent parent;
>
> and
>
> (b) where the absent parent is living together in the same household with another adult of the opposite sex (regardless of whether or not they are married)income of that other adult,
>
> is to be treated as the absent parent's income for the purposes of calculating his disposable income."

44. Regulation 11 (made, the Child Support Commissioner observed, under regulation 6(5)) deals with protected income. Under Regulation 11(1)(a) it is material whether or not the non-resident parent has a partner. Under regulation 11(1)(b) housing costs come into the calculation of protected income. Under regulation 11(1)(g) it is material whether there is a child who is a member of the family non-resident parent.

45. Regulation 15 is one of the regulations dealing with housing costs. Regulation 15(3), so far as now relevant, provides as follows:

> "Where a parent has eligible housing costs and another person who is not a member of his family is also liable to make payments in respect of the home, the amount of the parent's housing costs shall be his share of those costs … "

Schedule 3 of the Regulations also relates to housing costs. Paragraph 4, so far as now relevant, provides as follows:

> "(1) Subject to the following provisions of this paragraph the housing costs referred to in this Schedule shall be included as housing costs only where—
>
> …
>
> (b) the parent or, if he is one of a family, he or a member of his family, is responsible for those costs … "

46. It is common ground that if Ms M had been living with a man (whether or not she was married to him) her liability to pay child support maintenance would have been lower, for two reasons.

(1) Her exempt income and her protected income would have taken into account the whole of the household's housing costs (instead of only half of those costs).
(2) Her disposable income (and hence her protected income) would have been calculated on the basis that she had a partner and (as it appears from para 11 of the Child Support Commissioner's decision, though the facts are not clear) that the partner had a child who was a member of the family.

The financial difference for Ms M, in round figures, was as follows (the exact figures are in the agreed statement of facts and issues). Her children's maintenance requirement was assessed at about £105 a week. Her net income was assessed at about £330 a week. From this was deducted exempt income of £180 (including housing costs of about £90) so as to reach an assessable income of about £150 a week. The maintenance payable was assessed at about £47 a week. Had the whole of the housing costs been taken into account, it would have been only about £14 a week. In the event, after Ms M had been successful in her appeal, her ex-husband applied for a discretionary adjustment under section 29F of the 1991 Act (as inserted by the Child Support Act 1995). The effect of this adjustment was to reduce the disparity to a negligible sum. But the parties agreed that this should be disregarded in order to enable the point of principle to be determined on further appeal.

47. Mr Sales (for the appellant Secretary of State) produced detailed examples to show that there could be situations in which a non-resident parent who was one of a same-sex couple would do better financially if the couple were treated, not as a family unit, but as two individuals. This was part of his general submission that the CSA system is inextricably bound up with the wider social security system, and that it

depends entirely on circumstances, which may vary from time to time, whether two people living together are better or worse off if treated as a single family unit rather than as two individuals. Ms Monaghan (for the respondent Ms M) did not directly challenge the examples but submitted that there was no room for a "swings and roundabouts" approach if (as she contended) there was a clear case of discrimination offending against the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "Convention") as incorporated into domestic law by the Human Rights Act 1998 ("the 1998 Act").

The respondent's Human Rights Act challenge

48. The most relevant provisions of the 1998 Act are sections 3 and 6, which (so far as now relevant) provide as follows:

> "3.(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.
>
> (2) This section—
>
> (a) applies to primary legislation and subordinate legislation whenever enacted;
>
> (b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and
>
> (c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.
>
> 6. (1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.

…

(6) ‘An act’ includes a failure to act but does not include a failure to—

(a) introduce in, or lay before, Parliament a proposal for legislation; or

(b) make any primary legislation or remedial order.”

49. The relevant Convention rights are those in articles 8 and 14 of the Convention, and article 1 of the First Protocol: (“article 1 FP”):

“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.

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.

FIRST PROTOCOL

Article 1

Protection of property

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

50. Ms M's primary case was and is that in order to avoid a breach of article 14 in conjunction with article 8, or in conjunction with article 1 FP, the definitions in regulation 1(2) of the Regulations should be read and given effect, under section 3 of the 1998 Act, so as to treat her and her same-sex partner as an unmarried couple, and her partner's child as a member of the family. Her secondary case, if she fails on section 3, was and is that she should have a remedy under section 6 of the 1998 Act for a breach of her Convention rights under the same combination of articles.

The course of the litigation

51. The relevant assessment was made by the Secretary of State on 12 September 2001, to take effect from 13 August 2001. Ms M asked for a review but the assessment was maintained. She then appealed to the unified appeal tribunal ("the Tribunal") which held a hearing on 8 November 2002. At the appeal hearing Ms M had assistance both from the Citizens Advice Bureaux and from Liberty, and her advisers produced a bundle of authorities including the decision of the Court of Appeal in *Ghaidan v Godin-Mendoza* [2002] EWCA Civ 1533 [2003] Ch 380, even though it had been handed down only three days before. The Secretary of State's representative seems to have been less well prepared. The Tribunal allowed her appeal, giving brief written reasons on 11 November and extended reasons issued to the parties on 20 December 2002. The Tribunal (Chairman J A Priest) carefully addressed all the issues and concluded that on a literal interpretation of the Regulations there would be unjustifiable discrimination amounting to a breach under both limbs (that is article 14 in conjunction with article 8 and in conjunction with article 1 FP). Relying on section 6 of the Interpretation Act 1978 the Tribunal felt able to read the definition of "unmarried couple" as "a man or a woman and a woman or a man who are not married to each other but are living together as if they were husband and wife."

52. The Secretary of State appealed to the Child Support Commissioner (Mr Edward Jacobs). He held an oral hearing on

11 September 2003 with counsel instructed on both sides (at the same time he heard a housing benefit appeal, brought by Ms Cynthia Langley, which raised a similar point). In a written decision dated 1 October 2003 the Commissioner ruled that the decision of the Tribunal was not wrong in law. However he did not accept Ms M's argument on article 14 in conjunction with article 1 FP. Moreover his preferred route through section 3 of the 1998 Act was, not the Interpretation Act 1978, but the introductory rubric to Regulation 1(2), "unless the context otherwise requires." He gave leave to appeal to the Court of Appeal both to the Secretary of State and to Ms Langley (who was not successful before him).

53. The Court of Appeal (Kennedy, Sedley and Neuberger LJJ) heard the two appeals together in July 2004 and handed down a single set of judgments on 15 October 2004. The Court dismissed the Secretary of State's appeal, but Kennedy LJ dissented and Sedley and Neuberger LJJ differed to some extent in their reasoning. Sedley LJ (who gave the first judgment) asked himself whether Ms M's claim was within the ambit of a Convention right. At paras 31 to 51 he considered article 8 in detail under three heads: (i) Ms M's former family relationship; (ii) Ms M's present relationship; and (iii) Ms M's private life. He rejected the first of these approaches. He accepted the second, expressing his conclusion as follows (para 49):

> "Putting it schematically, the child support scheme sets out to respect family life by making allowance for the joint expenses of an absent parent's new household. It is this, without regard to discrimination, which brings the measure within the ambit of article 8. If then the scheme discriminates between one family unit and another on the ground of its members' sexuality, article 14 too becomes engaged. Here, by treating their finances as wholly separate when they are not, and by consequently assessing M's child support payment at a higher sum that if theirs was a heterosexual partnership, the scheme manifests a different level of respect for their family life."

Sedley LJ found it unnecessary to express a definite view on the third approach to article 8, that is respect for private life, but he expressed some doubt about it (paras 50 and 51). He also found it unnecessary (paras 52 to 58) to decide whether article 1 FP was engaged, but here too he expressed considerable doubt about that aspect of Ms M's claim. He concluded that section 3 of the 1998 Act enabled the problem of the

definitions to be overcome, not by either of the methods adopted below but (para 86) "by simply disapplying—in effect deleting—the definition of 'unmarried couple' in regulation 1(2)."

54. Neuberger LJ agreed with Sedley LJ in rejecting the first approach (former family) to article 8, and (going beyond Sedley LJ's doubts) he also rejected the third approach (private life). He differed from Sedley LJ as to article 1 FP, regarding it as "an almost paradigm case for invoking the article" (para 107). Finally he considered the approach to article 8 based on Ms M's present relationship and agreed with Sedley LJ's conclusion, expressing his conclusion as follows (para 133):

> "the reduction in liability effected by regulation 11 is accorded for the purpose of ensuring that that absent parent's new family is not so deprived of money that it is significantly detrimentally affected by the liability of the absent parent to pay child support. To my mind, it follows from this that M has made good her case that the relevant provision, of which she does not have the benefit because she is in a same sex, rather than a heterosexual, relationship, was enacted out of respect for family life, the family life in question being that of the absent parent and his/her new partner."

He agreed, although only with some hesitation, with Sedley LJ's application of section 3 of the 1988 Act (para 139). Kennedy LJ rejected all M's claims on the ground that (para 173):

> "no reliance can be placed on article 14 because neither article 8 nor article 1 Protocol 1 are sufficiently engaged."

He expressed no view as to the possible application of section 3 of the 1998 Act.

The issues before the House

55. There are three issues before the House. They can be stated (substantially as formulated in the agreed statement of facts and issues) as follows:

(1) Does the application to Ms M of the maintenance formula contained in the Regulations fall within the ambit of article 8 or article 1FP for the purposes of article 14 of the Convention?
(2) If so, would the application of the Regulations (if interpreted without recourse to section 3(1) of the 1998 Act) be contrary to Ms M's rights under article 14?
(3) If so, does section 3(1) operate to modify the interpretation of the Regulations, and (if not) what other remedy should be granted?

The first issue: "ambit" generally

56. In *Botta v Italy* (1998) 26 EHRR 241, 259, para 39 the European Court of Human Rights ("the ECHR") described (in terms which are now very familiar) the relationship between article 14 and other articles conferring particular Convention rights:

> "According to the Court's case law, '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 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 of the case fall within the ambit of one or more of the latter.'"

The quotation is from the judgment of the ECHR in *Abdulaziz Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471,499, para 71 (a well-known case about discrimination between husbands and wives in the field of immigration law). The case law can be traced back to *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578 (see para 44) and to the *Belgian Linguistics* case (No 2) (1968) 1 EHRR 252 (see paras 9-10).

57. The Strasbourg case law repeatedly uses, in the English language versions of its judgments, the expressions 'within the ambit' or 'within the scope' in order to describe the sort of link which must be established between any alleged discrimination and the article conferring a particular Convention right (which I will call "the substantive article"). Similarly the French language versions use terms such as 'emprise' (grasp) and 'champ' (field). An equivalent expression often found in our domestic case law, but not in the Strasbourg case law, is that Convention rights under a substantive article are "engaged." Its use is however not entirely uniform, and may give rise to misunderstanding, as Lord Hope of Craighead pointed out in *Harrow London Borough Council v Qazi* [2004] 1 AC 983, 1003, para 47.

58. In the course of the appeal hearing there was some discussion, to my mind rather arid, as to whether the requirement for the alleged discrimination to be within the ambit of the substantive article was an autonomous concept. It is no doubt an autonomous concept in the sense that any attempt by a national legislature to achieve some artificial narrowing of its meaning would be ineffective. But article 14 does not use the expression; it speaks simply of "the enjoyment of" the Convention rights and freedoms being "secured without discrimination." The Strasbourg case law does not, and could not, spell out any simple bright-line test for determining how close must be the link between the alleged discrimination and the rights granted by the substantive article.

59. When *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 came to this House my noble and learned friend Lord Nicholls of Birkenhead referred to this point. He mentioned the expressions "within the ambit" of the right conferred by the substantive article, "one of the modalities" of the exercise of the right, and "linked" to the exercise of the right (the latter two expressions being used in *Petrovic v Austria* (1998) 33 EHRR 307, 318, 319, paras 22 and 28). Lord Nicholls went on to observe (p 566, para 11):

> "These expressions are not free from difficulty. In *R (Carson) v Secretary of State for Work and Pensions* [2003] 3 All ER 577, 592-595, paras 32-41, Laws LJ drew attention to some difficulties existing in this area of the Strasbourg jurisprudence. In the Court of Appeal in the present case Buxton LJ appeared to adopt the approach, espoused in the leading text book *Grosz, Beatson & Duffy, Human Rights: The 1998 Act and the European Convention* (2000), p327, para C14-10, that

> 'even the most tenuous link with another provision in the Convention will suffice for article 14 to enter into play': [2003] Ch 380, 387, para 9. In your Lordships' House counsel for the First Secretary of State criticised this approach. He drew attention to later authorities questioning its correctness: *R (Erskine) v London Borough of Lambeth* [2003] EWHC 2479 (Admin), paras 21-22, per Mitting J ('it overstates the effect of the Strasbourg case law') and *R (Douglas) v North Tyneside Metropolitan Borough Council* [2004] 1 WLR 2363, paras 53-54, per Scott Baker LJ."

60. It was not an issue which this House had to resolve in *Ghaidan*. It is a live issue in this appeal. Though there is no simple bright-line test, general guidance can be derived from the Strasbourg case law, and it does not in my opinion lead to the conclusion that even a tenuous link is sufficient. Nor does it lead to the conclusion that precisely the same sort of approach is appropriate, whatever substantive article is in point. That is particularly important, I think, in considering the ambit of article 8.

61. Some Convention rights have a reasonably well-defined ambit (or scope). Article 11 (freedom of assembly and association) is one example. In *National Union of Belgian Police v Belgium* (1975) 1 EHRR 578 the Belgian Government failed to consult a municipal police union about legislation affecting public sector employment rights. The union's direct claim under article 11 failed, but article 14 was engaged (though on the particular facts the article 14 claim also failed). Another example is article 2 of the First Protocol (headed "the right to education," but commencing in a negative manner, "no person shall be denied the right to education"). This article sets an undemanding standard, but its ambit is one in which discrimination is particularly likely to occur, and so it is a field in which claimants are more likely to succeed under article 14 than under the substantive article. The well-known case of *R v Birmingham City Council Ex p Equal Opportunities Commission* [1989] AC 1155 (in which proportionately fewer grammar school places were available for girls than for boys) was decided under domestic law years before the commencement of the 1998 Act, but in Convention terms it would have been a classic example of discrimination amounting to a breach under article 14, although there was no breach under the substantive article (since there is no general right to grammar school education). The *Belgian Linguistics* case provides (on the 5th question, paras 26-32) an early example under the Convention, although the facts were complicated and the discrimination was on the grounds of language rather than gender. As I shall seek to

demonstrate, article 8 is very different because of its much wider and much less well-defined ambit.

The first issue: article 8 case law

62. I have already set out the text of article 8. It has been described as one of the most open-ended provisions of the Convention (*Jacobs & White*, European Convention on Human Rights, 3rd ed. (2002) p 217, referring to Feldman, "The developing scope of article 8 of the European Convention on Human Rights" [1997] EHRLR 265 and Warbrick,"The Structure of article 8" [1998] EHRLR 32). It has several striking features. First, uniquely among the Convention rights, the right conferred is a right to "respect" for one's private and family life and one's home and correspondence: not a right to privacy or to family life, or to a home. This gives rise to both negative and positive obligations whose boundaries are not easy to discern. Second, although personal privacy is certainly an important constituent element of the right to respect for private life, that right is not exclusively (and perhaps not even primarily, as the law seems to be developing) concerned with personal privacy. Third, there has been a similar tendency to extend the scope of respect for family life.

63. The Strasbourg Court has however shown itself to be well aware of the dangers of any unrestrained or unprincipled extension of article 8. A large number of Strasbourg authorities have been referred to on this topic, some concerned with respect for private life, some concerned with respect for family life or the home, and a few concerned with other Convention rights. I shall refer to the most important of these, in chronological order, as briefly as I can, and then seek to draw some conclusions as to respect for private life and respect for family life, the two approaches on which Ms Monaghan relies (with variations so far as family life is concerned). Some of the authorities are also relevant on the second issue.

64. The first case, *Dudgeon v United Kingdom* (1981) 4 EHRR 149 was concerned with the position of a male homosexual in Northern Ireland at a time when private sexual activity which would have been lawful in England (under the Sexual Offences Act 1967) was in theory a serious criminal offence, but did not in practice lead to prosecution, in Northern Ireland. The ECHR (without opposition from the United Kingdom), at para 41, agreed with the Commission that

> "the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of article 8(1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life."

The case turned mainly on whether the climate of opinion in Northern Ireland provided justification under article 8(2). The ECHR made no separate ruling under article 14, regarding it as unnecessary to do so.

65. Ms Monaghan relied on *Van Der Mussele v Belgium* (1983) 6 EHRR 163, the case of the pupil-advocate who objected to being required to do his stint of pro bono work. His complaint was (very unusually) made under article 4 of the Convention (forced labour) and the judgment is authority to the proposition (para 43) that "Work or labour that is in itself normal may in fact be rendered abnormal if the choice of the groups or individuals bound to perform it is governed by discriminatory factors." Nevertheless the claim failed on the allegation of discrimination. I do not think that this unusual case assists either side.

66. I have already referred to *Abdulaziz* (1985) 7 EHRR 471, a well-known case about article 14 in conjunction with article 8. The complaint was squarely within the ambit of respect for family life, since it was concerned with whether wives (settled in the United Kingdom) would be able to be reunited with their husbands (who were outside the United Kingdom).

67. *Norris v Ireland* (1989) 13 EHRR 186 was the Republic of Ireland's counterpart of *Dudgeon*, except that the Irish government contended (unsuccessfully) that article 8 was not applicable at all since (para 37) "the applicant had been able to maintain an active public life side by side with a private life free from any interference on the part of the State or its agents." There was no reliance on article 14.

68. *Logan v United Kingdom* App No 24875/94 (6 September 1996) was a decision of the Commission that an application was inadmissible because it was manifestly ill-founded. Complaints were made under articles 6, 8 and 9 (not 14). It merits passing mention only because the

applicant was aggrieved by a CSA assessment made under the 1991 Act. His complaint under article 8 was that the maintenance which he had to pay gave him insufficient money to maintain reasonable contact with his children. The Commission noted that the CSA legislation "insofar as it seeks to regulate the assessment of maintenance payments from absent parents, does not by its very nature affect family life." Nor, on the facts, was the financial burden on the applicant such as to disclose any lack of respect for his rights under article 8.

69. Mr Sales relied on *Botta v Italy* (1998) 26 EHRR 243, to which I have already referred. The applicant was physically disabled and complained of the lack of facilities for the disabled at a seaside holiday resort; he contended that this lack of facilities was in breach of national law. The ECHR rejected his complaint both under article 8 (lack of respect for private life) and under article 14 in conjunction with article 8. In the context of the state being under a positive obligation, it distinguished cases (such as *Airey v Ireland* (1979) 2 EHRR 305) in which a "direct and immediate link" had been established between the measures sought and the applicant's private or family life. It concluded (para 35) that the right claimed

> "concerns interpersonal relations of such broad and indeterminate scope that there can be no conceivable direct link between the measures the State was urged to take in order to make good the omissions of the private bathing establishments and the applicant's private life."

The case was not within the ambit of article 8 at all, and therefore the claim under article 14 also failed.

70. *Petrovic v Austria* (1998) 33 EHRR 307 was concerned with a father's complaint under 14 in conjunction with article 8 (family life) of discrimination in that he (unlike his wife) had not been allowed a parental leave allowance. The ECHR held that the matter was within the scope of article 8 (paras 26-29) and that there was a difference in treatment on the ground of sex (para 35). However (paras 38-39)

> "the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. 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.
>
> It is clear that at the material time, that is at the end of the 1980s, there was no common standard in this field, as the majority of the Contracting States did not provide for parental leave allowances to be paid to fathers."

The case is of interest because the ECHR referred in para 28 (citing an expression in the *National Union of Belgian Police* case (1975) 1 EHRR 578, (para 45) to a test of whether "the subject-matter of the disadvantage … constitutes one of the modalities of the exercise of a right guaranteed" (but in para 29 it actually applied the more familiar test of "within the scope"). The case is also of interest in attaching importance to the gradual evolution of cultural and social standards in Europe (paras 40-41):

> "Only gradually, as society has moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, have the Contracting States introduced measures extending to fathers, like entitlement to parental leave.
>
> In this respect Austrian law has evolved in the same way, the Austrian legislature enacting legislation in 1989 to provide for parental leave for fathers. In parallel eligibility for the parental leave allowance was extended to fathers in 1990.
>
> It therefore appears difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which is, all things considered, very progressive in Europe."

71. *Marzari v Italy* App No 36448/97, 4 May 1999 was an admissibility decision rejecting an application under article 8 by a disabled tenant of a public housing authority. When the authority declined to carry out various works which the tenant asked for, he stopped paying rent and after a good deal of indulgence he was eventually evicted. The Court, following *Botta*, held that there was a positive obligation on the state to assist with housing needs where "there

is a direct and immediate link between the measures sought by the applicant and the latter's private life."

72. *Smith and Grady v United Kingdom* (1999) 29 EHRR 493 and *Lustig-Prean and Beckett v United Kingdom* (1999) 29 EHRR 548 were the sequel to *R v Ministry of Defence Ex p Smith* [1996] QB 517. In two separate judgments delivered on 27 September 1999 the ECHR decided in favour of two men who had been discharged from the Royal Navy, and a woman and a man who had been discharged from the Royal Air Force despite their exemplary records, on the grounds of their admitted homosexuality. Their discharge was not for any misconduct but in line with official policy. The United Kingdom government accepted (para 70 of *Smith* and para 63 of *Lustig-Prean*) that the intrusive investigation and humiliating discharge of the applicants had been interferences with their right to respect for their private lives, and the case turned on justification under article 8(2). The ECHR found no separate issue under article 14 (paras 116 and 109 respectively).

73. In *Salgueiro de Silva Mouta v Portugal* (1999) 31 EHRR 47, a divorced father, who then entered into a same-sex relationship, was awarded custody of his daughter by the Lisbon Family Court. The Court of Appeal reversed this decision solely (as the ECHR found) on the ground of the father's sexual orientation. The ECHR found a breach of article 14 in conjunction with article 8 on the basis that the overruling of the Family Court was an interference with the father's right to respect for his family life. The government of Portugal accepted (para 25) that the matter was within the ambit of article 8, but only as regards respect for family life.

74. Ms Monaghan placed some reliance on *Thlimmenos v Greece* (2000) 31 EHRR 15. A person who had been convicted of felony was prohibited by law from becoming a member of the Greek chartered accountants' professional body. The applicant, a Jehovah's Witness, had been convicted of felony for refusing, for religious reasons, to enlist in the army. He relied on article 14 in conjunction with articles 6 and 9. The case demonstrates (para 44) that

> "The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different."

It also shows that the ECHR was prepared to look through the undisputed fact of the applicant's conviction for felony to see that it arose from his conscientious objection to military service (within the ambit of article 9) and not from any disgraceful conduct. To that extent it shows the ECHR as being sensitive to the full facts of the particular case. Beyond that I do not find it of much assistance.

75. *Estevez v Spain* (ECHR 10 May 2001) is of some importance as it is the first case put before the House in which a homosexual relied on article 14 in conjunction with respect for family life (as well as respect for private life) under article 8. After his partner had died in an accident the applicant claimed a social security allowance as a surviving spouse. When this was refused he applied to the ECHR. The ECHR ruled the application inadmissible as manifestly ill-founded. As regards respect for family life it stated (p 4),

> "The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation … Accordingly, the applicant's relationship with his late partner does not fall within article 8 insofar as that provision protects the right to respect for human life."

As regards respect for private life it accepted that the complaint might be within the ambit of article 8, but that the Spanish legislation had a legitimate aim, "the protection of the family based on marriage", and that the difference in treatment was within the State's margin of appreciation. Consequently the claim failed both under article 8 alone and under article 14 in conjunction with article 8.

76. *Pretty v United Kingdom* (2002) 35 EHRR 1 was the well-known case concerned with a sufferer from motor neurone disease who wished for assisted suicide. Its importance here is for the ECHR's recent wide statement of the scope of private life under (para 61):

> "As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and

> psychological integrity of a person. It can sometimes embrace aspects of an individual's physical and social identity. Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by article 8. Article 8 also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-determination as being contained in article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

Nevertheless the ECHR did not extend the right to respect for private life so far as to cover personal autonomy over assisted suicide.

77. *Goodwin v United Kingdom* (2002) 35 EHRR 18 was the culmination of a line of cases in which the ECHR had, by increasingly slim majorities, rejected claims by United Kingdom transsexuals that their inability to marry infringed their rights under article 8 (and article 12). In *Goodwin* there was a unanimous finding of breach of both articles, with no separate finding about article 14. The ECHR paid particular attention (paras 92-93) to the United Kingdom's slow response to its warnings in earlier cases, concluding,

> "that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant."

78. *Frette v France* (2002) 38 EHRR 438 concerned a single homosexual man who wished to adopt a child. The ECHR found that the claim was within the ambit of article 8 (apparently as regards respect for family life, though the judgment is not entirely clear) but dismissed the claim under article 14, in conjunction with article 8, on margin of

appreciation grounds (paras 40-44). However the applicant was successful on a separate complaint of a breach of article 6.

79. *Karner v Austria* (2003) 38 EHRR 528 was on facts comparable to those of *Estevez*, except that the surviving same-sex partner was seeking succession to a tenancy (of their previously shared flat) rather than a social security benefit. It was decided on the "home" limb of article 8. Several interveners

> "pointed out that a growing number of national courts in European and other democratic societies require equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view is supported by recommendations and legislation of European institutions" (para 36).

The claim succeeded. As to the margin of appreciation the ECHR stated (paras 40-41):

> "The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment. It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.
>
> The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to Member 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 that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary to exclude persons living in a homosexual relationship from the scope of [the relevant provision] of the Rent Act in order to achieve that aim."

80. *Connors v United Kingdom* (2004) 40 EHRR 189 is a very important decision, on respect for the home under article 8, which is currently being considered by another appellate committee of this

House. For present purposes I wish to refer only to one general passage about article 8 (para 82), that it

> "concerns rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community. Where general social and economic policy considerations have arisen in the context of article 8 itself, the scope of the margin of appreciation depends on the context of the case, with particular significance attaching to the extent of the intrusion into the personal sphere of the applicant."

The footnotes to this passage refer to *Gillow v United Kingdom* (1989) 11 EHRR 335 para 55; *Pretty*; *Goodwin;* and *Hatton v United Kingdom* (2002) 34 EHRR 1, paras 103 and 123. Although the "extent of the intrusion into the private sphere" is here being treated as relevant to the state's margin of appreciation, the authorities suggest to me that it is also not without relevance to the question of ambit.

81. The most recent case, on this part of the appeal, is *Sidabras and Dziautas v Lithuania* Application Nos 55480/00 and 59330/00, (27 October 2004). The applicants had been KGB officers and as such were debarred from holding any post in the public sector, and from many responsible jobs in the private sector. The ECHR held that their complaint fell within the ambit of article 8 (respect for private life) and observed (para 49):

> "in the instant case there is more at stake for the applicants than the defence of their good name. They are marked in the eyes of society on account of their past association with an oppressive regime. Hence, and in view of the wide-ranging scope of the employment restrictions which the applicants have to endure, the Court considers that the possible damage to their leading a normal personal life must be taken to be a relevant factor in determining whether the facts complained of fall within the ambit of article 8 of the Convention."

The ban was disproportionate and the claim under article 14 in conjunction with article 8 (respect for private life) was successful.

82. Ms Monaghan submitted that since the concept of respect for private and family life is so wide and multifaceted, your Lordships should be ready to conclude, in considering a complaint under article 14, that any alleged act of discrimination is within the ambit of article 8. But if that were right virtually every act of discrimination on grounds of personal status (gender, sexual orientation, race, religion, and so on) would amount to a breach of article 14, since these are all important elements in an individual's private life. There would be little or no need for the wider prohibition in article 1 of the Twelfth Protocol on discrimination in the enjoyment of any legal right.

83. My Lords, in my opinion that is not the effect of the Strasbourg case law which I have attempted to summarise. The ECHR has taken a more nuanced approach, reflecting the unique feature of article 8 to which I have already drawn attention: that 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; Norris*); so does intrusive interrogation and humiliating discharge from the armed forces (*Smith and Grady; Lustig-Prean and Beckett*). 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 and Dziautas*). 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.

84. Similarly the cases in which article 14 has been considered in conjunction with the family life limb of article 8 were all (whichever way they were ultimately decided) concerned with measures very closely connected with family life: *Petrovic* (parental leave); *Estevez* (social security benefit for surviving spouse); *Frette* (adoption). By contrast *Logan* (the CSA case) is an example of unsuccessful reliance on a much more remote link (financial resources to visit absent children).

The first issue: conclusions on family life and private life

85. All three members of the Court of Appeal rejected the argument that the method of calculation of Ms M's maintenance assessment under the 1991 Act and the Regulations fell within the ambit of the right to respect for the family relationship between Ms M and her two children by her marriage to her ex-husband; Sedley LJ at paras 36-39, Neuberger LJ at paras 97-100, and Kennedy LJ at paras 155-166. In my opinion

they were right to do so. Ms M is of course entitled to respect for her continuing relationship with her children. But she is not complaining of being deprived of all contact with her children, or of being deprived of contact with them at her home where her same-sex partner lives. On the contrary, they spend part of the time with her at her home. She is complaining because she considers that she should be paying less towards their maintenance. As Neuberger LJ said (para 99) her article 14 complaint has nothing to do with respect for her relationship with her children.

86. Ms M's stronger argument (as regards family life) depends on her present relationship with her same-sex partner. Kennedy LJ held (in the passage already referred to) that *Estevez* is still good law at Strasbourg, and that our domestic law has not moved further forward. Sedley and Neuberger LJJ held that domestic law has moved further forward, although that bald summary does not do justice to their careful reasoning (at paras 40-49 and 108-133 respectively, relying heavily on *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 and *Ghaidan v Godin-Mendoza* [2004] 2 AC 557).

87. I do not go into their reasoning because 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.

The first issue: article 1FP

89. I can deal with this issue briefly as I am in full agreement with the majority of the Court of Appeal (Sedley LJ at paras 52-53 and Kennedy LJ at paras 169-172). Sedley LJ quoted from the Commission in *Burrows v United Kingdom* App No 27558/95 that article 1FP was

> "primarily concerned with the formal expropriation of assets for a public purpose, and not with the regulation of rights between persons under private law unless the State lays hands—or authorises a third party to lay hands—on a particular piece of property for a purpose which is to serve the public interest."

Sedley LJ added,

> "Child support is neither a tax nor a form of expropriation: it is an allocation of private financial responsibility, and an expansive approach to [article 1FP] is in my view to be resisted."

90. Neuberger LJ fastened on the words "or authorises a third party to lay hands" as indicating that article 1FP has a wide scope. But those words are needed to cover cases such as *James v United Kingdom* (1986) 8 EHRR 123 (leasehold enfranchisement). In this case the CSA is concerned as an official intermediary, but it is enforcing a personal obligation of the absent parent. It is no more expropriating property than (in an analogy suggested in argument) when the civil justice system enforces a private contract by converting a contract debt into a judgment debt which can be recovered by the process of execution.

The second issue

91. I would therefore allow this appeal on the first issue. I would also allow it on the second issue, if the case gets that far, on the ground that Parliament has acted with reasonable promptness, and within its margin of appreciation, in the complex process of legislative change which has resulted in the 2004 Act. The United Kingdom government was criticised by the ECHR for dilatoriness in *Goodwin* (decided in July 2002) but it has since been engaged in a necessarily time-consuming process of deliberation and consultation (initiated by the consultation document: Civil Partnership, a framework for the legal recognition of same-sex couples published in June 2003) leading to the preparation and enactment of the 2004 Act. It is a massive piece of legislation extending to 264 sections and 30 schedules. It received the Royal Assent on 18 November 2004 and came into force, as already noted, on 5 December 2005. The delay in bringing it into force was necessary in order to make far-reaching administrative changes including the adaptation of computer systems, the training of staff, and so on.

92. The enactment of the 2004 Act was possible only because of the profound cultural change which has occurred in most of Europe, within the last two generations, in attitudes towards homosexuality. Many people (and not only homosexuals) would say that that change has taken far too long, and they would be right ("They are taking him to prison for the colour of his hair … For the nameless and abominable colour of his hair" wrote Housman in a poem not published for many years after it was written). Nevertheless two generations is not a long time in which to change prejudices which have been deeply ingrained for many centuries. In Europe, where the Christian religion has provided the cultural matrix for two thousand years, male homosexual activity was regarded as a grave sin, at one time punishable as a form of heresy; it was also for centuries a capital crime under the secular law of many European countries; other world religions also condemned it, and many still do.

93. In a recent article, "Homosexual Rights", Child and Family Law Quarterly (2004) vol. 16, p.125 my noble and learned friend Baroness Hale of Richmond has commented on the evolutionary process of legal change:

> "It is a fair hypothesis, advanced by Kees Waaldijk, that 'most countries, at different times and at different paces,

> go through a standard sequence of legislative steps recognising homosexuality.' The first steps are taken by the criminal law: permitting homosexual acts between male adults and then removing age and other distinctions between same-and opposite-sex sexual activity. The next steps are taken by the civil law: prohibiting discrimination against homosexuals in employment, and in the provision of goods, education, housing and other services. The final steps are taken by family law, extending laws applicable to unmarried heterosexual couples to homosexual couples, recognising the parental relationship between homosexual parents and their own, their partners' and even other people's children, providing for registered civil partnerships, and finally providing for civil marriage."

That sequence can be seen in our domestic law: the main steps being the Sexual Offences Act 1967, the beginning of specific anti-discrimination legislation in the 1970s (though with some back-sliding over clause 28), and now sweeping changes in family law. The United Kingdom may have been following the lead of other states within the Council of Europe, but it has not been so far behind as to go outside its margin of appreciation, except in relation to transsexuals.

94. In *R (Hooper) v Secretary of State for Work and Pensions* [2005] 1 WLR 1681, 1699, para 62 Lord Hoffmann said, in the course of discussing *Walden v Liechtenstein* App No 33916/96,

> "I can quite understand 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. Up to the point at which that time is exceeded, there is no violation of a Convention right. But there is no suggestion in the report of *Walden v Liechtenstein* that the discrimination between married couples was ever justified and I find it hard to see why there was no violation of Convention rights as long as the old law remained in place."

95. Both sides sought to draw some comfort from that passage. *Hooper* recognised that until a date in 2001 (I need not go into the

significance of the precise date) the United Kingdom social security law had favoured widows in a way that could be justified as positive discrimination. No right-minded person would now suggest that discrimination against homosexuals was ever justifiable, and so Lord Hoffmann's observations about the need for consultation, drafting and debate are not (Ms Monaghan submitted) in point. But that is to my mind a deeply unrealistic approach, and one that is at odds with the realistic approach of the ECHR in cases such as *Estevez*. Although discrimination against homosexuals could never have been justified, by today's standards, the fact is that for centuries a homosexual couple living together were (even if they escaped criminal sanctions and social ostracism) regarded as quite different from a married couple, or a heterosexual unmarried couple. Profound cultural changes do take time: as Sir Thomas Bingham MR said in *R v Ministry of Defence Ex p Smith* [1996] QB 517, 554:

> "A belief which represented unquestioned orthodoxy in year X may have become questionable by year Y and unsustainable by year Z."

96. In my opinion it was within the United Kingdom's margin of appreciation, down to the preparation, enactment and coming into force of the 2004 Act, whether to treat a same-sex couple (for social security purposes, and the allied purposes of the 1991 Act) as a family unit or as two individuals.

The third issue

97. The third issue (the possible application of section 3 of the 1998 Act) does not therefore arise, and I think it better to say nothing about it.

98. For these reasons I would allow the appeal, set aside the orders below and remit the matter to the Tribunal for any necessary adjustments to be made to the maintenance assessment.

BARONESS HALE OF RICHMOND

My Lords,

99. The Civil Partnership Act 2004 came into force on the day we began to hear this case. It grants to same sex couples the same legal recognition that the law grants to opposite sex couples. It allows them to contract into a formal status with virtually identical legal consequences to those of marriage. It treats those couples who choose not to enter such a partnership, but live together as if they were civil partners, in the same way as it treats opposite sex couples who choose not to marry, but live together as if they were married. Before then, the law had generally treated same sex couples as if they were two separate individuals.

100. In practical terms, many same sex couples will benefit from the change; but many others will not. Indeed, they will be worse off. This is because our means tested welfare benefit systems generally assume that a couple needs less to live on than two single people. They also assume that couples share both their resources and their expenditure. So the resources of both are brought into the calculation, but their combined needs are set at a lower level than they would be if they were two individuals. These systems also treat unmarried couples in the same way as married couples so as not to make marriage less attractive (in the old parlance 'less eligible') than living together.

101. Government policy-makers, of course, knew full well that there were snakes as well as ladders involved in applying the same legal rules to same sex couples as were applied to opposite sex couples. So too did those in the lesbian and gay community who were campaigning for the change. To people who have traditionally been excluded by society and the law, what matters most is equal dignity, being taken seriously on the same terms as the traditionally included, unless there is a good reason for making a difference.

102. Until the 2004 Act came into force, the child support scheme adopted the same approach as the welfare benefits system, although there is no necessary connection between the two. In calculating the liability of a non-resident parent to maintain her children, parents living in same sex relationships were treated as two individuals whereas parents living in opposite sex relationships were treated as a single unit. As with the welfare benefits system, this had some advantages for same

sex couples, about which opposite sex couples might wish to complain, and some disadvantages, about which same sex couples might wish to complain. The issue in this case is whether this difference in treatment breached the parents' right under article 14 of the European Convention on Human Rights. This requires that 'the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race . . .' and a number of other named characteristics ' . . . or other status'. It is agreed that sexual orientation is such a ground. Indeed, it falls within the list of specially suspect grounds, where 'particularly serious reasons' are required if a difference in treatment is to be justified and 'the margin of appreciation afforded to member states is narrow': see *Karner v Austria* (2003) 38 EHRR 528, paras 37 and 41.

103. It is also agreed that article 14 is not an open-ended guarantee of non-discrimination: see, for example, *Botta v Italy* (1998) 26 EHRR 241, 249, para 31, quoted by my noble and learned friend, Lord Walker of Gestingthorpe, at para 56 above. It does not require member states to secure the equal protection of all the laws to everyone within its jurisdiction. That is required by the 12th Protocol to the Convention, which came into force on 5 April 2005, but has not yet been signed or ratified by the United Kingdom. This is closely modelled on article 26 of the International Covenant of Civil and Political Rights, which itself is quite closely modelled on the 14th amendment to the United States Constitution. Article 14 is limited to discrimination in the enjoyment of the Convention rights.

104. The rights in question here are those protected by article 8 of the Convention itself and by article 1 of the First Protocol to the Convention. Article 8 gives everyone 'the right to respect for [her] private and family life, [her] home and [her] correspondence' and limits the circumstances in which a public authority may interfere with the exercise of that right. Article 1 of the First Protocol gives every natural and legal person 'the right not to be deprived of [her] possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law'.

105. But it is also agreed that there can be a breach of article 14 even if there is no breach of a substantive Convention right: see *Abdulaziz and others v United Kingdom* (1985) 7 EHRR 471. Ms Monaghan, appearing for the mother, does not suggest that her rights under article 8 or article 1 of the First Protocol have actually been violated. She accepts that there is a threshold below which the effect of an interference is not

so severe as to infringe her rights. She is wise to do so. It is completely unrealistic to isolate one feature of the child support scheme and complain of its unfavourable effects when there are other features of the scheme which have favourable effects. The scheme has to be looked at as a whole, with its ladders as well as its snakes. It must also be borne in mind that the same will apply to opposite sex couples. Sometimes treating them as a couple will be a good thing from their point of view, sometimes it will not.

106. Hence the complaint is not about the way that the scheme treated the mother and her partner as such. Had the scheme treated everyone in the same way there could have been no complaint. The complaint is that some couples were treated differently from others. If article 14 is read literally, the first question is whether the difference in treatment impacts upon the enjoyment of their Convention rights. The trouble with that reading is that almost anything might be said to have some impact upon the enjoyment of Convention rights, especially a broadly framed right such as that in article 8. The European Court of Human Rights has put it rather differently: does the subject matter of the disadvantage 'constitute one of the modalities of the exercise of a right guaranteed', or is it 'linked to the exercise of a right guaranteed,' or, more commonly, does it 'fall within the ambit' of a Convention right: see, for example, *Frette v France* (2004) 38 EHRR 438, para 31? However, it does not follow from the fact that there has not been a sufficiently severe interference to breach article 8 or article 1 of the First Protocol that the subject matter does not fall within the ambit, reach or grasp of the right in question. Nor does it follow from the fact that an interference or lack of respect can be justified under article 8(2) that a difference in treatment does not require to be justified under article 14. That was the whole point of *Abdulaziz and others v United Kingdom* (1985) 7 EHRR 471. The refusal to let husbands join their wives here was justified by the right of the United Kingdom to control immigration. But the difference in treatment between the husbands of wives settled here and the wives of husbands settled here had still to be justified under article 14. And it was not.

107. The child support scheme is clearly capable of affecting the enjoyment of the right to respect for the family life of the mother and father and their children. There is no doubt that family life was established between this mother, this father and their children. There is equally no doubt that the family life of the mother and her children did not come to an end when the parents separated and divorced. Most children whose parents do not live together do not see themselves as living in 'single parent families'. They see themselves as having two

parents, indeed sometimes more than two, who happen not to be living in the same household. These children actually spent two and a half days each week living with their mother and her partner. In the family courts such arrangements are increasingly reflected either in a shared residence order, which recognises that the children have two homes and divide their time between the two, or in no order at all, which leaves it to the parents to make their own arrangements about how the children will divide their time.

108. Does the operation of the child support scheme fall within the ambit of the mother's right to respect for her family life with her children? In my view, it clearly does. It is one aspect, among many others, of the state's support for family life. The United Kingdom argued as much before the European Commission of Human Rights in *Logan v United Kingdom*, App No 24875/94, 6 September 1996. Mr Sales, for the Agency, argued that it is simply the state's way of enforcing the private obligation of parents to support their children. That, of course, was the very point that I was making in my dissenting opinion in *R (Kehoe) v Secretary of State for Work and Pensions* [2005] UKHL 48, [2006] AC 42. There is a private law obligation upon every parent to support their children and a private law right of the parent looking after those children to receive that money for the benefit of the children (and sometimes there is an express private law right for the children to receive it directly). But there is also a public law obligation upon every parent to support their children, currently expressed in section 78(6) of the Social Security Administration Act 1992. The child support scheme is the state's way of enforcing both of these obligations – the obligation owed to the children and the obligation owed to the state to prevent the children becoming a charge on the state. Before the child support scheme was instituted, the private law obligation was enforced through the family courts, no doubt not as efficiently as the state would have liked, but then neither is the child support scheme conspicuous in its efficiency.

109. The Court of Appeal rejected this way of putting the case, because they could not see how the operation of scheme impacted upon the mother's family life with her children. But there are many ways in which it may do so. In *Logan* the complaint was that the mandatory child support payments meant that the father could not visit his children as often as he was entitled under the court's order to do. The complaint of a direct breach of article 8 failed because he could not show that the impact upon his family life was sufficiently grave, but in another case it might have been. There was no complaint under article 14. A more common complaint might be that the mandatory payments did not leave

the parent in a shared residence situation with enough money to support the children while they were with her. It may be unlikely that any of these complaints would reach the minimum level of severity of impact required to breach article 8. But that the scheme falls within the reach of the parent's right to respect for her family life with her children seems to me clear. *Petrovic v Austria* (2001) 33 EHRR 307 was concerned, not with the right to parental leave to look after the child, but the right to a parental leave allowance to facilitate that leave. No-one was preventing or interfering with the father's decision to look after the child. The state was simply not supporting him in doing so. There was no breach of article 8 because there was no positive obligation to provide such an allowance. But its existence demonstrated the state's respect for family life. That was sufficient to engage article 14. In *Frette v France* (2004) 38 EHRR 438, there was no breach of article 8, because the right to respect for family life presupposes the existence of a family and the refusal to allow the applicant to adopt a child 'could not be considered to infringe his right to the free expression and development of his personality or the manner in which he led his life, in particular his sexual life' (para 31). Nevertheless, the subject matter was sufficiently within the ambit of article 8 for the state to be required to justify a difference in treatment based on sexual orientation.

110. Test it this way. The private law of child maintenance used to discriminate *systematically* between mothers and fathers. There was power to order a father to pay maintenance to the mother for the benefit of the children when there was no power to order the mother to pay maintenance to the father. The enforcement of the obligation to maintain one's children was one of the ways in which the state respected and facilitated the family life of both parents and children. Had the system continued to discriminate between mothers and fathers, this would surely have been sufficient to engage article 14. Whether or not the difference in treatment could be justified (as it was in both *Petrovic* and *Frette*) is another matter.

111. I appreciate that Ms Monaghan did not emphasise this aspect of her case in the course of argument. She was understandably concerned to emphasise the impact of the scheme upon the mother's right to respect for her private and family life with her partner. For the state to disregard their relationship and treat it as non-existent is to demonstrate a lack of respect for this most intimate and important part of their lives and personalities. The state no longer prevents or punishes their relationship, as it did the relationships of gay men in the days before the Sexual Offences Act 1967. I do not think that the state (as opposed to the customs of society or religion) has ever prevented or punished

lesbian relationships. The contempt shown for the mother's relationship by the child support scheme is not on the same level as the contempt shown for gay relationships in the past. But we are not here concerned with whether or not there has been a breach of article 8, merely with whether it is within the reach of the right which it protects. As is already apparent, I do not accept that a lack of respect has to reach such a level of severity as to constitute a breach of article 8 for article 14 to be engaged.

112. The European Court of Human Rights has not yet recognised that the relationship between two adult homosexuals amounts to family life. But then I know of no case in which it has recognised that the relationship between two unmarried adult heterosexuals amounts to family life. Family life has so far been confined to the relationships between married couples and between parents or other relatives and carers and their children. This includes the relationship between a same sex parent and his children and between a same sex couple and the children of their family. This mother and her partner were clearly enjoying their right to respect for the family life which they had with their children while those children were with them. And family life continues even when parents and children are apart. The assessment and enforcement of child support clearly affects that family life, whether for better or for worse. This is another reason for holding that article 14 is engaged. Furthermore, if the discriminatory treatment in *Frette v France* (2004) 38 EHRR 438 fell within the ambit of the right to respect for private life, I do not see why the discriminatory treatment in this case does not do so. I do not therefore find it necessary to inquire whether article 14 is also engaged by virtue of article 1 of the First Protocol.

113. In my view, the difference in the treatment of homosexual and heterosexual relationships by the child support scheme in relation to the family lives of the parents and their children has to be justified if it is not to fall foul of article 14. The only justification which is offered is the historical discrimination between the two types of relationship in both the welfare benefit and child support schemes. Although it is now recognised that there is no objective justification for such discrimination, it is said that the law must be given time to catch up. The realisation that there is no justification is remarkably recent. It used to be taken for granted that discriminating against extra-marital relationships of any sort was a way of protecting and supporting the preferred relationship of marriage. The European Court of Human Rights acknowledges that 'the protection of the family in the traditional sense', by which it means the marital family, is in principle capable of being weighty justification for a difference in treatment: see *Karner v*

Austria (2003) 38 EHRR 528, para 40. But it has still to be shown that the exclusion of same sex couples is necessary to achieve that aim. No one has yet explained how failing to recognise the relationships of people whose sexual orientation means that they are unable or strongly unwilling to marry is necessary for the purpose of protecting or encouraging the marriage of people who are quite capable of marrying of they wish to do so.

114. It is hugely to the credit of the United Kingdom Government and Parliament that they have recognised this. They are ahead of much of Europe, although parts of Europe are ahead of them. But can this be an objective justification for not having recognised it sooner? I do not see how it can be. Race discrimination was always wrong, long before the world woke up to that fact. Sex discrimination was always wrong, long before the world woke up to that fact. But there may on occasions still be good and objective reasons for distinguishing between the sexes. One such reason may be the persistence of historical disadvantage and exclusion. Until remarkably recently, married women were excluded from parts of the labour market. Until remarkably recently, overt sex discrimination in the pay and conditions of women workers at all levels was not only lawful but common. Even though such discrimination is now unlawful, the reality is that there is still a 'gender gap' between men and women in life time earnings and an even larger 'mother gap' between mothers and others. Discriminatory treatment of pregnant women is still common. While such systemic discrimination against women persisted, it may have been justified for the benefits system to make some small adjustment in their favour. It may well be a matter of judgment when the effects of that exclusion have been so far overcome that the compensation is no longer justified: see *R (Hooper) v Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681.

115. But it is one thing to use historical disadvantage and exclusion to justify some compensatory treatment for the excluded group which is denied to others. It may then be fair to give the system some time to catch up. This is in effect what happened in *Petrovic v Austria* (2001) 33 EHRR 307. Mothers had been given an allowance because they were traditionally expected to give up work to care for their children whereas fathers were not. It is another thing entirely to use historical disadvantage and exclusion to justify continued disadvantage and exclusion *of the excluded group*. No one has suggested any legitimate aim that this difference in treatment pursues. By contrast, in *Frette v France* (2004) 38 EHRR 438, there was the legitimate aim of protecting the interests of children at a time when child psychiatrists and psychologists were divided in their opinions of the effects of being

adopted by homosexual parents. Even so, the discrimination was held justified by the narrow margin of four votes to three. The partly dissenting opinion of Sir Nicholas Bratza and Judges Fuhrmann and Tulkens says this (at pp 471 – 472) of the margin of appreciation:

> " … we might conceivably accept the Government's view that some margin of appreciation should be afforded to States in the sensitive area of adoption by homosexuals. … On the other hand, the reference in the present judgment to the 'lack of common ground' in the contracting States or 'uniform principles' on adoption by homosexuals, which paves the way for States to be given total discretion, seems to us to be irrelevant, at variance with the Court's case law relating to article 14 of the Convention, and when couched in such general terms, liable to take the protection of fundamental rights backwards. It is the Court's task to secure the rights guaranteed by the Convention. It must supervise the conditions in which article 14 of the Convention is applied and consider therefore whether there was a reasonable, proportionate relationship in the instant case between the methods used – the total prohibition of adoption by homosexual parents – and the aim pursued – to protect children. … [The absolute position taken by the French court] fundamentally precludes any real consideration of the interests at stake and the possibility of finding any practical way of reconciling them. At a time when all the countries of the Council of Europe are engaged in a determined attempt to counter all forms of prejudice and discrimination, we regret that we cannot agree with the majority."

In that case, there was a legitimate aim, so the point at issue was the application of the margin of appreciation to the question of proportionality. In this case, no-one has suggested a legitimate aim. No one has suggested, for example, that the religious or moral views of sections of the community might constitute such a justification (as opposed to an explanation). This is much closer to the position in *Karner v Austria* (2003) 38 EHRR 528, where the court was unanimous in finding a violation of article 14, than it is to the position in *Frette v France* (2004) 38 EHRR 438,decided more than a year earlier, where the court was so narrowly divided.

116. The fact that Parliament has now legislated is very welcome but it does not make right what was done before. These facts arose before the Civil Partnership Bill was introduced. Had the Bill not been introduced, the same questions would have arisen. In my view, they should have received the same answers, just as they did in *Ghaidan v Godin-Mendoza* [2004] UKHL 29, [2004] 2 AC 557. In that case, the Government supported the surviving partner's claim to succeed to the tenancy on the same terms as the survivor of a heterosexual relationship. Mr Sales did not argue that we should wait for Parliament to remedy the historical discrimination between heterosexual and homosexual partnerships in respect of the home they had shared.

117. In my view, therefore, this is a case of unjustified discrimination in the enjoyment of the Convention right to respect for private and family life. It is our duty to remedy that, if possible, by interpreting the legislation so as to comply with the Convention rights: see Human Rights Act 1998, section 3(1). The relevant legislation is the definition of an 'unmarried couple' in regulation 1(2) of the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 SI 1992/185 as amended. As this is delegated legislation, the majority of the Court of Appeal simply deleted the provision, thus leaving it to the Agency and appellate authorities to supply their own non-discriminatory definition of the equivalent relationship. The tribunal, presided over by Mrs Priest, invoked the Interpretation Act 1978 to interpret 'a man and a woman … living together as husband and wife' as 'a man or a woman and a woman or a man … living together as husband and wife'. My present inclination is to prefer the latter approach. There is still a need to define the type of couple relationship with which the legislation is concerned. This approach does that. This House in *Ghaidan v Godin-Mendoza* [2004] UKHL 40, [2004] 2 AC 557 emphasised the scope of what was 'possible' under section 3. This approach does not offend against any 'cardinal feature' of the legislation. It also avoids the arbitrary effect of interpreting 'two persons' to include homosexual partners but 'a man and a woman' to exclude them. The original version of this definition in the Supplementary Benefits Act 1972 referred to 'two persons' cohabiting as man and wife. It was only in the Social Security Act 1980 that the alternative expression 'a man and a woman' was chosen. The operative words were undoubtedly 'living together as husband and wife' rather than the description of the two people involved. This House has already held, in *Ghaidan v Godin-Mendoza*, that these words are apt to cover both homosexual and heterosexual relationships.

118. For these reasons, which are essentially the same as those of the tribunal chaired by Mrs Priest, and in common not only with the tribunal, but also with the Child Support Commissioner and the majority of the Court of Appeal, I would dismiss this appeal.

LORD MANCE

My Lords,

Introduction

119. The issue in these proceedings is the compatibility with the European Convention on Human Rights of the child support regime which applied in the period from 13th August 2001 to 18th February 2002 under the Child Support Act 1991 and the Child Support (Maintenance Assessments and Special Cases) Regulations 1992 (1992 SI No. 1815) (the "MASC" Regulations).

120. Mrs M lived during that period with a same sex partner, and was obliged under the Act and Regulations to make pay child support maintenance in respect of her two sons who lived with her former partner (although they spent two and a half days a week with her). The computation of maintenance required under the Regulations took account of the level of her housing costs, as well as her disposable and protected income. In this respect, regulation 15 provided:

> "(1) Subject to the provisions of this regulation …, a parent's housing costs shall be the aggregate of the eligible housing costs payable in respect of his home.
>
> …
>
> (3) Where a parent has eligible housing costs and another person who is not a member of his family is also liable to make payments in respect of the home, the amount of the parent's housing costs shall be his share of those costs".

Regulation 1(2) defines a "family" as follows:

"1(2) In these Regulations unless the context otherwise requires –

…

'family' means – …

(b) a married or unmarried couple … and any child or children living with them for whom at least one member of that couple has day to day care

…

'partner' means

(a) in relation to a member of a married or unmarried couple who are living together, the other member of that couple;

…

'married couple' means a man and a woman who are married to each other and are members of the same household.

'unmarried couple' means a man and a woman who are not married to each other but are living together as husband and wife.

…"

121. Living with a same sex partner, Mrs M was only allowed her half share in the calculation of her housing costs. She was also treated as having no partner for the purposes of the calculation of her disposable and protected income under other MASC Regulations. But the overall effect in her case was that the maintenance that she was called upon to pay was higher than it would have been had her new partner been of the opposite sex. In other cases the effect would be the opposite. As Sedley LJ said in paras 88-89 of his judgment, "Other provisions in the material regulations can work either way, depending on the facts of each case. ... there will be some same-sex couples who will not thank M for succeeding". Further, the child benefit regime is, like many aspects of social legislation, a package. The distinction between the treatment of heterosexual partners as a couple and the treatment of same-sex partners as two individuals on a "stand-alone" basis extended, prior to 5 December 2005, across the whole social security system; it affected therefore not merely the calculation of child support benefit but also for example income support, job-seekers' allowance, housing benefit and council tax benefit; and it was, the Secretary of State has informed your Lordships, one which was "in general" to the (financial) benefit of same-sex couples. But that does not address the issue whether it was discriminatory in a sense and manner falling within and contrary to article 8 read with article 14.

122. Mrs M took this issue to the Appeals Tribunal for Child Support, which on 11 November 2002 determined that her housing costs and her

disposable and protected income should all be calculated on the basis that she had a partner who was a member of her family within the meaning of the Regulations. The Tribunal concluded that any other result would be discriminatory both under article 8 and under article 1 of Protocol 1, read in each case with article 14 of the Convention on Human Rights, and that it was possible to avoid a discriminatory result under section 6 of the Interpretation Act 1978 by reading 'man' to include 'woman' and 'woman' to include 'man' in the definitions in paragraph 1 of the MASC Regulations. Mr Edward Jacobs, as Child Support Commissioner, upheld this result on 1 October 2002, but found the Interpretation Act route "unnecessarily inventive". In his view, the definitions did not apply, because, in accordance with their opening words, the context consisting in a need to read the legislation compatibly with the Convention 'otherwise required'. The Court of Appeal, by a majority, dismissed the appeal, but took the view that a result compatible with the Convention was "better accomplished ... by simply disapplying – in effect deleting – the definition of 'unmarried couple' in regulation 1(2)": per Sedley LJ at para 86.

123. Since 5 December 2005, the same issues could not arise. The regime has been re-structured by the Civil Partnerships Act 2004, giving same sex couples expressly the same rights as opposite sex couples. The law relating to social security and tax credits were also embraced within a general restructuring of the law, to the same end. The legislative story goes back at least to late 2001. In October 2001, Jane Griffiths' Relationships (Civil Registration) Bill was introduced in the House of Commons, in November 2001 a major cross-departmental review of the policy and cost implications of a civil partnership registration scheme was initiated, supported by the Women and Equality Unit of the Department of Trade and Industry. In January 2002 Lord Lester of Herne Hill introduced a Civil Partnerships Bill in the House of Lords but withdrew it on 11 February 2002 to allow completion of the cross-departmental review. At the conclusion of the review, in December 2002 it was announced that a strong case was seen for a civil partnership scheme and that a consultation paper would be published in the summer of 2003, as it was on 30 June 2003. There followed a three month consultation period, which showed strong public support for such a scheme. In the DTI report "Responses to Civil Partnership" dated November 2003, the government undertook to introduce legislation as soon as parliamentary time allowed. The first draft of the Civil Partnership Bill was dated 22 April 2004, and ensuing Parliamentary process led to the Civil Partnership Act 2004 receiving the Royal assent on 18 November 2004. The Act is an extremely comprehensive piece of legislation, covering not merely the creation and regulation of civil partnerships, but many other subjects, some-interrelated, including

social security, pensions, tax credits and the present, with the aim of achieving equality of treatment between opposite sex and same-sex couples. The implementation of the legislation required time, and took place just over a year later.

Mrs M's case

124. Mrs M's case under article 8 read with article 14 of the Convention is that the regime fell "within the ambit" or "scope", or was "one of the modalities of the exercise", of her right to respect for (a) her family life with her children and former partner, (b) her family life with her new same sex partner and (c) her private life She does not have to show an actual breach of the United Kingdom's obligation to afford such respect under article 8, taken by itself. See the *Belgian Linguistics Case (No 2)* (1968) 1 EHRR 252, 283 and *Petrovic v. Austria* (2001) 33 EHRR 14, considered in paras 141-142 below. But the circumstances must fall within the ambit of article 8, in order for article 14 to be relevant. In this connection, I have had the benefit of reading in draft the opinion of my noble and learned friend, Lord Walker of Gestingthorpe, and I am in agreement with his analysis of the authorities and the reasoning leading him to the conclusion that a tenuous link between the child support regime and her family or private life is insufficient.

Mrs M's relationship with her children and former partner

125. In the present case, Mrs M was entitled to respect for such continuing family life as she had with her children as well as, possibly, with her former partner. But the regime as a whole was directed at supporting her children in the new family in which her children lived; while the particular aspects of the regime about which she complains were directed at any new relationship she formed. If these aspects (or indeed the whole regime) had any bearing at all on her continuing family life with her children or former partner, the link could only be of the most indirect and tenuous nature. I agree with the Court of Appeal's unanimous rejection of the case based on her family life with her children and former partner.

Mrs M's relationship with her new same-sex partner

126. The crux of the present case lies in my view in the submission, accepted by the majority in the Court of Appeal, that the regime fell within the ambit of family life which Mrs M shared with her new same sex partner. That involves two issues, first, whether Mrs M's same sex relationship during the period from 13 August 2001 to 18 February 2002 was to be regarded as involving family life, and whether, if so, the child support regime impinged sufficiently on that family life for it to be said to fall within its ambit.

127. As to the second issue, if Mrs M's relationship with her same-sex partner in the relevant period falls to be regarded as having involved family life within the meaning of article 8(1), I would regard the regime about which, or certain aspects of which, she complains as falling, though only just, within the ambit of her right to respect for such family life under article 8, or as one of the "modalities" by which the State exercised respect for that right in relation to any new family relationship that she might form. The aim of the MASC Regulations was to reflect and give effect to Mrs M's obligations as an absent parent to contribute to the living costs of her children. But they calculated housing costs and protected income by taking account of any new opposite sex partner. They did this, no doubt, in a manner which was designed to avoid any unduly adverse impact on that new relationship and to achieve a fair balance between it and the children's needs. The Commissioner specifically mentioned that the computation of protected income was "put crudely, to ensure that the [absent] parent's family had enough to live on after the child support maintenance has been paid". The full allowance made for housing costs in the case of any new opposite sex relationship must be taken to have been designed to respect the perceived needs or status of those in such a relationship.

128. So I would regard the first issue as critical. It opens a number of questions. The relevant articles of the Convention on Human Rights are, under section 1(1) of the Human Rights Act 1998, 'Convention rights' and, under section 1(2), have effect for the purposes of the Act. Under section 2(1) a court or tribunal determining a question which has arisen in connection with a Convention right "must take into account" any judgment, decision, declaration or advisory opinion of the European Court of Human Rights "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". Under section 3(1) primary and subordinate legislation must, so far as possible, be read and given effect compatibly

with the Convention rights, while section 4(1) provides for a declaration of incompatibility in any proceedings in which a court determines that a provision of primary legislation is incompatible with a Convention right.

129. The meaning of section 2(1) was authoritatively expounded by my noble and learned friend, Lord Bingham of Cornhill, in reasoning with which all other members of the House agreed in *R (Ullah) v. Special Adjudicator* [2004] UKHL 26; 2 AC 323 para 20:

> "20. In determining the present question, the House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg court: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] 2 AC 295, para 26. This reflects the fact that the Convention is an international instrument, the correct interpretation of which can be authoritatively expounded only by the Strasbourg court. From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of the Strasbourg case law. It is indeed unlawful under section 6 of the 1998 Act for a public authority, including a court, to act in a way which is incompatible with a Convention right. It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less."

130. In *R (S) v. Chief Constable of South Yorkshire Police* [2004] UKHL 39; 1 WLR 2196, para 27, Lord Steyn cited this paragraph with approval in relation to article 8, distinguishing between article 8(1), which had, he said, to "receive a uniform interpretation throughout member states, unaffected by different cultural traditions" and article 8(2), in relation to which differing cultural traditions in different states could be material to the question of objective justification. The

observation was made by way of qualification of a statement by Lord Woolf CJ in the Court of Appeal, [2002] 1 WLR 3223, 3233, that

> "just as in the appropriate circumstances a margin of appreciation has to be extended for any shortcomings in this jurisdiction in relation to observing the Convention, so there can be situations where the standards of respect for the rights of the individual in this jurisdiction are higher than those required by the Convention. There is nothing in the Convention setting a ceiling on the level of respect which a jurisdiction is entitled to extend to personal rights".

Lord Steyn's reasoning was agreed by all other members of the House (save in the case of my noble and learned friend, Baroness Hale of Richmond, on the one question whether there was on the facts an interference with private life under article 8(1)). Baroness Hale also said in para 78:

> "I accept that we must interpret the Convention rights in a way which keeps pace with rather than leaps ahead of the Strasbourg jurisprudence as it evolves over time."

131. In *R (Ullah) v. Special Adjudicator*, [2004] 2 AC 323, 350, para 20, Lord Bingham referred to "clear and constant jurisprudence of the Strasbourg court", and a domestic court may have to consider whether this criterion is met. In an evolving area, a domestic court may perhaps also have to consider whether relatively elderly jurisprudence reflects the result that the court would still reach. The Strasbourg Court itself said in *Goodwin v. United Kingdom* (2002) 35 EHRR 18, para 74, that, whilst it will not depart without good reason from prior precedents:

> "the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved".

It is relevant that it is in the first instance for the domestic courts of this country to consider and, so far as possible, give effect to Convention

rights (or, if this is not possible in the case of primary legislation, to make a declaration of incompatibility).

132. Two decisions show the established jurisprudence of the Strasbourg court in the present area. The first is the relatively old Commission decision of *S v. United Kingdom* (1986) 47 D & R 274 decided on 14 May 1986. The applicant had for three years lived in a same sex relationship with a partner, following whose death on 8 February 1984 she was unable to succeed to the deceased's local authority tenancy, since she was not, under section 30 of the Housing Act 1980, regarded as a spouse or as a member of the deceased's family living with the deceased as husband or wife. The Commission declared inadmissible her claim that she had been discriminated against in relation to her rights under article 8, saying:

> "As regards family life, the Commission recalls that it has already found that, despite the modern evolution of attitudes towards homosexuality, a stable homosexual relationship between two men does not fall within the scope of the right to respect for family life ensured by article 8 of the Convention (No. 9369/81, Dec. 3.5.83, D.R. 32 p. 220). The present applicant's relationship with her now deceased partner accordingly also falls outside the scope of Article 8 insofar as it protects the right to respect for family life."

The Commission also rejected complaints of interference with her private life and her home. In *Fitzpatrick v. Sterling Housing Association Ltd* [2001] 1 AC 27, decided on 28 October 1999, Lords Slynn of Hadley, Clyde and Hobhouse of Woodborough referred to this authority as indicating the current Strasbourg position, but Lord Slynn observed that the law was still "in an early stage of development" and "attitudes may change as to what is acceptable throughout Europe" (p.40A-B), while Lord Clyde referred to the "developing" Strasbourg jurisprudence (p.54A). The ruling in *S v. United Kingdom* regarding interference with the home must on any view now be seen in the light of later Strasbourg jurisprudence to contrary effect: see *Karner v. Austria* (2004) 38 EHRR 24, decided on 24 July 2003, with regard to a claim to succeed to a tenancy held by a same sex partner who died in 1994.

133. The second decision is more recent and is the nearest Strasbourg authority on the facts to the present. In *Mata Estevez v. Spain* (10 May

2001), the applicant lived with a same sex partner for ten years, until the partner died in an accident on 13 June 1997. The applicant claimed a surviving spouse's pension, which the relevant Spanish law conferred only on heterosexual couples married in accordance with article 149 of the Civil Code (the one exception being for unmarried couples who could not marry because divorce was not possible in Spain before 1981). He argued, inter alia, that this law discriminated against him in respect of his family life, contrary to articles 8 and 14. The Commission, in rejecting the argument, said:

> "As regards establishing whether the decision in question concerns the sphere of 'family life' within the meaning of Article 8 § 1 of the Convention, the Court reiterates that, according to the established case-law of the Convention institutions, long-term homosexual relationships between two men do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention (see *X. and Y. v the United Kingdom* application no. 9369/81, Commission decision of 3 May 1983, Decisions and Reports (DR) 32, p. 220, and *S v the United Kingdom*, application no. 11716/85, Commission decision of 14 May 1986, DR 47, p. 274). The Court considers that, despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, this is, given the existence of little common ground between the Contracting States, an area in which they still enjoy a wide margin of appreciation (see, *mutatis mutandis*, the *Cossey v the United Kingdom* judgment of 27 September 1990, Series A no. 184, p. 16, § 40, and, *a contrario*, *Smith and Grady v the United Kingdom*, nos. 33985/96 and 33986/96, §104, ECHR 1999-VI). Accordingly, the applicant's relationship with his late partner does not fall within Article 8 in so far as that provision protects the right to respect of family life."

Although the Commission's decision related to a refusal to pay a survivor's pension following a death in 1997, the loss of pension was presumably continuing. The decision thus re-affirms both that homosexual relations did "not fall within the scope of the right to respect for family life protected by Article 8 of the Convention" and that Contracting States "still" had a wide margin of appreciation at a time very shortly before the period relevant to the present appeal.

134. I also mention at this point *Fretté v. France* (2002) 38 EHRR 21, decided on 26 February 2002. A homosexual complained under articles 8 and 14 that his application to adopt a child had been rejected based solely on his sexual orientation. The complaint was that his right to enjoy respect for his private life without discrimination had been infringed; the law permitted single men and women to apply to adopt, subject to prior authorisation in any particular case: see paras 28-29 of the Strasbourg Court's judgment as well as para 32, where the Court observed that no question arose of family life, because "the right to respect for family life presupposes the existence of a family and does not safeguard the mere desire to found a family". As to the claim relating to respect for private life, the Court held that article 8 read with 14 was engaged, but that "Since the delicate issues raised in this case … touch on areas where there is little common ground among Member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, a wide margin of appreciation must be left to the authorities of each State" (para 41). In this light and in the light of divided opinions then current in the scientific community, the Court held by a narrow majority that sufficient objective justification appeared to exist for the refusal to permit adoption by a homosexual, so that the difference in treatment was not discriminatory.

135. One view of *Mata Estevez* might have been that the Strasbourg Court was leaving it to each domestic court to interpret the meaning of "family life" in article 8(1) of the Convention in its own national context. That would mean that it was using the term "margin of appreciation" in a sense identified by Lord Hope of Craighead, in *R v. DPP Ex p Kebeline* [2000] 2 AC 326, 380, when he said:

> "This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. By conceding a margin of appreciation to each national system, the court has recognised that the Convention, as a living system, does not need to be applied uniformly by all states but may vary in its application according to local needs and conditions."

In support of this view, it might be said that conceptions of "family life" may differ in different cultural, traditional and religious environments, and the common law authorities which I cite in paragraphs 139-140 below certainly show an evolution within the United Kingdom.

136. However, the Strasbourg Court spoke in categorical terms in *Mata Estevez* when it said that, according to the established case-law, "long-term homosexual relations … do not fall within the scope of the right to respect for family life protected by Article 8 of the Convention"; and the decisions in your Lordships' House in *R (Ullah) v. Special Adjudicator* and *R (S) v. Chief Constable of South Yorkshire* establish that the concepts deployed in article 8(1) should be given "a uniform interpretation throughout member states, unaffected by different cultural traditions". The reference to "margin of appreciation" in *Petrovic* is thus to be understood in another sense, as referring to the freedom of national courts, or member states, to provide for rights more generous than those guaranteed by the Convention, though not as the product of interpretation of the Convention. In this connection, the United Kingdom already has, quite apart from the Convention, a developing body of common law authority underlining the importance attaching to fundamental rights, which surely include equal treatment.

137. Another point made by Lord Hope of Craighead in *Kebeline* and worth noting at this stage was that the margin of appreciation is an international concept, not directly applicable in domestic courts. He said, at pp 380-381:

> "This doctrine is an integral part of the supervisory jurisdiction which is exercised over state conduct by the international court. … But in the hands of the national courts also the Convention should be seen as an expression of fundamental principles rather than as a set of mere rules. The questions which the courts will have to decide in the application of these principles will involve questions of balance between competing interests and issues of proportionality.
>
> In this area difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention. This point is well made at p. 74, para. 3.21 of *Human Rights Law and Practice* (1999), of which Lord Lester of Herne Hill and Mr Pannick are the general editors, where the area in which these choices may arise is conveniently and appropriately described as the 'discretionary area of

> judgment.' It will be easier for such an area of judgment to be recognised where the Convention itself requires a balance to be struck, much less so where the right is stated in terms which are unqualified. It will be easier for it to be recognised where the issues involve questions of social or economic policy, much less so where the rights are of high constitutional importance or are of a kind where the courts are especially well placed to assess the need for protection. But even where the right is stated in terms which are unqualified the courts will need to bear in mind the jurisprudence of the European Court which recognises that due account should be taken of the special nature of terrorist crime and the threat which it poses to a democratic society: *Murray v. United Kingdom* (1994) 19 E.H.R.R. 193, 222, para. 47."

138. Another way to explain the position, avoiding the language of deference, is that that the legislature or executive are, in some circumstances, recognised as being better placed to evaluate and decide and, on that basis, as having a greater or lesser margin of decision-making or discretionary power: see eg *Brown v. Stott* [2003] 1 AC 681, 703C-D per Lord Bingham of Cornhill; *R (Pro-Life Alliance) v. British Broadcasting Authority* [2003] UKHL 23; [2004] 1 AC 185, paras. 74-77, per Lord Hoffmann; and Lester & Pannick's Human Rights Law and Practice (2nd ed) paras. 3.19 – 3.21. The scope of any such margin will depend, as Lord Hope said in *Kebeline*, on the nature of the rights in issue. Lord Hoffmann made the same point in *R v. (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348, para. 34:

> "Public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998, so that, for example, the individual's right to a home is accorded a high degree of protection … while ordinary property rights are in general far more limited by considerations of public interest …"

Domestic developments in the concept of "family life"

139. That domestic conceptions of the "family" have radically altered is reflected in domestic case-law. In *Gammans v. Ekins* [1950] 2 KB 328, the issue was, again, succession to a tenancy as a member of the

deceased tenant's family, in this case under the Increase of Rent and Mortgage Interest (Restrictions) Act 1920 Mr. Ekins had lived "in close but unmarried association" with the deceased, Mrs Smith, for 20 years. They were regarded by neighbours as man and wife, although the judge made no finding whether the relationship was platonic. Asquith LJ regarded membership of the same family as limited to three relationships: that of children, that constituted by way of legitimate marriage and, thirdly, relationships whereby one person becomes in loco parentis to another. He and Jenkins LJ considered it to be outside any ordinary accepted use of language to treat two people "masquerading" or "posing" as a married couple, there being no children to "complicate the picture" as members of the same family. Both Asquith LJ, and Evershed LJ, who found greater difficulty in the case, would also have been influenced by the 'sinful' nature of any sexual relationship.

140. In stark contrast, a quarter of a century on in *Dyson Holdings Ltd. v. Fox* [1976] QB 503 the Court of Appeal concluded that changed social practice and attitudes meant had led to an expansion of the concept of "family" to embrace just such a situation under the same statutory provision. A further quarter of a century later, in *Fitzpatrick v. Sterling Housing Association* [2001] 1 AC 27, decided on 28 October 1999 prior to the coming into force of the Human Rights Act 1998, the House considered a similar question under successor legislation, the Rent Act 1977, but in relation to same-sex partners following the death in 1994 of the partner who had been the tenant. The House held that Parliament by using the concept of a "spouse" living with the original tenant "as his or her wife or husband" had used gender-specific language which could not apply to a same-sex relationship. So there was no statutory tenancy under para 2(2) of Schedule 1 to the 1977 Act. But, by a majority of three to two, it held that changes in habits and opinions meant that a same-sex partner was now capable of being regarded at common law as "a member of the original tenant's family" and so as entitled to succeed at least to an assured tenancy under para 3(1) of Schedule 1 (although this was in some respects less favourable than a statutory tenancy under para 2(2)). I return in paragraph 29 to the final chapter written in this story after the coming into force of the Human Rights Act.

Further Strasbourg and domestic case-law

141. At this point, it is convenient to step back and look at *Petrovic v Austria* (2001) 33 EHRR 14 and a line of other authority reaching up to the present date. In *Petrovic v Austria*, the applicant complained that the

State's refusal to pay him parental allowance in 1989, on the ground that it was only available to mothers, discriminated against him on grounds of sex. During an eight week period after birth, mothers received a maternity allowance. Parental allowance was payable in respect of any further leave taken thereafter in order to care for the newborn child. The Court held that there was no breach of article 8 alone, since there was no obligation on the State to pay any allowance to anyone in respect of that further period, but that

> "27. Nonetheless, this allowance paid by the State is intended to promote family life and necessarily affects the way in which the latter is organised as, in conjunction with parental leave, it enables one of the parents to stay at home to look after the children.
>
> 28. The Court has said on many occasions that Article 14 comes into play whenever 'the subject-matter of the disadvantage ... constitutes one of the modalities of the exercise of a right guaranteed' (see the National Union of Belgian Police v Belgium judgment of 27 October 1975, 1 EHRR 578, para 45), or the measures complained of are 'linked to the exercise of a right guaranteed' (see the Schmidt and Dahlström v.. Sweden judgment of 6 February 1976, 1 EHRR 632, para 39).
>
> 29. By granting parental leave allowance States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the allowance therefore comes within the scope of that provision. It follows that Article 14 – taken together with Article 8 – is applicable."

142. There was, however, no breach, because the area was one where States enjoyed a margin of appreciation. There was no common standard in the field at the material time (the late 1980s) and

> "40. … Originally, welfare measures of this sort – such as parental leave – were primarily intended to protect mothers and to enable them to look after very young children. Only gradually, as society has moved towards a more equal sharing between men and women of responsibilities for the bringing up of their children, have the Contracting States introduced measures extending to fathers, like entitlement to parental leave.

> 41. In this respect Austrian law has evolved in the same way, the Austrian legislature enacting legislation in 1989 to provide for parental leave for fathers. In parallel, eligibility for the parental leave allowance was extended to fathers in 1990 …
>
> It therefore appears difficult to criticise the Austrian legislature for having introduced in a gradual manner, reflecting the evolution of society in that sphere, legislation which is, all things considered, very progressive in Europe."

143. Shortly after *Petrovic*, in July 1998 the Court decided *Sheffield v. United Kingdom* (1998) 27 EHRR 163, rejecting complaints, under article 8 and article 8 read with 14, by females post-operative transsexuals about the United Kingdom's refusal to give legal recognition to their status as women following their gender reassignment operations. The Court referred, at para 76, to the margin of appreciation, and said that it was

> "satisfied that a fair balance continued to be struck between the need to safeguard the interests of transsexuals … and the interests of the community in general and that the situations in which the applicants may be required to disclose their pre-operative gender do not occur with a degree of frequency which could be said to impinge to a disproportionate extent on their right to respect for their private lives".

But the Court earlier also, at para 60, observed that, even if there had been no significant scientific developments regarding the aetiology of transsexualism:

> "it is nevertheless the case that there is an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexuals encounter. Even if it finds no breach of Article 8 in this case, the Court reiterates that this area need to be kept under review by Contracting States."

144. In *Goodwin v. United Kingdom* (2002) 35 EHRR 18, decided on 11 July 2002, this message came home. The Home Secretary had in

April 1999 set up an interdepartmental working group, which reported in April 2000, suggesting three options for public consultation. The Court of Appeal in *Bellinger v Bellinger* [2001] EWCA Civ 1140; [2002] Fam 150, para 96, decided on 17 July 2001, had expressed its views that the situation was "profoundly unsatisfactory", that the recommendation for public consultation merited action and that the problems might well come before the Strasbourg Court again "sooner rather than later". Against this background, it is no surprise that the Strasbourg European Court now concluded that, with the passing of further time and no significant domestic reform, the unsatisfactory position whereby post-operative transsexuals lived in the United Kingdom in an intermediate legal zone was "no longer sustainable" under article 8. It was "no longer" within the margin of appreciation.

145. Within a short time, the House of Lords considered *Goodwin* in the appeal in *Bellinger v. Bellinger* [2003] 2 AC 467, decided on 10 April 2003. The claimant, a female transsexual born as a male claimed a declaration that her "marriage" with a man in 1981 was valid and subsisting. The House held that she could not be regarded as a "female" within the meaning of section 11(c) of the Matrimonial Causes Act 1973, but declared, in the light of *Goodwin*, that section 11(c) was incompatible with her right to respect for her private and family life and her right to marry under articles 8 and 12.

146. In *Karner v. Austria* (2003) 38 EHRR 528, decided 24 July 2003, the Court's decision was clearly based on discrimination contrary to articles 8 and 14, taken together, affecting the applicant's right to respect for his *home*. The claims relating to family and private life were left on one side. See para 33 of the judgment. The Austrian Supreme Court had held that domestic legislation only allowed succession by opposite sex partners, married or unmarried. The Strasbourg Court accepted that protection of the family was a "weighty and legitimate reason which might justify a difference in treatment" but could see no need to exclude homosexuals from succession in order to achieve any such aim.

147. In *Ghaidan v. Godin-Mendoza* [2004] UKHL 30; 2 AC 557, decided on 21 July 2004, the House, in that light and in relation to a death occurring on 5 January 2001 returned to the subject of succession by a homosexual partner to a statutory tenancy under para 2(2) of the Rent Act 1977. It held that there was no justification and no legitimate aim served by the difference in treatment of hetero- and homosexual partners, and by a majority of four to one it also concluded that, under

the Human Rights Act (and contrary to the conclusion reached prior to the coming into force of that Act in *Fitzpatrick*), it was possible to read para 2(2) in such as way as to treat the survivor of a homosexual couple as the surviving spouse of the original tenant.

148. My noble and learned friend, Lord Nicholls, with whose speech Lord Steyn, Lord Rodger of Earlsferry and my noble and learned friend, Baroness Hale of Richmond, agreed, also rejected an argument based on *Petrovic v. Austria* and *Walden v. Liechtenstein* (Application No. 33916/96) to the effect that, as there had been a continuing evolution in society's attitude to cohabiting homosexual couples and because the relevant death had occurred two years before the decision in *Karner*, the United Kingdom should not be criticised. Counsel pointed out that the United Kingdom had responded quickly to the decision in *Karner* by two bills, the Housing and Civil Partnership Bills. But Lord Nicholls, in rejecting this submission, said at p 570, para 23, that:

> "Under the Human Rights Act 1998 the compatibility of legislation with the Convention rights falls to be assessed when the issue arises for determination, not as at the date when the legislation was enacted or came into force: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, 842, para 62. The cases of *Walden* and *Petrovic* concerned the margin of appreciation afforded to contracting states. In the present case the House is concerned with the interpretation and application of domestic legislation. In this context the domestic counterpart of a state's margin of appreciation is the discretionary area of judgment the court accords Parliament when reviewing legislation pursuant to its obligations under the Human Rights Act 1998. I have already set out my reasons for holding that in the present case the distinction drawn in the legislation between the position of heterosexual couples and homosexual couples falls outside that discretionary area."

149. In para 62 of his speech in *Wilson v. First County Trust Ltd (No 2)* Lord Nicholls of Birkenhead had referred to a "value judgment by the court, made by reference to the circumstances prevailing when the issue has to be decided", and to its being "the current effect and impact of the legislation which matter, not the position when the legislation was enacted or came into force". I fully accept the rejection of the date of enactment or coming into force. But the circumstances and issues in a particular case may in my view require a court to consider an

intermediate time between the date when legislation came into force and the date, whenever that may be, when an issue about its compatibility happens to be determined at first instance or on appeal. This may be a consideration of particular relevance in times of changing social conditions and attitudes where courts may, in appropriate circumstances, recognise the legislature or executive as better placed to make an assessment of the appropriate timing and form of any amending legislation.

150. The last case that I mention at this point is *R (Hooper) v. Secretary of State for Work and Pensions* [2005] UKHL 29, [2005] 1 WLR 1681, decided on 5 May 2005. Widowers, whose wives had died in the 1990s, claimed that there had been a violation of their rights under article 14 read with article 1 of Protocol 1. This consisted in not paying to widowers the equivalent of the widowed mother's allowance and the widow's pension that a widow would have received from 2 October 2000, when the 1998 Act came into force, and 9 April 2001, when the United Kingdom legislative scheme was altered by the Welfare Reform Pensions Act 1999, eliminating any difference in treatment. (The discrimination consisted rather in maintaining an out-of-date benefit scheme in favour of widows, than in not extending it to men: per Lord Hoffmann at para 17.) The widowers were able to rely on *Willis v United Kingdom* (2002) 35 EHRR 547, where the Strasbourg Court had already held that the scheme involved illegitimate discrimination in the period prior to 2 October 2000. No objective justification was claimed for the payment of the benefits to widows at the relevant times: per Lord Hoffmann at paragraph 41. So there was no basis for the application of the principle in *Petrovic v. Austria* or *Walden v. Liechtenstein* (which Lord Hoffmann found a difficult decision on its facts): see paras 60-63. But Lord Hoffmann also said, at para 62:

> "I can quite understand 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. Up to the point at which that time is exceeded, there is no violation of a Convention right."

151. This appeal is concerned with a period in the years 2001 to 2002 commencing only just after the decision in *Mata Estevez* (para 132 above). The decisions in *Karner v. Austria* and *Ghaidan v. Godin-*

Mendoza, which followed it domestically, were concerned with the right to respect for the home (paras 146 and 147 above). In the light of the Strasbourg Court's decision in *Mata Estevez* and what your Lordships' House has previously stated regarding article 8(1) - cf paragraph [18] above - the concept of "family life" under article 8 cannot, I think, be regarded as having included same-sex relationships during the relevant period from 13 August 2001 to 18 February 2002.

152. I have little doubt that the Strasbourg Court would see the position now as having changed very considerably, and that, if such an issue were to come before it in respect of the position in 2006, Mrs M's same-sex relationship could very well be regarded, in both Strasbourg and the United Kingdom, as involving family life for the purposes of article 8. But that is because there have been continuing changes in social attitudes and in the legislative picture across Europe. The respondents' schedule of countries legally recognising familial relationships between same-sex couples shows the extent to which there has been a general move towards legal recognition of same-sex relationships across Europe in recent years. Laws were passed providing for registered partnerships in the Nordic countries, Denmark (1989), Norway (1993), Sweden (1994), Iceland (1996) and Finland (2001), for unregistered cohabitation in Hungary (1996), Portugal (2001) and Croatia (2003), for registered cohabitation or partnerships in Belgium (1998), the Netherlands (1998), France (1999), Germany (2001) and Switzerland (2004), for marriage in the Netherlands (2001) and Belgium (2003) and Spain (2005) and for registered cohabitation and marriage Luxembourg (2004). Italy, Greece and a number of the new Eastern European and Baltic democracies still appear to stand on one side, but the picture is overall one of radical change since the beginning of 2001. Outside Europe, the list shows not dissimilar developments. Unregistered cohabitation was the subject of laws in New South Wales (1999), Victoria (2001), Western Australia (2002), Tasmania (2003), Canada (2000) (with a further law on marriage in 2005), New Zealand (2002) (with a further law on registered partnership in 2004) and South Africa (various laws from 1999 to 2003). In Israel court decisions recognised several spousal benefits (1994 to 1996), adoption rights (2001), civil service survivor benefits (1998), insurance compensation survivor rights (1999) and pension rights (2000). The legal restructuring evidenced by this list marks a general recognition by legislatures and societies of the need for equal treatment of opposite and same-sex couples. It is right to add that we were not given sufficient detail to judge how far all relevant inequalities in other countries' legislation, were eliminated (as they appear to have been in the United Kingdom) at the same time as same-sex civil registration, partnership or marriage schemes were introduced. So it may be that the United Kingdom

legislation is more advanced than that of some of such other countries. But, on the face of it, a great change has taken place across Europe during the last five or so years, of which any Court considering the current scope of article 8(1) would take most careful account.

153. The position is in my view different in respect of the period from 13 August 2001 to 18 February 2002 with which the House is concerned. I have in para 123 above summarised the history of the recent changes to United Kingdom law, encompassed by the Civil Partnerships Act 2004. My noble and learned friend, Baroness Hale of Richmond, has said of them that they are "hugely to the credit of the United Kingdom Government and Parliament. They are ahead of much of Europe, although parts of Europe are ahead of them". Such changes required a very careful process of development, consultation and drafting, to achieve a comprehensive legislative picture based on equality of treatment. Baroness Hale of Richmond, has herself observed, in words quoted in para 93 of his speech by my noble and learned friend, Lord Walker of Gestingthorpe, that there is necessarily an evolutionary process, by which the law in this area has adapted to achieve an equality-based treatment of the sexes across the whole legal scene. Because of the front-line importance of a home, the Strasbourg and United Kingdom courts have been active at a relatively early stage to eliminate differences in treatment which were evidently unfair. The area of law with which the House is concerned is not so front-line. It is one where there are swings and roundabouts, advantages and disadvantages, for same-sex couples in achieving complete equality of treatment. There are many allied areas of legislation that used similar terminology and required close attention, to achieve coherent, comprehensive reform. It is an area in relation to which Parliament and the democratically elected government should be recognised as enjoying a limited margin of discretion, regarding the stage of development of social attitudes, when and how fast to act, how far consultation was required and what form any appropriate legislative changes should take.

154. In these circumstances, the House has not been shown any basis for criticism of the United Kingdom for delay either in reviewing the law or in moving to alter it in the light of the review. It is said, nonetheless, that this is not a situation where the principle discussed in *Petrovic v. Austria* 33 EHRR 14 and *R (Hooper) v. Secretary of State for Work and Pensions* [2005] 1 WLR 1681 could have any operation, because unequal or discriminatory treatment of same-sex couples has never been justified. That is how we would now see it from a moral viewpoint. But here we are concerned with the legal position during a particular period in the years 2001 to 2002. If it is right that, until quite

recently neither the Strasbourg court nor a United Kingdom domestic court would have regarded a same-sex relationship as involving family life, then it also follows that it was not then unlawful, under articles 8 and 14 of the Convention, to discriminate in domestic legislation between opposite and same-sex couples.

155. Justification exists where discrimination is prima facie unlawful, but there is a special reason legitimising it - e.g. where (as in probably in *Petrovic* itself) men and women were treated differently for a reason for which there was historically rational justification but which has now disappeared. In such a case *Petrovic* accepts, and Lord Hoffmann in para 62 in *Hooper* agreed, reasonable time may be allowed for legislative change – though it must not be exceeded as it was in relation to transsexuals (cf *Goodwin*). Here, discrimination was, as a matter of history, not even prima facie unlawful under article 8, because the concept of "family life" did not extend to cover the situation. It cannot have become unlawful so, until a broader understanding of the concept developed. There is in my view no logical or fair distinction between a situation where there once was, but no longer is, justification and this situation. Accordingly, insofar as it may be necessary, I consider that the principle in *Petrovic* is capable of applying to the present situation, and that it underlines the conclusion that the United Kingdom is not open to criticism for the changes in its internal law, which occurred - both as a result of judicial decision and as a result of legislation - gradually over a period. This process reflected the evolution of society and its attitudes and the unreality of supposing that all aspects of any exercise in achieving complete equality in every area of United Kingdom law could have been addressed by the courts and/or Parliament at one and the same moment.

156. For these reasons, I would hold that Mrs M has not established that the child benefit regime as it existed under the MASC Regulations in the United Kingdom in the period from 13 August 2001 to 18 February 2002 was inconsistent with the Convention right to respect for family life introduced into domestic law by the Human Rights Act.

Respect for Mrs M's private life

157. This brings me to the third basis on which Mrs M relies on article 8 read with article 14. That is that the MASC Regulations would interfere with her right to respect for her personal life, unless read in one of the ways they were read below. None of the members of the Court of

Appeal accepted this submission, although Sedley LJ did no more than express his doubt about it. Neither the child support regime nor those aspects of which Mrs M complains were directed at Mrs M's private life. Any possible effect would appear to me as remote and indeterminate as, if not more so than, that suggested by the complainant in *Botta v. Italy* (1998) 26 EHRR 241. In my view, any link with Mrs M's private life would be tenuous in the extreme, and quite insufficient for the purposes of bringing the regime and those aspects within the ambit of article 8 read with article 14.

Article 1 of Protocol No. 1 and article 14

158. Finally, Mrs M relies on article 1 of Protocol No. 1 read with article 14. The Commission recalled in *Burrows v. United Kingdom* (Application No. 27558/95) that the article is primarily concerned with the formal expropriation of assets for a public purpose, and not with the regulation of rights between persons under private law unless the State lays hands – or authorises a third party to lay hands - on a particular piece of property for a purpose which is to serve the public interest. A scheme providing for leasehold enfranchisement falls nonetheless within the scope of article 1 of Protocol 1, although the tenants benefiting from enfranchisement are private individuals, where the scheme as a whole is devised and introduced in the public interest in pursuance of legitimate social policies: *James v. United Kingdom* (1986) 8 EHRR 123. Possessions may include the notional "proprietary" right conferred on individual citizens by legislation providing for social security and welfare benefits, whether or not these are conditional on the prior payment of contributions: *STEC v. United Kingdom* (Application Nos. 6573/01 and 65900/01) (admissibility decisions taken on 6 July 2005). The second paragraph of the article provides that the first paragraph "shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary … to secure the payment of taxes or other contributions or penalties", but is, as Sedley LJ pointed out, no more than a proviso to the first paragraph. The second paragraph may to some degree have been introduced as a matter of caution, and it certainly cannot expand the scope of the first paragraph.

159. It seems to me artificial to treat child support payments as "depriving" the absent parent of "possessions" within the first paragraph. As Sedley and Kennedy LJJ observed, to treat the first paragraph of the article as directed to the level of financial payments between parents which the State enforces by its machinery would carry the scope of the article into every situation where legislation has a net

adverse financial impact on a person. The MASC Regulations were not expropriating anything belonging to the absent parent, but seeking to achieve a fair measure of the absent parent's pre-existing obligation to support his or her children. This is so, even though the legislative measure and procedure were no doubt introduced as a matter of legitimate policy, to address a growing social problem. There is still no element of, or resembling, expropriation in the public interest, as there undoubtedly was in the case of leasehold enfranchisement. I agree with the reasoning on this point of all my noble and learned friends, Lord Walker of Gestingthorpe, Lords Bingham of Cornhill and Lord Nicholls of Birkenhead. It follows that neither the child support regime nor the aspects of which Mrs M complains fall within the ambit of article 1 of Protocol No. 1 so as to engage article 14.

Conclusion

160. In the result, I consider that Mrs M has not established that the child support regime during the relevant period from 13 August 2001 to 18 February 2002 was on its face inconsistent with any Convention right. It is therefore unnecessary for me to consider whether any such potential inconsistency could have been avoided or eliminated by the exceptional verbal treatment, or as the Secretary of State would have it mistreatment, prescribed by the Tribunal, the Commissioner or the Court of Appeal. It is also unnecessary for me to express any view on the difficult issue of remedy which would have arisen had I been of a contrary view. I would allow this appeal accordingly.