IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No. 9 of 2019
Civil Cause No. 111 of 2018
Civil Cause No. 184 of 2018

BETWEEN

(1) THE DEPUTY REGISTRAR OF THE CAYMAN ISLANDS
(2) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Appellants

AND

(1) CHANTELLE DAY
(2) VICKIE BODDEN BUSH

Respondents

Before:

The Rt. Hon Sir John Goldring, President
The Hon Sir Richard Field, JA
The Hon C. Dennis Morrison, JA

Appearances: Dinah Rose Q.C. and Sir Jeffrey Jowell Q.C. instructed by Timothy Parker, Reshma Sharma and Celia Middleton for the Appellants.
Edward Fitzgerald Q.C. instructed by Ben Tonner QC and Peter Laverack for the Respondents.

Date of hearing: **28 – 30 August 2019**

Delivery of Judgment: **7 November 2019**

JUDGMENT

1. This is the judgment of the Court.

Introduction

2. Chantelle Day and Vickie Bodden Bush (the Respondents to this appeal) wish to marry in the Cayman Islands. On 12 April 2018 they applied for the appropriate licence at the Cayman Islands General Registry. On 13 April 2018 the Deputy Registrar refused to grant the licence. In doing so, he relied on the terms of section 2 of the Marriage Law (2010 Revision) ("the Marriage Law"), which defines marriage in terms of "*the union between a man and a woman as husband and wife*." On 14th September 2018, Ms Day and Ms Bush applied to the Grand Court for orders to enable them to marry. They sought declarations that the Marriage Law does not conform with their rights as enshrined in the Bill of Rights, Freedoms and Responsibilities ("the BoR"), which forms Part 1 of The Cayman Islands Constitution Order 2009 ("the Constitution"). They claimed that the Marriage Law infringed their rights to private and family life under section 9(1), their freedom of conscience under section 10(1), their right to marry and found a family under section 14(1) and their right to non-discrimination under section 16(1). They sought a declaration that the Marriage Law should be "*read and construed with such modifications, adaptations, qualifications…as may be necessary to bring [it]…into conformity with the Constitution*." While they claimed they were entitled to marry, they sought as a minimum, a declaration that provision should be made for them to enter into a civil partnership.

3. The Chief Justice, in a detailed and lengthy judgment, found that the BoR did give the Respondents the right to marry, that the Appellants and the Governor of the Cayman Islands, (who is not an appellant) were accordingly in violation of the Respondents' rights under the BoR. By way of remedy, the Chief Justice ordered that section 2 of the Marriage Law be modified under section 5 of the Constitution Order, so as to read, "*marriage means the union between two people as one another's spouses*." He also modified section 27 of the Law (relating to the marriage declaration) to bring it into conformity with the amended section 2.

4. Relying on the amended Marriage Law, the Respondents sought speedily to marry. On 9th April 2019, this court ordered that there be a stay of the Chief Justice's judgment pending determination of this appeal.

5. Ms Dinah Rose QC (who did not appear below), submitted that by defining marriage in terms of an institution available only to opposite-sex couples the Marriage Law does not violate any right enshrined by the Constitution. In so submitting, she made a number of points not made, or not made in quite the same way, to the Chief Justice. Mr Ed Fitzgerald QC, on behalf of the Respondents, disagreed. Although he did not seek to support every conclusion reached by the Chief Justice, he

submitted the Chief Justice's analysis was correct and that he was right to order that the Marriage Law be amended in order to permit the Respondents to marry.

6. What Ms Rose did accept was that under section 9(1) of the BoR, the Legislative Assembly of the Cayman Islands was required to provide the Respondents with a legal status functionally equivalent to marriage, such as civil partnership. That is something it has so far signally failed to do so. Not only does this inaction place the Legislative Assembly in breach of the law, it also means the Government of the United Kingdom is in violation of Article 8 of the European Convention of Human Rights ("ECHR").

7. The failure either to permit marriage or provide for a functionally equivalent status, has affected the Respondents' lives in the Cayman Islands in many deleterious ways, as the Chief Justice set out in detail. Not least of all, it has affected the legal status of their child.

The Marriage (Amendment) Law 2008

8. On 5th September 2008 the Marriage (Amendment) Bill was considered by the Legislative Assembly. On 29th September 2008 there was to begin the first round of formal negotiations in respect of a new Cayman Islands Constitution. The Marriage (Amendment) Law 2008 came into effect on 27th October 2008. The final (third) round of negotiations concluded on 5 February 2009.

9. The introduction to the Marriage (Amendment) Law 2008 stated that it was a provision "*to expressly provide that a marriage is a union between a man and a woman…*" It amended The Marriage Law (2007 Revision) by inserting, as section 2, that:

> "*"marriage" means the union between a man and a woman as husband and wife*."

The Marriage Law (2010 Revision)

10. The definition of marriage in terms of the union between a man and woman remained in the same terms in the 2010 revision.

The Cayman Islands Constitution Order 2009

11. As we have said, the formal negotiations concluded on 5th February 2009. On 20th May 2009 the proposed constitution was voted upon in referendum. 62% of Caymanians who voted, supported it.

On 10 June 2009, the Constitution was adopted by the Privy Council. On 6th November 2009 it came into force, except for the BoR As presently relevant, that came into force three years later, on 6 November 2012.

12. Section 5 of the Constitution, upon which the Chief Justice relied in his re-writing of the Marriage Law, is entitled, "*Existing laws."* Its form, as Professor Sir Jeffrey Jowell QC, also representing the Appellants, explained to the court, was common in constitutions in the Caribbean. Section 5 provides:

> "*5(1) Subject to this section, the existing laws shall have effect on and after the appointed day as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.*
>
> *…(3) In this section "existing laws" means laws and instruments…having effect as part of the law of the Cayman Islands immediately before the appointed day*."

13. The appointed day was 6 November 2009.

14. Part IX of the Constitution, entitled, "*The Constitution of the Cayman Islands*" states:

> "*The people of the Cayman Islands…*
>
> *Affirm their intention to be-*
>
> *A God-fearing country based on traditional Christian values, tolerant of other religions and beliefs…*
>
> *A country in which religion finds its expression in moral living and social justice…*
>
> *A caring community based on mutual respect for all individuals and their basic human rights.*
>
> *A country committed to the democratic values of human dignity, equality and freedom…*
>
> *A community protective of traditional Caymanian heritage and the family unit….*"

The Bill of Rights

15. Section 1 of the BoR states:

> "*1(1) This Bill of Rights…is a cornerstone of democracy in the Cayman Islands.*
> *(2) This part of the Constitution-*
> *(a) recognises the distinct history, culture and Christian values…of the Cayman Islands and it affirms the rule of law and the democratic values of human dignity, equality and freedom;*
> *(b) confirms or creates certain responsibilities of the government and corresponding rights of every person against the government; and*
> *(c) does not affect…rights against anyone other than the government…*"

16. The Cayman Islands are part of the United Kingdom for the purposes of international law. The European Convention on Human Rights ("the ECHR") has been extended to them. The BoR is plainly based on the ECHR. Its form and content substantially follow the Convention. Sections 14, 9, 10 and 16 of the BoR, to a greater or lesser extent, reflect Articles 12, 8, 9 and 14 of the ECHR. As Mr Fitzgerald rightly pointed out, the BoR is not the European Convention. It is domestic legislation directly giving rights to those in the Cayman Islands. As Mr Fitzgerald emphasised, it was open to the United Kingdom Parliament to provide more extensive rights to those in the Cayman Islands than those provided by the ECHR. Whether it did so, is a fundamental issue in this case.

Section 14 of the BoR
Article 12 of the ECHR

17. Section 14 of the BoR is headed "*Marriage*." It is the sole reference to marriage in the BoR. It states:

> "*14(1) Government shall respect the right of every unmarried man and woman of marriageable age (determined by law) freely to marry a person of the opposite sex and found a family…*

(3) Nothing in any law or done under its authority shall be held to contravene subsection (1) to the extent that the law makes provision that is reasonably justifiable in a democratic society-

...(b) for regulating, in the public interest, the procedures and modalities of marriage…"

18. Article 12 of the ECHR is in less restrictive terms than section 14. It is entitled, "*Right to marry,*" and states:

"*Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right*."

19. It was a crucial aspect of Mr Fitzgerald's argument, that the wording of section 14(1) does not preclude the right to marry a person of the same sex.

Section 9 of the BoR
Article 8 of the ECHR

20. Section 9 is entitled, "*Private and family life*" and states:

"*9(1) Government shall respect every person's private and family life, his or her home and his or her correspondence…*

(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that is reasonably justifiable in a democratic society…"

21. Article 8 of the ECHR is entitled, "*Right to respect for private and family life*" and states:

"*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 law and necessary in a democratic society…"

22. Another crucial aspect of Mr Fitzgerald's argument was that section 9(1) gives the Respondents the right to marry. If it does, none of the justifications in section 9(3) would justify a violation of that right.

Section 10 of the BoR
Article 9 of the ECHR

23. Section 10(1) of the BoR, entitled, "*Conscience and religion,*" states:

> "*10(1) No person shall be hindered by government in the enjoyment of his or her freedom of conscience.*
> *(2) Freedom of conscience includes freedom of thought and of religion or religious denomination; freedom to change his or her religion, religious denomination or belief; and freedom, either alone or in community with others, both in public and private, to manifest and propagate his or her religion or belief in worship, teaching, practice, observance and day of worship.*"

24. Article 9 of the ECHR, entitled, "*Freedom of thought, conscience and religion*" states:

> "*9(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom…to manifest his religion or belief, in worship, teaching, practice and observance.*
> *(2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society …*"

25. Although, as will become apparent, this in reality adds nothing to the Respondents' case, it was Mr Fitzgerald's submission that section 10(1) gives the Respondents a right to marry.

Section 16 of the BoR
Article 14 of the ECHR

26. Section 16(1) of the BoR, entitled, "*Non-discrimination,*" states:

"*…government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution*."

27. Article 14 of the ECHR states:

"*The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground…*"

28. Both as far as the BoR and the ECHR are concerned, as Mr Fitzgerald accepted, the protection against discrimination under section 16/Article 14 is only provided in respect of a violation of a right under the BoR/ECHR. It is not, in other words, a free-standing right against discrimination, such as may be provided in other parts of the world. This is a topic to which we shall return.

The principles of constitutional interpretation

29. As did the Chief Justice, we have had drawn to our attention a number of decisions regarding the appropriate approach to interpreting constitutional provisions. We shall refer to some.

30. In *Minister of Home Affairs v Fisher* [1979] 3 All ER 21, an appeal to the Privy Council from the Court of Appeal of Bermuda, Lord Wilberforce said (at 25e):

"*Here, we are concerned with a Constitution, brought into force certainly by Act of Parliament, the Bermuda Constitution Act 1967 United Kingdom…It can be seen that this instrument has certain special characteristics. 1. It is, particularly in Chapter 1, drafted in a broad and ample style which lays down principles of width and generality. 2. Chapter 1 is headed "Protection of Fundamental Rights and Freedoms of the Individual". It is known that this chapter; as similar portions of other constitutional instruments drafted after the post-colonial period, starting with the Constitution of Nigeria, and including the Constitutions of most Caribbean territories, was greatly influenced by the European Convention for the Protection of Human Rights and Fundamental Freedoms…That Convention was signed and ratified by the United Kingdom and applied to dependent territories including Bermuda. It was in turn influenced by the United Nations' Universal Declaration of Human Rights of 1948. These antecedents, and the form of Chapter 1 itself, call for a generous*

interpretation avoiding what has been called "the austerity of tabulated legalism", suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."

31. Lord Wilberforce went on to consider (at page 26c-f) whether, as the appellants were urging, the constitutional provisions should be construed as though they were acts of parliament, or, whether the court should:

> "*treat a constitutional instrument such as this sui generis, calling for principles of interpretation of its own…without necessary acceptance of all the presumptions that are relevant to legislation of private law.*
> *It is possible that, as regards the question now for decision, either method would lead to the same result. But their Lordships prefer the second. This is in no way to say that there are no rules of law which should apply to the interpretation of a constitution. A constitution is a legal instrument, giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.*"

32. *Matadeen v Pointu* [1999] 1 AC 98 was a decision of the Privy Council on appeal from the Supreme Court of Mauritius, in which Lord Hoffmann gave the Privy Council's Opinion. He said (at page 108C-F):

> *"Their Lordships consider that this fundamental question is whether section 3 [of the Constitution of Mauritius], properly construed in the light of the principle of democracy stated in section 1 and all other material considerations, expresses a general justiciable principle of equality. It is perhaps worth emphasising that the question is one of construction of the language of the section. It has often been said,*

in passages in previous opinions of the Board too familiar to need citation, that constitutions are not construed like commercial documents. This is because every utterance must be construed in its proper context, taking into account the historical background and the purpose for which the utterance was made. The context and purpose of a commercial contract is very different from that of a constitution. The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account. Furthermore, the concepts used in a constitution are often very different from those used in commercial documents. They may expressly state moral and political principles to which the judges are required to give effect in accordance with their own conscientiously held views of what such principles entail. It is however a mistake to suppose that these considerations release judges from the task of interpreting the statutory language and enable them to give free rein to whatever they consider should have been the moral and political views of the framers of the constitution. What the interpretation of commercial documents and constitutions have in common is that in each case the court is concerned with the meaning of the language which has been used. As Kentridge A.J. said in giving the judgment of the South African Constitutional Court in State v. Zuma [1995] (4) B.C.L.R. 401, 412:-

> *'If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination.'"*

33. At page 114G-H, Lord Hoffmann went on to say:

> "*Since 1973 Mauritius has been a signatory to the International Covenant on Civil and Political Rights. It is a well-recognised canon of construction that domestic legislation, including the Constitution, should if possible be construed so as to conform to such international instruments. Again, their Lordships accept that such international conventions are a proper part of the background against which [the provision in question]…must be construed.*"

34. *Reyes v Queen* [2002] 2 AC 235 was another decision of the Privy Council, this time in a mandatory death sentence murder case on appeal from the Court of Appeal of Belize. In delivering the judgment, Lord Bingham of Cornhill said (at paragraph 26):

"*When…an enacted law is said to be incompatible with a right protected by a Constitution, the court's duty remains one of interpretation. If there is an issue…about the meaning of the enacted law, the court must first resolve that issue. Having done so, it must interpret the Constitution to decide whether the enacted law is incompatible or not…*

As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the Constitution. But it does not treat the language of the Constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the Constitution, but is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in light of evolving standards of decency that mark the progress of a maturing society…In carrying out its task of constitutional interpretation the court if not concerned to evaluate and give effect to public opinion…

…28…This does not mean that in interpreting the Constitution of Belize effect need be given to treaties not incorporated into domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their Constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a Constitution fails to conform with international standards of humanity and individual right, unless it is clear on a proper interpretation of the Constitution, that it does."

35. In *Matthew v The State* [2005] 1 AC 433, Lord Bingham stated at paragraph 42 (in a dissenting judgment, but not materially so):

"*42 The correct approach to interpretation of a constitution such as that of Trinidad and Tobago is well established by authority of high standing. In Edwards v Attorney General for Canada [1930] AC 124 , 136, Lord Sankey LC, giving the judgment of the Board, classically described the Constitution established by the British North America Act 1867 (30 & 31 Vict c 3) as "a living tree capable of growth and expansion within its natural limits". The provisions of the Act were not to be cut down "by a narrow and technical construction", but called for "a large and liberal interpretation…*"

36. Lord Bingham also referred to the judgment of the Supreme Court of Canada in *Hunter v Southam Inc* [1984] 2 SCR 145, in which Dickson J said:

> *"The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a Bill or a Charter of Rights, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the Constitution and must, in interpreting its provisions, bear these considerations in mind. Professor Paul Freund expressed this idea aptly when he admonished the American courts 'not to read the provisions of the Constitution like a last will and testament lest it become one'*."

37. Finally, as Chief Justice Smellie said in *Hewitt v Rivers et al*, (Cause 198 of 2013):

> *"In summary, I consider that my approach to the interpretation of the Constitutional provisions [of the Cayman Islands] at issue on this petition must seek to give effect to the real meaning of the provisions and where that meaning is not plain, to apply a purposive interpretation. In that sense, the context will be most important, including as it reflects the aspirations of the Caymanian society which the Constitution embodies."*

38. It is clear from the authorities cited, that the court must approach constitutional provisions, such as those in the BoR, in a broad and purposive manner, not narrowly and technically. Mr Fitzgerald rightly emphasised the 'living tree' analogy referred to by Lord Bingham. He emphasised the change in social mores as far as same-sex marriage is concerned: the current norms and international conventions which must inform that broad and purposive construction of the provisions. In so doing, Mr Fitzgerald took the court (as he did the Chief Justice) to a number of decisions of other Common Law courts in other jurisdictions. He emphasised that in interpreting the provisions of the BoR the court must (as the Chief Justice put it) 'rely on the wisdom of the constitutional courts of the common law world.' Again, it is a topic to which we shall return.

39. As we readily accept, for the reasons the decisions make plain, the court must interpret the Constitutional Law of the Cayman Islands and that part of it which deals with citizens' rights, in a broad and purposive way. It is incumbent upon it when doing so to have regard, among other things, to societal changes. However in doing so, it is not open to the court simply to ignore or put on one side what the provisions clearly say. For the court to do that, on the basis of what are said to be current norms or mores or values, has the real danger, as Lord Hoffmann put it in *Matadeen v Pointu*, of the court giving "*free rein to whatever [the judge]…considers should have been the moral and political views of the framers of the constitution*." Or as Kentridge AJ put it in *State v Zuma*, it could quickly amount, not to interpretation but "*divination*." As Ms Rose submitted, it was not for the courts to impose their own values because they disagree with the values expressed in a constitution. In other words, it is not for the courts effectively to legislate in respect of a constitutional provision, the meaning and effect of which is clear, and reflects the drafter's intentions, because it disagrees.

40. We should add this unexceptional observation. When construing a provision, in a constitution, that provision must not only be considered individually, but in the context of the constitution as a whole.

The ECHR

41. As we have said, the United Kingdom Parliament chose to base the provisions of the BoR on the ECHR. Because it did, there is no dispute, but that the jurisprudence of the European Court of Human Rights in respect of those provisions is material, both when deciding what the intention of Parliament was at the time the legislation was enacted, and the subsequent interpretation of those provisions.

42. The European Court of Human Rights has considered the topic of same-sex marriage on several occasions. As will become apparent, in responding to similar submissions to those argued by Mr Fitzgerald before us, it has decided, first, that Article 12 does not provide a right to marry to same-sex couples and, second, such a right cannot be derived from Article 8, taken in conjunction with Article 14. It has decided that Article 8 taken in conjunction with Article 14 does entitle same-sex couples in a stable relationship to legal protection.

43. *R & F v United Kingdom* App No 45748/05 was a case in which, because marriage was defined in English law in terms of a man and woman, a transsexual woman had either to sacrifice her gender or her existing marriage. It was decided by The European Court of Human Rights at a time approaching the constitutional negotiations in respect of the Cayman Islands, namely in November 2006. The court said (at page 14) that:

> *"In domestic law marriage is only permitted between persons of opposite gender, whether such gender derives from attribution at birth or from a gender recognition procedure. Same-sex marriages are not permitted. Article 12 of the Convention similarly enshrines the traditional concept of marriage as being between a man and a woman…While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950."*

44. *Schalk and Kopf v Austria* (2011) 53 EHRR 20, was a decision of the European Court of Human Rights, made after the Constitution came into force in 2009, but before Part 1 of the Constitution, namely the BoR came into force in 2012. It concerned a same-sex couple living in Vienna, who complained that the Austrian Civil Code only recognised and provided for marriage between 'persons of the opposite sex.' The Austrian Constitutional Court dismissed their complaint. They appealed to the European Court of Human Rights. Firstly, they submitted that Article 12 imposed an obligation on the Austrian Government to grant them access to marriage. Secondly, they submitted that if Article 12 did not enshrine such a right to marry, Article 14 in conjunction with Article 8, did. Thirdly, in what was described by the court in its judgment as the second limb of their complaint, they complained of the lack of alternative legal recognition of their same-sex

relationship. At the time they lodged their application, there was no possibility of such recognition. That had been changed in Austria (by the Registered Partnership Act 2010) by the time of the judgment.

45. The judgment of the European Court of Human Rights referred to and set out Article 9 of the Charter of Fundamental Rights of the European Union, which had been signed on 7th December 2000 and came into force on 1st December 2009. It also set out the relevant parts of the Commentary to the Charter. Article 9 provided that:

> "*The right to marry and found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.*"

46. The Commentary, as relevant, provided that:

> "*In order to take into account the diversity of domestic regulations on marriage, Article 9...refers to domestic legislation. As it appears from its formulation, the provision is broader in scope than the corresponding Articles in other international instruments. Since there is no explicit reference to 'men and women' as the case is in other human rights instruments, it may be argued that there is no obstacle to recognise same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples.*"

47. Under the heading, "*General principles,*" the European Court of Human Rights said (at paragraph 50) that:

> "*...it has not yet had an opportunity to examine whether two persons who are of the same sex can claim to have a right to marry.*"

48. Having referred to previous cases in which Article 12 was found to enshrine the traditional concept of marriage as being between a man and a woman, the court said, (at paragraph 54 and following):

"*54. The Court notes that Article 12 grants the right to marry to "men and women."…Furthermore, Article 12 grants the right to found a family.*

55. The applicants argued that the wording did not necessarily imply that a man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted. In the 1950s marriage was clearly understood in the traditional sense of being a union between partners of different sex…

57 …the applicants did not rely mainly on the textual interpretation of Article 12. In essence, they relied on the Court's case law according to which the Convention is a living instrument which is to be interpreted in the light of present-day conditions…In the applicants' contention Article 12 should, in the light of present-day conditions be read as granting same-sex couples access to marriage or, in other words, as obliging member States to provide for such access in their national laws.

58. The Court is not persuaded by the applicants' argument. Although…the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present [in 2010] no more than six out of forty-seven Convention states allow same-sex marriage…

60. Turning to the comparison between Article 12 of the Convention and Article 9 of the Charter, the Court has already noted that the latter has deliberately dropped the reference to "men and women"…By referring to national law, Article 9 leave the decision whether or not to allow same-sex marriage to the States…

61. Regard being had to Article 9…therefore, the Court would no longer consider that the right to marry enshrined by Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.

62. In that connection, the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society…

63. In conclusion, the Court finds that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple such as the applicants, access to marriage.

64. Consequently, there has been no violation of Article 12…"

49. Having rejected a right to same-sex marriage under Article 12, the court went on to consider the "*alleged violation of Article 14…taken in conjunction with Article 8*". At paragraph 92 and following, it said:

" *…the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life" [under Article 8] but has not found that it constitutes "family life," even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency of a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between Contracting States, this was an area in which they enjoyed a wide margin of appreciation…*

93. The Court notes…a rapid evolution of social attitudes towards same-sex couples…in many member States…a considerable number…have afforded legal recognition to same-sex couples…Certain provisions of European Union law also reflect a growing tendency to include same-sex couples in the notion of "family"…

94. In view of this evolution, the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants…falls within the notion of "family life," just as the relationship of a different-sex couple in the same situation would

95. The Court therefore concludes that the facts of the present case fall within the notion of "private life" as well as "family life" within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 of the Convention applies."

50. Having for the first time found that "*family life*" for the purposes of Article 8 could apply to same-sex couples, the court went on to consider the applicants' argument that:

"*100 …they were discriminated against as a same-sex couple, firstly, in that they still did not have access to marriage and, secondly, in that no alternative means of legal recognition were available to them until the entry into force of the Registered Partnership Act.*"

51. The court concluded, significantly for present purposes, that:

"*In so far as the applicants appear to contend that, if not included in Article 12, the right to marry might be derived from Article 14 taken in conjunction with Article 8, the Court is unable to share their view. It reiterates that the Convention is to be read as a whole, and its Articles should therefore be construed in harmony with one another…Having regard to the conclusion…that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a*

provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either."

52. Having rejected the submission that a right to marriage could be derived from Articles 8 and 14, the court then went on to consider the second of the applicants' arguments, namely the lack, before the Registered Partnership Act, of alternative legal recognition. In that context it said (in paragraph 105) that:

> "*The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore be regarded as one of evolving rights with no established consensus, where states must also enjoy a margin of appreciation in the timing of the introduction of legislative changes…*
> *106. The Austrian Registered Partnership Act, which came into force on 1 January 2010, reflects the evolution…"*

53. At paragraph 108 the court stated that:

> "*…States are still free, under Article 12 of the Convention, as well as under Article 14 taken in conjunction with Article 8, to restrict marriage to different-sex couples…*"

54. We need not go into the facts of *Hämäläinen* (Application No 37359/09) 16 July 2014. At paragraph 96 of its judgment, the court confirmed its analysis in *Schalk v Kopf.* It said:

> *"The Court reiterates that Article 12 of the Convention is a lex specialis for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman…While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as*

imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see Schalk and Kopf…).”

55. The next major development was the decision in the case of *Oliari and others v Italy* (2017) 65 EHRR 26. The applicants were men in stable, same-sex relationships. Italian law did not permit them to marry. Neither (at the time of the complaints) did it provide for any alternative, legal status. In the course of its judgment, the court observed (in paragraph 55) that twenty-four countries out of the forty-seven member states had enacted legislation permitting same-sex couples to have their relationship recognised as a legal marriage or form of civil union or registered partnership.

56. In paragraph 65 the court referred to the United States Supreme Court decision in the case of *Obergefell v Hodges (United States)*, 576 US (2015), in which the court held that same-sex couples may exercise the fundamental right to marry in all states; that there was no lawful basis for a state to refuse to recognise a lawful same-sex marriage performed in another state. More detail of that case is set out in paragraphs 87 and 88 below.

57. As to the applicants’ complaint of a lack legal safeguard regarding their relationships, the court concluded that in the absence of marriage, the failure of the Italian state to provide for a type of civil union did amount to a violation of Article 8. It referred to the rapid development of legal recognition of same-sex couples (see paragraphs 177 and 178). It decided, in other words, that states no longer had a margin of appreciation (to which reference had been made in *Schalk and Kopf*) as to whether or not to provide legal protection for same-sex unions.

58. As to the applicants’ complaint of a violation of Article 12 alone, and of Article 14 read in conjunction with Article 12, the court said (at paragraph 189):

“*189. The applicants…relied on Article 12 on its own and argue that since the judgment in Schalk v Kopf…more countries have legislated in favour of gay marriage, and many more are in the process of discussing the issue. Therefore, given that the Convention is a living instrument, the Court should re-determine the question in the light of the position today…*

192. The Court notes that despite the gradual evolution of States on the matter (today there are eleven CoE states that have recognised same-sex

marriage) the findings reached in [previous cases]…remain pertinent. In consequence, the Court reiterates that Article 12…does not impose an obligation on the respondent Government to grant a same-sex couple…access to marriage.

193. Similarly, in Schalk and Kopf, the Court held that Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either. The Court considers that the same can be said of Article 14 in conjunction with Article 12.

194. It follows that both the complaint under Article 12 alone and under Article 14 in conjunction with Article 12 are manifestly ill-founded and must be rejected…"

59. *Orlandi and Others v Italy* (Application Nos. 26431/12, 26742/12) is the court's most recent decision. The complaints pre-dated Italy's introduction of a form of civil partnership for same-sex unions. The applicants had married abroad. They complained about the refusal to register their marriages in Italy, and about the fact they could not marry or have any other legal recognition of their family union in Italy. At paragraph 145, the court said:

"As to Article 12, the Court notes that in Schalk and Kopf it found that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex, and therefore that Article 12 was applicable to the applicants…but that Article 12…did not impose an obligation on the respondent Government to grant a same-sex couple…access to marriage…and in Oliari and Others v Italy….the Court held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on Contracting States to grant access to marriage to same-sex couples."

60. In paragraph 204, the Court noted the rapid development to the legal recognition of same-sex couples worldwide. In paragraph 205, it went on to say:

"*The same cannot be said about registration of same-sex marriages contracted abroad in respect of which there is no consensus in Europe. Apart from the*

member States…where same-sex marriage is permitted, the comparative law information available to the Court…showed that only three of…twenty-seven…allowed such marriages to be registered, despite the absence…in their domestic law of same-sex marriage…Thus, this lack of consensus confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision as to whether to register, as marriages, such marriages contracted abroad….

207…the refusals [to register the marriages]…are the result of the legislator's choice not to allow same-sex marriage- a choice not condemnable under the Convention…"

61. The court went on to find (paragraph 210) that:

"*…the Italian State could not reasonably disregard the situation of the applicants which corresponded to a family life…without offering the applicants a means to safeguard their relationship.*"

62. For completeness we refer to *Juliet Joslin et al v New Zealand*, Communication No. 902/1999, a decision of the United Nations Human Rights Committee, sitting in its judicial capacity under the First Optional Protocol. It rejected the complaint that the failure of the Marriage Act 1955 [NZ] to provide for same-sex marriage, violated rights under Article 16 (right to recognition before the law), Article 17 (right to privacy), Article 23(1) (the right to marry and found a family) and Article 26 (right to equality) under the International Covenant on Civil and Political Rights ("ICCPR").

63. Article 23, paragraph 2, stated that:

"*The right of men and women of marriageable age to marry and found a family shall be recognised.*"

64. The Committee held (at paragraph 8.2) that:

"*Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only*

substantive provision in the Covenant which defines a right by using the term "men and women", rather than "every human being", "everyone" and "All persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other."

Mr Fitzgerald's argument

65. We shall try to encapsulate Mr Fitzgerald's main submissions.

The interpretation of section 14 of the BoR

66. Mr Fitzgerald submitted that section 14 is a provision which (as he set out in his first skeleton argument) "*protects the institution of marriage from abolition and it protects for all time the right of people of opposite-sex who are of marriageable age and…not already married. It goes no further*." As he put it in his most recent skeleton argument, "*It merely imposes an obligation on the Government to respect a particular form of pre-existing right to marry.*" In a submission, with echoes of those failed submissions before the European Court of Human Rights, Mr Fitzgerald argued that the right to marry can be derived from those rights expressed in sections 9 and 10 of the BoR.

67. Mr Fitzgerald further submitted that the wording of section 14(1), merely protecting as it does the institution of opposite-sex marriage, does not preclude the recognition of the right to marry where that is founded on, or derived from, sections 9 and 10. Moreover, had Parliament intended to restrict the right to marry to heterosexual couples, the word 'only' would have been included before the phrase "*a person of the opposite sex*," as the Chief Justice found.

68. Mr Fitzgerald does not seek to support the Chief Justice's finding that section 14(1) could not be read as precluding same-sex marriage on the basis that such a finding would be discriminatory and contrary to section 16.

The jurisprudence of the European Court of Human Rights
Its relationship with the BoR

69. Mr Fitzgerald accepted that the effect of the decisions of the European Court of Human Rights, means that for the purposes of the ECHR, Article 12 does not presently provide the right to same-sex marriage, neither does Article 8 in conjunction with Article 14. On the assumption that section 14(1) provided a right to marry (which, as we have said, was not his case), he accepted, that simply reading across those decisions to the parallel provisions of the BoR, would inevitably lead to the conclusion that section 14(1) does not provide a right to same-sex marriage; also that such a right cannot be derived from section 9 (and it follows, section 10) in conjunction with section 16. Mr Fitzgerald submitted that in construing Article 12, and its relationship with Articles 8 and 14, the European Court of Human Rights was doing no more than permitting member states a margin of appreciation as far as any possible future obligation to provide for same-sex marriage was concerned. The ECHR is a living instrument. The time could come (or, as he might put it, will inevitably come) when the court no longer affords member states such a margin of appreciation. In support of that submission, Mr Fitzgerald drew the court's attention to various passages in cases in which there was reference to the margin of appreciation. However, on a proper understanding, it became apparent that the references related either to the registration of same-sex marriages contracted abroad, or to the recognition of other legal status in the context of Article 8.

70. Mr Fitzgerald went on to argue that the domestic court in the Cayman Islands was obliged to follow domestic law as set out in the BoR. No question of allowing any margin of appreciation could arise. The court, in applying the provisions of the BoR, must give them their full, purposive effect. The decisions of the ECHR only identified the bare minimum protection. The protection under the BoR went further. In assessing how much further, this court, as did the Chief Justice, must take into account comparative case law from other jurisdictions. It must have regard to what are the recognised current norms regarding same-sex marriage.

71. The decision of the United Nations Human Rights Committee in *Joslin*, Mr Fitzgerald submitted, was some time ago. It fails to recognise those current norms. It was severely criticised by Sachs J in sitting in the Constitutional Court of South Africa in *Fourie v Minister of Home Affairs* [2005] ZACC 19, a decision to which we shall come.

72. Mr Fitzgerald submitted that application of the principle of *lex specialis*, referred to by the European Court of Justice in its interpretation of the Convention, and relied upon by Ms Rose in her submissions to this court, has no application in the present context. He submitted that if it did, it would mean that biological parents could not rely on section 9 to challenge any law which

proscribed reproduction outside wedlock. The Chief Justice found that if section 14(1) as a whole applied only to people of the opposite sex, it would mean that a same-sex couple had no right to found a family.

73. Mr Fitzgerald referred to *In re McLaughlin* [2018] 1 WLR 4250, in which the Supreme Court was invited (as Mr Fitzgerald put it) not to consider the general provisions of Article 8 because Article 1 of Protocol 1 (dealing with property rights) expressly dealt with the particular situation. He submitted that this argument was given short shrift by Baroness Hale of Richmond at paragraph 23 of her speech, and by Lord Hodge at paragraph 69 of his, when they said:

> "*23 The fact that it also falls within the ambit of A1P1 is not a problem. The two articles are safeguarding different rights—respect for family life and respect for property. There is no reason to regard the latter as a lex specialis excluding the former in those cases, such as this, where it applies. I therefore conclude that the facts fall within the ambit, not only of A1P1, but also of article 8.*"
>
> "*69 Like Baroness Hale PSC, I see no basis for the assertion that A1P1 is a lex specialis which excludes consideration of article 8.*"

Section 10

74. We shall take this aspect of the case comparatively shortly. Although Mr Fitzgerald did not in terms quite concede it, it is difficult to see how he could fail in respect of section 9, which on any view is at the heart of his case, and succeed in respect of section 10. If section 14(1) is the *lex specialis* as far as marriage is concerned, that is equally fatal to Mr Fitzgerald's case on section 10 as it is on section 9.

75. As we understand Mr Fitzgerald's argument on section 10, it can be encapsulated in the following way. Section 10(1) gives the Respondents the right to believe in same-sex marriage. Section 10(2) provides a free-standing right to manifest that belief by marrying. Opposite-sex couples can manifest their belief in marriage by marrying. Same-sex couples cannot. That is unjustifiably discriminatory under section 16 of the BoR.

76. It was also an element of (although not essential to) Mr Fitzgerald's submission that the Legislative Assembly's denial of the right to marry contained in the Marriage Act was motivated by religious belief, something which was impermissible in a secular country such as the Cayman Islands. For evidence in support of that contention, reference was made (at least before the Chief Justice) to the Hansard report of the debate in the Legislative Assembly which led to the Marriage Act.

77. The Chief Justice found that the Respondents' inability to marry offended and denied their right to freedom of conscience and belief, as people who wished to manifest their belief in the institution of marriage. He found the Marriage Law was propelled by religious belief. However, he did not find that section 10 of itself provided a free-standing right to marry.

78. In support of his submission, Mr Fitzgerald placed considerable reliance on the first-instance decision of Chief Justice Kawaley in the Supreme Court of Bermuda in *Ferguson v Attorney General* [2008] SC (Bda) 46 Civ.; also on the judgment of the Court of Appeal of Bermuda affirming the decision (Appeal Nos. 11 and 12 of 2018), (currently on appeal to the Privy Council).

79. The Bermudan Constitution has not incorporated the provisions of the ECHR in the same way as has the Cayman Islands Constitution. It has a free-standing non-discrimination provision. Significantly for present purposes, it has no equivalent to Article 12. However, section 8(1) of the Bermudan Constitution does reflect in its wording Article 9 of the ECHR. That section provides that:

> "*…no person shall be hindered in the enjoyment of his freedom of conscience, and for the purposes of this section the said freedom includes freedom of thought and of religion, freedom to change his religion or belief and freedom, either alone or in community with others…to manifest and propagate his religion or belief in worship, teaching, practice and observance.*"

80. Having analysed the different authorities drawn to his attention, Chief Justice Kawaley found that Bermudan legislation which prevented same-sex marriage contravened the applicants' rights of freedom of conscience protected by section 8(1), by depriving them of the opportunity to participate in legally recognised same-sex marriages.

81. The Bermudan Court of Appeal agreed with the Chief Justice. As President Baker said (paragraph 71 and following):

> "*71. ...We agree with the Chief Justice that the State cannot pass a law of general application that favours those who disagree with same-sex marriage. Section 8 of the Constitution is there to protect the beliefs of minorities and their freedom of conscience. Their freedom of conscience matters and is not lightly to be interfered with. Indeed, no evidence has been advanced by the Appellant to justify that interference in the present case.*
>
> *72. It is true that the draughtsman of the Bermuda Constitution 50 years ago is unlikely to have had same-sex marriage in the forefront of his mind, or indeed in his mind at all, but that is not the point. It was drafted with sufficient flexibility to protect everyone's freedom of conscience in a changing world. Interference with that freedom can be by both positive and negative acts, in this instance by the negative act of preventing same-sex couples having the right to marry.*"

Other common law jurisdictions

82. As we said, it was Mr Fitzgerald's submission that the decisions of the ECHR only identified the bare minimum protection. The BoR provided greater rights. Their extent, he submitted, can be derived from comparative case law from other jurisdictions. That illustrates, as Mr Fitzgerald put it in his skeleton argument, how, in the developed common law world, the institution of marriage has been opened up to same-sex couples (for example in the United States, Canada, South Africa, Australia, New Zealand, Ireland, and in addition throughout the Americas as a result of a decision of the Inter-American Court of Human Rights). The arc of human history, he submitted, is towards the progressive opening up of marriage to formerly excluded status groups. It is the norms provided by those decisions which must provide the guide for this court in its broad and purposive interpretation of the BoR.

83. Mr Fitzgerald began by emphasising the words of that very distinguished judge, now President of the Caribbean Court of Justice, Saunders J, who, when giving the judgment of the Eastern Caribbean Court in *Spence v R; Hughes v R* on 2nd April 2001, said (at paragraph 214):

> "*In my view we would be embarking upon a perilous path if we began to regard the circumstances of each territory as being so peculiar, so unique as to warrant a reluctance to take into account the standards adopted by humankind in other jurisdictions. Section 5 imposes upon the State an obligation to conform to certain "irreducible" standards that can be measured in degrees of universal approbation. The collective experience and wisdom of courts and tribunals the world over ought fully to be considered.*"

84. Mr Fitzgerald drew several decisions or opinions to our attention, as he did the Chief Justice. We shall refer to some. Significantly, as Ms Rose submitted, in none of the jurisdictions to which the cases relate was the court construing a constitutional right expressly conferred subject to an opposite-sex limitation.

85. In *Halpern v Canada (Attorney General)* 65 OR (3d) 161, the Court of Appeal for Ontario (in 2003) held that the common law definition of marriage in terms of "*the voluntary union…of one man and one woman…*" unjustifiably infringed the couples' equality rights under section 15(1) of the Canadian Charter of Rights and Freedoms. (The court rejected an allegation that it infringed the right to freedom of religion).

86. In *Fourie v Minister of Home Affairs* [2005] ZACC 19, the applicants, relying on a substantive, freestanding, equality clause under the Constitution, successfully argued that the common law definition in terms of marriage being the union of one man with one woman, was unconstitutional. In his judgment, Sachs J, in the Constitutional Court of South Africa, spoke of the "*severe*" damage done to same-sex couples in not being able to marry (see paragraphs 71 and 72 of the judgment). At paragraph 48, he stated:

> "[48] *The way the words dignity, equality and privacy later came to be interpreted by this Court showed that they in fact turned out to be central to the way in which the exclusion of same-sex couples from marriage can be evaluated. In a long line of cases, most of which were concerned with*

persons unable to get married because of their sexual orientation, this Court highlighted the significance for our equality jurisprudence of the concepts and values of human dignity, equality and freedom. It is these cases that must serve as the compass that guides analysis in the present matter, …."

87. The United States Supreme Court in *Obergefell*, a case referred to by the European Court of Human Rights in *Oliari*, (see paragraph 56 above), decided in 2015 that the Fourteenth Amendment required a state to licence same-sex marriage, also to recognise such a marriage performed in another state. There was no marriage provision. The judgment of Kennedy J, among other things, traced the history of same-sex marriage and the changes in social mores. Chief Justice Smellie referred to the following part of Kennedy J's judgment:

"*…Like choices concerning contraception, family relationships, procreation, and childbearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make...*

Indeed, the Court has noted it would be contradictory "to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society…

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether to marry and whom to marry is among life's momentous acts of self-definition…"

88. At page 19, Kennedy J said:

"*The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from the Amendment's guarantee of equal protection of laws.*

89. Mr Fitzgerald took the court to the advisory opinion of the Inter-American Court of Human Rights of November 24, 2017. It was issued in response to questions posed by the State of Costa Rica. The Opinion stated (paragraph 220 and following):

> "*220. The establishment of a differentiated treatment between heterosexual couples and couples of the same sex regarding the way in which they can form a family – either by a de facto marital union or a civil marriage – does not pass the strict test of equality (supra para. 81) because, in the Court's opinion, there is no purpose acceptable under the Convention for which this distinction could be considered necessary or proportionate…*
>
> *224. Moreover, in the Court's opinion, there would be no sense in creating an institution that produces the same effects and gives rise to the same rights as marriage, but that is not called marriage except to draw attention to same-sex couples by the use of a label that indicates a stigmatizing difference or that, at the very least, belittles them. On that basis, there would be marriage for those who, according to the stereotype of heteronormativity, were considered "normal," while another institution with identical effects but with another name would exist for those considered "abnormal" according to this stereotype…*
>
> *226. Notwithstanding the foregoing, this Court cannot ignore the possibility that some states must overcome institutional difficulties to adapt their domestic law to same-sex couples…*
>
> *227…States that do not yet ensure the right of access to marriage to same-sex couples are obliged not to violate the provisions that prohibit discriminating against them and must…ensure them the same rights derived from marriage in the understanding that this a transitional situation.*"

The negotiations leading up to the adoption of the Constitution

90. There was before the Chief Justice, and before us, evidence relating to some eight years of negotiations involving, representatives from the Cayman Islands and the United Kingdom

Government. Mr Ian Hendry of the United Kingdom chaired the negotiations. The Cayman Islands delegation included the Governor, the Attorney-General, five representatives of the elected government, four government backbenchers, five representatives of the official opposition, two church representatives, three members of the Chamber of Commerce, and two members of the Human Rights Committee. Mr Hendry is recorded in a note as saying that "*marriage is so defined in this text without peradventure that marriage can only be between an unmarried man and an unmarried woman, it can't be anything else.*"

91. As we have said, on 20 May 2009 there was a referendum in which 62% of those who voted approved the proposed Constitution.

92. Mr Hendry was the co-author of the authoritative text, Hendry and Dixon, *British Overseas Territories Law*, 2nd Edition, (Hart: 2018). At pages 166-7 the following appears:

> *"The most controversial provision for each of the Caribbean territories is the right to marry. This is not because those territories are opposed to the institution of marriage—quite the reverse—but because they are unanimously opposed to same-sex marriages…To date, the case law of the European Court of Human Rights has confirmed that the right to marry guaranteed by Article 12 of the Convention refers to a traditional marriage between two persons of opposite biological sex. And while the UK Parliament has legislated for same-sex marriage in the Marriage (Same Sex Couples) Act 2013, the Act does not extend to any overseas territory. Despite the reference in Article 12 of the Convention to national law governing the exercise of the right to marry, that wording does not, in the view of some territories, provide a clear enough steer on this issue, and therefore additional wording was agreed during the negotiations. For the Virgin Islands, the solution comes with the wording: 'Every man and woman of a marriageable age has the right to marry and found a family in accordance with laws enacted by the Legislature', and for the Cayman Islands with: 'Government shall respect the right of every unmarried man and woman of marriageable age (as determined by law) freely to marry a person of the opposite sex and found a family.' …*"

93. The Chief Justice questioned whether those said to be representing the Cayman Islands were representative of those who lived in the Cayman Islands. Having concluded there was no ambiguity in the Constitution which might justify recourse to the negotiations, he did not take them into account.

94. Mr Fitzgerald submitted the Chief Justice was correct. He submitted that to seek to impute (as he put it) the will of the people from the negotiating history was a dangerous exercise in which the court should not indulge. At best, it could not safely be inferred that the negotiating history supported the appellants' construction of section 14 as they claimed. Ms Rose submitted that the history was both admissible and confirmed the Appellants' construction of section 14.

Our analysis

95. We cannot accept Mr Fitzgerald's submission that section 14 was included in the BoR to protect the institution of marriage from abolition. Section 14 is entitled "*Marriage*." It contains the only reference to marriage in the BoR. It is, as it seems to us, plainly intended to confer a specific right in the terms stated in respect of marriage. The fact it may use the word "*respect*" is neither here nor there. This is a bill of *rights* (our emphasis). It provides, for example, the right to a fair trial (section 7) and the right not to be punished without law (section 8). The word "*respect*" is used in section 9(1), the section said by Mr Fitzgerald to give rise to the Respondents' right to marry.

96. It seems to us inherently unlikely that the only provision relating to marriage in a bill of rights would be included in order to protect heterosexual marriage from possible future attack. It seems improbable that anyone could reasonably have believed in 2009 (or for that matter, now) that the institution of marriage between a man and a woman was in such potential peril as to require the sort of protection argued for by Mr Fitzgerald. That cannot have been the intention of the drafter of section 14 the BoR.

97. The wording of section 14(1), on its face, defines marriage in terms of marriage between a man and a woman. The wording, in our judgment, precludes same-sex marriage. It seems to us Ms Rose was right when she submitted that as a matter of syntax and logic, the words, "*the right of every unmarried man and woman of marriageable age…freely to marry a person of the opposite sex*" make up a single, composite expression. Meaning and effect have to be given to the words, "*a person of the opposite sex*." If, as Ms Rose put it, the framers of the Constitution had intended that same-sex couples should enjoy a constitutional right to marry, the words *"of the opposite sex"*

would have been otiose and misleading. The absence of the word 'only' before *"of the opposite sex"* does not support the proposition that the limitation expressed in these four words can be ignored, circumvented or expanded so as to include in their scope persons of the same sex.

98. Moreover, as Ms Rose observed, it is only within section 14(1) that the words *"every ... man and woman*" appear. That is the only right enshrined in the BOR to specify the sex of the person to whom it applies.

99. The Chief Justice gave as one reason for rejecting the Appellants' construction of section 14(1), that it would deny to those in the position of the Respondents all right to found a family with the protections available to opposite-sex couples. That, as it seems to us, is not so. As Ms Rose submitted, the position under the BoR (as under the ECHR and the ICCPR), while restricting the right to marry and found a family to opposite-sex couples, does not deprive them of the right to respect for private and family life (under section 9 of the BoR, Article 8 of the ECHR and Article 17(1) of the ICCPR). That right applies equally to same-sex and opposite-sex couples. As to the suggestion that a restrictive reading of section 14(1) could result in the proscribing of same-sex (or unmarried) couples having a family, that would, as it seems to us, infringe their right to a private and family life.

100. There is another difficulty with Mr Fitzgerald's submissions. Sub-section (3) of section 14 provides that marriage may be regulated in the public interest. Sections 9 and 10 do not. It follows from Mr Fitzgerald's submissions that those sections provide a broader right to marry than does the section ostensibly concerning marriage. We add, if the right to marry can be derived from sections 9 and 10, we find it difficult to see what the purpose of including section 14 was.

101. The BoR was based on the ECHR. The United Kingdom Parliament plainly intended that the pattern of the BoR should follow that of the ECHR. At the time of the legislation the jurisprudence of the European Court of Human Rights in respect of marriage was clear. Article 12 did not impose an obligation to grant a same-sex couple access to marriage. That obligation only arose in respect of opposite-sex couples. Subsequently, the court found (in *Schalk v Kopf*) that a right to marry could not be derived from Article 8 in conjunction with Article 14. The Articles had to be construed in harmony. Article 12 was the specific, substantive provision in respect of marriage. Articles 8 and 14 were for a more general purpose and more limited in scope. They could not be used as the means of construing a right to same-sex marriage, when the substantive provision in respect of

marriage did not impose such an obligation. It provided for the opposite. That analysis was repeated subsequently (see paragraphs 50-1 and 54 above in particular). The European Court of Human Rights' analysis had nothing to do with allowing member states any margin of appreciation. It was based on its finding that Article 12 was the *lex specialis* as far as marriage is concerned.

102. That too was the effect of the decision in *Joslin* as far as the ICCPR (see paragraphs 62-3 above).

103. The rationale underlying the decisions of the European Court of Human Rights applies equally to the BoR. Just as a right to marry cannot be derived from Articles 8 and 14 because Article 12 is the *lex specialis* as far as marriage is concerned, so it cannot be derived from sections 9, and 16 (or, for that matter, sections 10 and 16). In other words, the specific, defined and restricted right to marry under section 14 cannot be extended by a reference to other general rights in other provisions. Consequently, section 16 cannot be brought into play.

104. While of course it was open to Parliament to provide greater rights than are provided for by the ECHR, we see nothing to suggest that was Parliament's intention. That it was not is underlined by the more explicit language of section 14 when compared to Article 12. Section 14, unlike Article 12, specifically refers to marriage in terms of marriage to "*a person of the opposite sex.*"

105. As to Mr Fitzgerald's reliance on *In re McLaughlin*, that seems to us misconceived. In that case, as those parts of the speeches relied on by Mr Fitzgerald make clear, the Supreme Court held that there might simultaneously be both a right derived from a general article, (in that case, Article 8) and a right derived from a specific article (in that case, Article 1 of Protocol). The difference between that case and the present is that each provision was safeguarding different rights. Here, the effect of Mr Fitzgerald's submission is that in respect of the same right, the general provision can provide protection when the specific provision does not.

106. We shall deal very briefly with section 10 of the BoR.

107. As we have said, section 14 is the *lex specialis* as far as marriage is concerned. There cannot be derived from a general provision such as section 10, a right to marriage for the reasons we have set out. The Respondents' case fails on that ground alone. It is unnecessary for us to go further than that in the circumstances.

108. As we read his judgment, the Chief Justice was influenced in his conclusion that section 14(1) did not preclude same-sex marriage, by his understanding (possibly based upon submissions made to him by the Appellants below), that if it did, same-sex marriage could only be introduced by an amendment of the Constitution. That is not so. As Ms Rose submitted, the Legislative Assembly could legislate for same-sex marriage. If it did, the resultant right to marry would merely not form part of, or be enforceable under, the BoR. That is what has happened in many instances in Europe.

109. We finally turn to the several decisions from other jurisdictions concerning same-sex marriage.

110. Each decision related to a significantly different constitutional pattern from that of the Cayman Islands. In none was there a defined express right to marry. Each concerned a free-standing non-discrimination clause. It was the application of that provision that the court in question was considering. At the time the Cayman Islands Constitution was drafted, the drafters must be taken to have been aware of different possible models available. They could have chosen the South African or Canadian model. They chose that of the ECHR. (It seems that for Bermuda they chose a different model). As Ms Rose said, the choice of the ECHR was not anomalous or second best. In short, as Ms Rose submitted, in none of those cases was the court considering a constitutional right to marry which is expressly conferred subject to an opposite-sex limitation. Those decisions, essentially, concerned the application of substantive, free-standing, non-discrimination provisions.

111. Had the Cayman Islands chosen to adopt a free-standing non-discrimination provision, the decisions of other jurisdictions would plainly have been highly material. As it is, the decisions of the ECHR are highly material when considering the BoR. It is they which must inform the construction of the BoR. That is particularly so when, as we have said, there is nothing to suggest an intention to go further in the BoR than provided for by the ECHR. It seems to us, even when applying a broad and purposive interpretation of a constitution, and taking into account the 'living tree' principle, that it is problematic to seek to construe a wholly different domestic provision, which is on its face perfectly clear, by reference to opinions expressed elsewhere, on an entirely different legal basis, albeit on a topic which the domestic court is considering.

112. We would too make this observation. While the cases to which our attention was drawn may indicate changing social mores as far as same-sex marriage is concerned, the evidence before us suggests that is by no means universal. In a number of Caribbean jurisdictions drawn to our attention, for example, is there no right to same-sex marriage. Neither is it universal in Europe.

113. In short, we have concluded that the construction of the BoR should be informed by the jurisprudence of the European Court of Human Rights, not that of other jurisdictions construing different legal provisions. That, as it seems to us, reflects the intention of the drafters of the Cayman Constitution.

114. As to the negotiating history, we agree, as the Appellants submitted, it tends to support their construction of section 14. It could be taken to explain why section 14(1) is in the terms it is. It also does seem to us that those representing the Cayman Islands were representative. However, that having been said, in our judgment the meaning and effect of section 14(1) is sufficiently clear for us not to have recourse to the negotiating history. Like the Chief Justice, albeit on the basis of a different analysis, we are able to resolve this case without taking the negotiating history into account.

Conclusion

115. We well understand how and why the Chief Justice reached the decision he did. However, for the reasons we have set out, we have been driven to conclude this appeal must be allowed. We set aside the orders made by the Chief Justice. In the circumstances, it is not necessary to consider whether the orders he made under section 5 of the Constitutional Order were appropriate.

The appropriate declaration

116. As we said in paragraph 6 above, the Appellants have finally accepted that section 9(1) of the BoR requires the Legislative Assembly to provide the Respondents with legal status functionally equivalent to marriage. Its failure to comply with its obligations under the law in that regard is woeful. That it had such an obligation has been apparent for several years. As the Chief Justice set out in detail, the Respondents, in broad terms, offered to compromise the present litigation on appropriate undertakings from the Appellants to establish an institution of civil partnership. Even now, when during the course of argument, the court sought information as to what the Appellants intended to do, we were merely told they were awaiting the outcome of the litigation. It is difficult to avoid the conclusion that the Legislative Assembly has been doing all it can to avoid facing up to its legal obligations. In the meantime, Ms Day and Ms Bush (and their child) suffer in the many ways the Chief Justice set out.

117. In our judgment, a declaration in the following form is appropriate:

"*In recognition of the longstanding and continuing failure of the Legislative Assembly of the Cayman Islands to comply with its legal obligations under section 9 of the Bill of Rights*

And in recognition of the Legislative Assembly's longstanding and continuing violation of Article 8 of the European Convention on Human Rights,

IT IS DECLARED THAT:
Chantelle Day and Vickie Bodden Bush are entitled, expeditiously, to legal protection in the Cayman Islands, which is functionally equivalent to marriage."

118. It is not appropriate to require undertakings from the Attorney-General, as is urged upon us by the Respondents. Moreover, proper fulfilment of its legal duty by the Legislative Assembly should provide the protection sought.

A final observation

119. We feel driven to make this final observation.

120. This court is an arm of government. Any constitutional settlement requires the executive and the legislature to obey the law and to respect decisions of the court. It would be wholly unacceptable for this declaration to be ignored. Whether or not there is an appeal to the Privy Council in respect of same-sex marriage, there can be no justification for further delay or prevarication.

121. Moreover, in the absence of expeditious action by the Legislative Assembly, we would expect the United Kingdom Government, to recognise its legal responsibility and take action to bring this unsatisfactory state of affairs to an end.

GOLDING, President

FIELD, JA

MORRISON, JA