IN THE GRAND COURT OF THE CAYMAN ISLANDS

CIVIL CAUSE NO. 111 OF 2018
CIVIL CAUSE NO. 184 OF 2018

BETWEEN **1. CHANTELLE DAY**

2. VICKIE BODDEN BUSH **APPLICANTS/PETITIONERS**

AND **1. THE GOVERNOR OF THE CAYMAN ISLANDS**

2. THE DEPUTY REGISTRAR OF THE CAYMAN ISLANDS GOVERNMENT GENERAL REGISTRY

3. THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS **RESPONDENTS**

EXECUTIVE SUMMARY OF JUDGMENT

1. This case raises the sensitive question whether the Applicants/Petitioners ("the Petitioners") who are both women, have a constitutional right to marry and found a family.

2. In the present state of the Marriage Law, while opposite-sex couples are recognized by the State as committed couples and allowed to marry and so enjoy a variety of further legal rights and protections from the State[1], same-sex couples are denied access to marriage and so are denied access to those rights and protections.

3. The Petitioners submit that the present state of the Marriage Law violates their Constitutional rights. Specifically, their rights to a private and family life, including the

[1] Aspects of which to be considered further below.

right to found a family; to freedom of conscience and perhaps most profoundly, to freedom from unjustifiable discrimination on the grounds of status; namely, their sexual orientation.

4. The Petitioners submit that they are entitled to a remedy from the Court that affords them equal access to marriage. Alternatively at least, to declaratory orders to the effect that they are entitled to have their relationship otherwise respected by the State, by way of legislation which recognizes and protects their relationship as a civil union. They nonetheless submit, that the right to marry, being the only remedy which the Court can itself provide and which would accord them full equality in the eyes of the law, is therefore the primary and proper remedy to which they are entitled.

5. Since 2009, the Constitution of the Cayman Islands enshrines a Bill of Rights[2] which contains, among others, fundamentally important provisions which are relied upon by the Petitioners. Primarily, they are those which mandate that: (1) *Government shall respect every person's private and family life, his or her home and his or her correspondence*[3]; (2) *No person shall be hindered by government in the enjoyment of his or her freedom of conscience*[4], and (3) *Government (subject to certain exceptions specified) shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.*[5] In this section "*discriminatory*" means "*affording different and unjustifiable treatment to different persons on any ground*", such as sexual orientation, among others.

6. Also of central importance to the case is section 14(1) of the Bill of Rights which reads:

> "*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*".

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[2] The Cayman Islands Constitution Order 2009, Schedule 2 Part 1, which contains the Bill of Rights and which actually came into effect, after a three year preparatory period, on 6 November 2012.
[3] Section 9(1).
[4] Section 10(1).
[5] Section 16(1).

7. The Petitioners assert that the foregoing provisions when taken together, and read and construed within the Constitution as a whole, mandate the remedies which they seek, notwithstanding that the right to marry is expressed in section 14 (1), so as to place a limited obligation on government to guarantee that right specifically for couples of the opposite sex .

8. The Respondents disagree. First, in relation to the right to marry, the Respondents assert that the words of section 14(1) not only guarantee the right for men and women as parties of the opposite sex, but also preclude, by necessary implication, access to marriage by parties of the same sex. Further, that as section 14 (1) is the constitutional provision that provides especially for the right to marry (ie: the "*lex specialis*", say the Respondents), it is impermissible for this Court to hold that that right is located elsewhere in the Bill of Rights, in particular in the rights to family life, to freedom of conscience and to freedom from discrimination. These, the Respondents describe as the other more general rights invoked by the Petitioners and which do not provide for the right to marry which is said to be the exclusive domain of section 14. The aim of section 14(1) say the Respondents, is the "protection and promotion" of "marriage" and "family" in the traditional sense, as understood in the Cayman Islands, and that there is high judicial authority[6] for the proposition that this is a legitimate aim and can justify different treatment in relation to according access to married status.

9. As regards the Petitioners' plea that they should be entitled in the alternative to enter into a civil union protected by law, the Respondents say that this is a challenge to the absence of any law on the subject, not a challenge to any positive act of the Respondents. That

[6] Citing Karner v Austria (App No 40016/98, 24 July 2003) at [40] ECtHR, among other cases from the ECtHR, to be discussed below.

therefore, this is perforce a matter for the Government to consider, not for the Court to address. Nonetheless, that the Respondents would of course respond to any ruling of the Court to the contrary, with respect for good administration and the rule of law.

10. It is of course common ground, that the starting point for the analysis is that the Bill of Rights, being a part of the Constitutional Order in Council and so an Act of the United Kingdom Parliament, is part of the Supreme Law of the Islands. In the Cayman Islands, the Legislature's freedom to legislate is therefore constrained to the extent that it must not pass legislation that is inconsistent with or repugnant to the fundamental rights and freedoms enshrined and protected by the Constitution.[7]

11. This is expressly settled by section 124 of the Constitution which defines the "Legislature" as "the Legislature *established by section 59(1)*" and further by section 59 itself which, even while establishing the Legislature, does so in the following terms:

> "*59(1) There shall be a Legislature of the Cayman Islands which shall consist of Her Majesty*[8] *and a Legislative Assembly.*
>
> *(2) Subject to this Constitution, the Legislature may make laws for the peace, order and good government of the Cayman Islands."*
> [Emphasis added.]

The 2008 amendment of the Marriage Law

12. This case arises against the background of the Marriage Law having been amended, shortly before the introduction of the Bill of Rights, to express a definition of marriage[9] . In this regard, section 2 of the 2008 Marriage (Amendment) Law provided:

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[7] As is the case of the Constitutional relationships between the U.K Parliament and the other British Overseas Territories. See, for instance, in the case of Bermuda - *AG of Bermuda v Roderick Ferguson (and others)*, Civil Appeal Nos 11 an 12 of 2018, Judgment of the Bermuda Court of Appeal, delivered on 23 November 2018, per Baker P. at [7].

[8] Acting through Her Representative, the Governor.

[9] By the Marriage (Amendment) Law, 2008 (Law 15 of 2008), coming into effect on 27 October 2008.

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

13. Prior to this amendment, the Law was administered on the basis of what was taken to be the common law understanding that marriage indeed meant a union between a man and a woman but as classically stated by Lord Penzance[10], as also being an exclusive union for life:

> *"I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others."*

The background to the 2008 Amendment Law

14. It is clear, from the Hansard records of the debate upon the second reading of the Bill for the Amendment Law[11], that the statutory definition of marriage was regarded as important for reasons expressly aimed at excluding same-sex couples from the institution of marriage.

15. It is also evident from Hansard that the 2008 Amendment was passed in order to promote and protect a view of marriage based on the proponents' understanding of the Islands' religious, moral and cultural heritage.

16. In his arguments on behalf of the Respondents, Professor Jowell QC referred to and relied upon these latter concerns as justification for the Respondents' position even while, in his final submissions, expressly on behalf of the Respondents "*distancing ourselves*" from any arguments based on grounds of morality[12]. He submitted that it is the duty of this Court, in

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[10] As classically stated by Lord Penzance in *Hyde v Hyde and Woodmansee* (1865-69) L.R. 1 P&D 130 at 133.

[11] Official Hansard Report Electronic Version 2008/09 Session, Friday, 5 September 2008 pp 326-341 (referenced by both sides in the arguments). I note here that while the Respondents at [84] of their written submissions say that reference to the Hansards is impermissible for discerning the legislative intent behind the 2008 Amendment, they necessarily rely upon the debate in the Assembly (as well upon the constitutional consultation process)in support of the legislative policy objectives for which they contend.

[12] Pointedly disagreeing with those views presented by the Cayman Islands Ministers Association in their uninvited "Amicus Brief", about which further comments will be made below.

its construction of the Bill of Rights, to have regard for and to defer to the democratic will of the Caymanian people, as manifest in the Legislature's intention to preserve and protect their traditional view of marriage as a sacred union – one which can be entered into only between a man and a woman.

17. The idea of legal recognition for same-sex civil unions was also discussed but heavily discountenanced during the debate on the 2008 Amendment to the Marriage Law[13].

18. This steadfast refusal of the Cayman Legislature to provide any kind of legal recognition for same-sex unions, now more than a decade after the introduction of the Bill of Rights, is an important part of the background against which this action is brought.

19. In this regard it is appropriate here to record that the Courts must, of course, accord due deference and respect for the views of the members of the Legislature who are the democratically elected representatives of the people of the Cayman Islands. Accordingly, the Courts will not second guess their views expressed on matters of Caymanian tradition, culture or social normative standards or beliefs. To the extent that those views become embodied in local legislative policy and measures which are in keeping with the Constitution, the Courts are obliged to recognize and enforce them. But the problems which this case presents for resolution by this Court – and which it is therefore obliged to resolve – are quintessentially constitutional in nature.

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[13] For instance, at page 333 1st column – page 334 2nd column per Mr. Cline A Glidden Jr, the Third Elected Member for the District of West Bay, referring to civil partnerships as "other ramifications and possibilities that could go against the norms" And at page 336, 1st column The Hon Alden McLaughlin referred to "*the spectre of civil unions*" and later, at 2nd column "*Now, the only way any of that could impact the Cayman Islands would be one of two ways: The first, and obvious, is that if the Legislative Assembly came to the view that this was right and proper and passed something akin to the Civil Partnerships Act in the United Kingdom and gave persons of the same sex relationships those rights and privileges. I do not think, at least in the presently constituted House, there is much fear of that. The other way would be if the United Kingdom extended to the Cayman Islands the provisions akin to those of the Civil Partnerships Act. Madam Speaker, when Minister Meg Munn was here earlier this year, and, indeed, when she returned to the UK and gave evidence before the Foreign Affairs Committee, she gave assurances that the UK had no intention or desire to apply the Civil Partnerships provisions or extend them to the Cayman Islands.*"

20. They give rise to obvious questions of construction, first among these being the question whether the Marriage Law as a "(pre)-existing law" of the Legislature, is in conformity with or repugnant to the Constitution.

21. Equally, the question of construction arises whether the ongoing refusal (or from the perspective of same-sex couples, failure) of the Legislature, to provide a legal framework for the recognition and protection of same-sex civil unions, conforms with the Constitution.

22. As to the question of repugnancy or conformity of the Marriage Law (as amended) (hereinafter "the Law"), Professor Jowell QC acknowledged on behalf of the Respondents, that it is a Law which was in existence on the date when the Constitutional Order came into effect[14] and so was among the "existing laws" within the meaning of section 5 of the Constitutional Order. In this regard, section 5, subsection (1) of which is primarily relied upon by the Petitioners for the provision of the remedies which they seek, provides as follows:

> "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 this 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.* [Emphasis added.]
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> *(2) The Legislature may by law make such amendments to any existing law as appear to it to be necessary or expedient for bringing that law into conformity with the Constitution or otherwise for giving effect to the Constitution; and any existing law shall have effect accordingly from such day, not being earlier than the appointed day, as may be specified in the law made by the Legislature.*
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> *(3) In this section "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and*

[14] The "appointed day" - 6 November 2009, appointed by Proclamation No.4 of 2009, published on 23 October 2009 in Extraordinary Gazette No 69/2009.

instruments made under them) having effect as part of the law of the Cayman Islands immediately before the appointed day."

23. The principles laid down by section 5 of the Constitutional Order are of fundamental importance to the task presented to this Court. They reflect the relationship between colonial legislatures and the Imperial Parliament which have been entrenched in British Constitutional law for more than 150 years, ever since the Colonial Laws Validity Act 1865 which states, in section 2 that:

> *"Any colonial law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such Act of Parliament, or having in the colony the force and effect of such Act, shall be read subject to such Act, order, or regulation, and shall, to the extent of such repugnancy, but not otherwise, be and remain absolutely void and inoperative."* [Emphasis added.]

24. It is acknowledged that the Constitution Order (including the Bill of Rights which it contains and entrenches), is an Order made under the authority of an Act of Parliament; viz: the West Indies Act 1962[15]. Accordingly, in keeping with settled constitutional principle, the duty of ensuring conformity with the Constitution – as the words in emphasis from section 5(1) make plain – is a mandatory duty of the Court when called upon to interpret, pronounce and enforce the meaning of the Constitution[16].

25. As already noted, among the very sensitive questions of fundamental rights and obligations which arise, is that of the freedom of conscience and religious beliefs. Given the deference which should be accorded to the views expressed on this subject in the Legislature, it is

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[15] Pursuant to the powers vested in Her Majesty the Queen in Council under sections 5 and 7- see the Preamble to the Constitution Order itself.

[16] Right of Access to the Courts for the resolution of claims arising under the Bill of Rights is also expressly provided by section 26 (1) under the heading "Enforcement of rights and freedoms" in these terms:

"(1) Any person may apply to the Grand Court to claim that government has breached or threatened his or her rights or freedoms under the Bill of Rights and the Grand Court shall determine such an application fairly and within a reasonable time."

just as well to lay down the marker here that this Court, when addressing this issue from the point of view of the constitutional principles and for reasons which will be more fully explained, may not do so simply by deferring to views expressed in the Legislature, or for that matter, those of the parties or even its own views. Rather, the task at hand requires strict adherence by the Court to the requirements of the constitutional principles.

The factual background to the Petitioners' case

26. Chantelle Day, the First Petitioner, is Caymanian. She was born in the Cayman Islands where she was raised by Caymanian parents. She became, in all respects, a well-integrated member of Caymanian society, manifest, for instance, by her representation of the Islands at the Commonwealth Games. She is a qualified lawyer and employed by a Cayman Islands law firm. She attests to being in love with and wishing to marry the Second Petitioner, Vickie Bodden Bush.

27. Vickie Bodden Bush is a dual citizen of the United Kingdom and Honduras. She was born in the Bay Islands of Honduras and moved to the Cayman Islands while in her 20's, to live with her family, which as both of her surnames suggest, has deep roots in Caymanian society. She has lived between the Cayman Islands and the United Kingdom for the past 20 years but does not have permanent residency or BOTC[17] status in the Cayman Islands. Although having undertaken formal training as a nurse, she is unassured of being able to obtain employment in that or any other field in the Cayman Islands, in the absence of legal recognition of her relationship with the First Petitioner. She attests nonetheless, to being in love with and wishing to marry the First Petitioner, Chantelle Day.

[17] British Overseas Territory Citizenship.

Formation of a family unit

28. The Petitioners met in the Cayman Islands, seven years ago, in 2012. They attest that throughout the course of 2013 they fell in love, began living together as a couple and formed a stable, committed and loving relationship. But practical problems arose in the Cayman Islands due to the lack of any legal recognition available for same-sex couples, most acutely at the time, the resultant tenuous nature of Vickie Bodden Bush's immigration status and the related uncertainty about the right to live and work in the Cayman Islands.

29. As a result, between September 2014 and August 2018, the Petitioners lived away from the Cayman Islands. They lived in Dublin, Ireland for a period of time, then moved to London, England. In both Ireland and England, the Petitioners each had the right to live and work by virtue of being British Citizens.

30. In 2016, whilst still living in Ireland, the Petitioners began acting as de facto guardian to a young girl "A", pursuant to an agreement with A's biological mother. A moved to London with the Petitioners later the same year. In July 2017, the Petitioners obtained indefinite leave for A to remain in the United Kingdom and immediately proceeded with an adoption application.

31. The laws of England, unlike those in the Cayman Islands[18], do not prohibit same-sex couples from adopting a child on grounds of sexual orientation, gender or marital status. The Petitioners' application to the Court in England for adoption of A as their daughter, was granted on 1 June 2018. The Petitioners accordingly, regard and treat A as their lawful daughter.

[18] The Adoption of Children Law 2003 which, in allowing single persons or "spouses" to adopt, defines spouses in terms of the context of marriage as defined in the Marriage Law. (The Adoption of Children Law, 2013 (Law 7 of 2013)). Note: This Law is only part in force – Definition of "child" Commencement Order GE74/014 s2.

32. The First Petitioner proposed to the Second Petitioner in September 2017, and she accepted, and so the Petitioners became engaged to be married. As the First Petitioner attests[19], the Petitioners decided that they would return to the Cayman Islands in 2018 to be close to home, to raise A within their community of family and friends and to resume the First Petitioner's career path with her Cayman-based employer.

33. Further, and pertinently, that they strongly prefer to be married in the Cayman Islands because, as expressed by the First Petitioner[20]: "*it would be demoralizing to have married abroad*[21] *and have to return to Cayman to fight for our marriage to be recognized*".

34. The evidence shows that from September 2017 to April 2018, the Petitioners sought, with the help of their attorneys, to work with the Governor's Office to encourage a reading of the Marriage Law[22] which would allow for same-sex marriage or, alternatively, legislative change.

35. This included a letter of 1 December 2017 from Mr. Tonner QC on behalf of the Petitioners to Her Excellency the Governor, Mrs. Helen Kilpatrick in which an explanation of the Petitioners' legal arguments was set out "*in order to find a non-litigious solution to the discrimination faced by (the Petitioners).*"

36. Under the heading "Executive Summary", it offered the following response to a request from the Governor's Office (as Representative of Her Majesty's Government), that the Petitioners set out the various options which they perceived to be available in ensuring that their partnership rights are guaranteed:

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[19] In in her First Affidavit at paras 20-42.

[20] At para 15 of her First Affidavit

[21] Marriage between same-sex couples being now authorized in England since the advent of the Equal Marriage (Same Sex Couples) Act 2013.

[22] The 2010 Revision as amended in 2008 by the Marriage (Amendment) Law 2008, discussed above. (hereinafter "the Law")

"*We summarize the position as follows:*

1. *The Cayman Islands is obliged under the European Convention (on) Human Rights (ECHR) to allow Chantelle and Vickie access to an institution that provides the same package of rights as marriage (e.g. via marriage itself or civil partnership). The current situation is clearly a violation of the ECHR.*

2. *The United Kingdom is ultimately responsible for the Cayman Islands' breaches of the ECHR and for remedying them;*

3. *Civil partnership is a bare minimum. Marriage is the standard to be achieved. If the issue is litigated, arguments can be made that under domestic Caymanian law, marriage must be offered to remedy the inequality that exists in the Cayman Islands. Indeed, the UK Government's position is that all UK Citizens should be entitled to marry in their home jurisdiction (as has been stated in respect of marriage inequality in Northern Ireland).*

4. *There are four options available to remedy the breach*

    a. *Introduce by Order in Council the equivalent of the UK's Equal Marriage (Same Sex Couples) Act 2013;*

    b. *Introduce by Order in Council the equivalent of the UK's Civil Partnership Act 2004; or*

    c. *Chantelle and Vickie apply to the Governor for a special licence to marry and the application is granted on the basis that the Governor has an obligation under Section 24 of the Bill of Rights and section 5 of the Cayman Islands Constitutional Order (CICO) to construe the Marriage Law in a way which gives effect to the Constitution and the Bill of Rights; or*

    d. *Chantelle and Vickie apply to the Governor for a special licence to marry and the application is refused thereby forcing Chantelle and Vickie to litigate*".

37. By any objective measure, it must be regretted that such efforts, at finding a non-litigious resolution, did not bear fruit.

38. Eventually, on 12 April 2018, the Petitioners attended in person at the Cayman Islands Government General Registry where they applied for a special licence to marry. A "special

licence" in this sense was needed, as at the time they both resided outside the Cayman Islands.[23]

39. On 13 April 2018, the Deputy Registrar of the General Registry[24] (the Second Respondent), refused to grant a special licence to marry for the following reasons:

> *"In the Cayman Islands, the ability to marry is restricted to opposite-sex couples by virtue of the definition of "marriage" in section 2 of the Marriage Law (2010 Revision) as "the union between a man and a woman as husband and wife". A special marriage licence can therefore only be granted to solemnize a marriage between a man and a woman....*
>
> *As the proposed same-sex union between the above individuals would not fall within the definition of "marriage" under section 2 of the Law, a special marriage licence cannot be granted for the purpose of solemnizing that union. The application is therefore refused."*

Commencement of these proceedings

40. Against that background these proceedings were filed, first in Cause 111 of 2018 on 31 July 2018 by grant of leave for judicial review of the Deputy Registrar's (and by implication the Governor's) decision to refuse a special licence. Subsequently, on the 28 September 2018, the Petitioners also filed a constitutional challenge pursuant to section 26 of the Bill of Rights (Cause number 184 of 2018) (the "Petition"), which seeks a declaration that the Cayman Islands has violated their rights enshrined by the Bill of Rights and asking for that breach to be remedied[25].

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[23] Section 22 of the Marriage Law authorizes the Governor in this regard.

[24] Acting as the Governor's delegate.

[25] On the 5 October 2018 both proceedings were consolidated by order of this Court and directions given for the filing and service of affidavits intended to be relied upon and for the listing of the matter for trial.

The institution of marriage

41. The legal and conceptual basis for the Petitioners' claim for a remedy by the State, is that in the Cayman Islands, as throughout the rest of the democratic world, the institution of marriage is a secular one, controlled by the State. This the State does through the regime of the Marriage Law. Accordingly, through the institution of marriage, two people may contract as equals, acquire rights and, in many instances mandated by law, come to owe duties and obligations as equals. Thus, through the institution, the State grants them many rights and obligations which are unavailable by any other means.

Freedom of conscience

42. To the extent that the 2008 Amendment to the Marriage Law was passed to preclude, on religious rounds, the right of same-sex couples to marry, the Petitioners' submit that it infringes their right to freedom of conscience. This right is enshrined in section 10 of the Bill of Rights which provides, under the heading "Conscience and religion" as follows:

> "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" [emphasis added]*

43. From the case law, it will be immediately apparent that the right to freedom of conscience is engaged by the denial to same-sex couples of the right to marry. Freedom of conscience encompasses not only freedom of religious belief and practice, it also encompasses freedom from restraint or coercion from others to act in a way which is contrary to one's

own conscience and beliefs. This principle falls to be applied in this case in circumstances where no countervailing limitation of the kind allowed by section 10(6) of the Constitution is identified or relied upon by the Respondents.

The Law and section 14(1) of the Bill of Rights

44. The next logical question is whether the definition of marriage as it now stands in the Law, must be regarded as excluding further development of the institution of marriage by reference to the Constitution itself, the Supreme Law.

45. Professor Jowell's argument on behalf of the Respondents is ultimately that section 14 (1) is included in the Bill of Rights as the *lex specialis*, not only as an express recognition and protection of the right of opposite-sex couples to marry but also as being utterly preclusive of any such right or the development of any such right, for same-sex couples. I set out section 14(1) here again for convenience:

> *"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".*

46. Professor Jowell prefaces his argument for the interpretation of section 14 (1) by reference to the "*comprehensive negotiation process*" leading to the 2009 Constitution. This process he said resulted in the special wording of section 14 (1) which, for the avoidance of doubt, adds the explicit limitation that marriage must be between members "of the opposite sex" (together with the further limitations that persons seeking to enter into marriage must be unmarried and of marriageable age). He submits that the result of this long and comprehensive negotiation process should be respected and fidelity paid to what is the clear intent that the right to marry be confined, rightly or wrongly, to persons of the opposite sex. The negotiation process will therefore be examined below.

47. He submitted that the Petitioners' claim is misconceived as they say that section 14(1) only requires Government to "respect" the right to marriage, in the form of a guarantee (albeit for persons of the opposite sex only). And that equally misconceived, is their argument that the right of members of the same sex to marry is found in different parts of the Bill of Rights, in particular section 9 (private and family life) as read with section 10 (freedom of conscience and religion) and section 16 (freedom from discrimination).

48. He submitted that if the man and woman in the street were asking who is entitled to marry, they would not turn to the sections in the Bill of Rights on private life, conscience or discrimination. They would look at the table of contents and see that "marriage" is set out in section 14. Further, that the section rightly or wrongly, does guarantee the right to marriage with one hand, but then, with the other hand, excludes from it the under-aged, (as do Article 12 of the European Convention on Human Rights ("the Convention") and Article 23(2) of the ICCPR[26]) as well as those already married and members of the same sex.

49. Professor Jowell further submitted that it is not permissible to provide a right which is clearly forbidden by the intent of section 14(1), by locating that right in other more general provisions of the Constitution. That would be unorthodox, he said. In this regard reliance was also placed upon the leading ECtHR case on this matter, *Schalk & Kopf*[27]:

> *"101. Insofar as the applicants appear to contend that, if not included in Article 12 [the right to marry] the right to marry may be derived from Article 14 [equality of treatment] taken in conjunction with Article 8 [the right to private and family life], 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 reached above, namely, that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access*

[26] The International Covenant on Civil and Political Rights, adopted by the United Nations General Assembly on 16 December 1966.

[27] *Schalk and Kopf v Austria* (App 301414-04), ECHR 22 November 2010 and see further below.

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."

50. Thus, it is submitted by the Respondents, that the clear limitation in the clause governing marriage could not possibly be evaded, side-stepped or circumvented by more general clauses. The governing clause about marriage, realistically and practically, is section 14(1). In the case of *Hamalainen*[28], the ECtHR held the equivalent Article 12 of the Convention to be "*the lex specialis for the right to marry*". It clearly, they argued, excludes same-sex marriage which cannot then be found in any other section of the Constitution, goes the submission. Thus, there is "*differentiation*" said Professor Jowell, but it is constitutional differentiation which has great force and gravity – other provisions of the constitution cannot be brought into play, to in effect, judicially review a *lex specialis* of the Constitution itself.

51. However, as will be seen from the case of *Oliari v Italy* and other cases[29] to be considered below, the ECtHR has itself declared that member states have an obligation to respect and provide a legal framework for the protection of same-sex unions. Moreover, Professor Jowell went on frankly to admit that this treatment of section 14(1) for which he argues would also mean, given its contended preclusive effect, that the conjunctive right to found a family of which section 14(1) also speaks, must be confined only to married couples of the opposite sex. The answer, he submitted, is surely that unmarried couples or single parents are not indeed given a right to found a family. They have the right to marry, provided they meet the criteria under section 14(1). They also have the right to "family life" under section 9 of the Bill of Rights and the right to any benefits or rules under relevant

[28] (Below)
[29] (Below)

common law or statutory provisions; as do same-sex couples. But in contrast to unmarried or single persons, same-sex couples do not have a right to marry for the reasons already submitted above. The extent to which their right to family life, under section 9 of the Bill of Rights or under Article 8 of the Convention, includes the right to an arrangement which recognizes civil unions is a different matter which, for reasons already discussed and to be further discussed below, must, say the Respondents, be left to government to decide.

52. While only guardedly admitted by Professor Jowell as set out above, this construction of section 14(1) – as a provision which not only guarantees the rights to marry and found a family for heterosexuals but also denies it completely for homosexuals, and moreover, which precludes for them the founding of those rights in other provisions which might otherwise be open to that construction - faces two obvious problems.

53. First, the delimiting construction arises only as a matter of implication because no such delimiting words are expressed in section 14(1) itself. Yet, had the British Parliament so intended in the enactment of the Constitution, section 14(1) could simply have included the word "only" before "a person of the opposite sex".

54. Secondly, and notwithstanding the *lex specialis* argument[30] the contended meaning is plainly discriminatory because on its face it would preclude access to same-sex couples on the basis only of their sexual orientation. It follows, that in order to comport with section 16 of the Bill of Rights, the contended construction must be grounded in justification. As will be further examined below, it cannot suffice for a blatantly discriminatory construction to be advanced simply on the basis that that is the clear intention of those who took part in the constitutional negotiations or on the purely technical argument of a "*lex specialis*". That

[30] As derived from *Schalk and Kopf* and *Hamalainen* (both above).

would itself, be a wholly unorthodox approach to construction. The analysis must therefore continue by reference also to the other constitutional provisions invoked by the Petitioners, and ultimately to engage the justification analysis, to see whether this discriminatory argument of the Respondents is capable of being upheld. More will therefore need to be said also about the constitutional negotiation process in that context.

The right to private and family life and the right to found a family

55. Section 9(1) of the Bill of Rights provides as follows:

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

56. Section 9(3) then prescribes the closed list of limitations upon those rights protected by section 9(1), in the following familiar terms:

> "*(3) Nothing in any law or done under its authority shall be held to contravene this section to the extent that it is reasonably justifiable in a democratic society –*
>
> *(a) In the interests of defence, public safety, public order, public morality, public health, town and country planning, or the development or utilization of any other property in such a manner as to promote the public benefit;*
>
> (b) *For the purpose of protecting the rights and freedoms of other persons...*"

57. It will be seen that section 9(1) recognizes and protects four distinct rights: respect for private life, respect for family life, respect for the privacy and security of a person's home

and respect for the privacy of a person's correspondence. The Petitioners rely on the first two of these four rights.

58. They say that section 9 of the Bill of Rights is violated due to the State's failure to fulfill its positive obligation to provide same-sex couples with access to an institution that recognizes their relationship and which provides them with the bundle of rights and obligations available to opposite-sex couples. This is a failure to provide the bare minimum required by the Convention and hence by the Bill of Rights itself.

59. This bare minimum they say, could have been met by the State prior to these proceedings being brought either by its opening the institution of marriage to same-sex couples or by the creation of an equivalent institution, such as one modelled on civil partnerships in England and Wales.

60. As their primary position, the Petitioners submit that section 9 of the Bill of Rights is violated due to the State's failure to open the institution of marriage itself to same-sex couples. In this respect, the Petitioners invite the Court to have regard to and be persuaded by comparative case law[31], not only from the ECtHR[32] but from the United States Supreme Court[33], South Africa[34], Canada[35], Bermuda[36] and the Inter-American Court of Human Rights[37].

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[31] By reference to the approbation of this approach by the Privy Council in *Reyes v R, (above)* where (at [26]) in interpreting the Belize Constitution, Lord Bingham referred to the fact that decided cases from around the world gave valuable guidance on the proper approach to the Court's task of constitutional interpretation and referred to the importance of ensuring so far as possible that a constitution conforms to *"international standards of humanity and individual rights."*

[32] Which has not yet gone so far as to declare that the Convention imposes an obligation on member states to recognize same-sex marriages, only civil partnerships, vide *Oliari* below.)

[33] *Obergefell [ ]*

[34] Fourie and Bonthuys []

[35] *Halpern* (above)

[36] *Godwin and DeRoche []*

[37] *Matthews* []

61. It is convenient to start therefore, by seeing what the European Court of Human Rights (the ECtHr) has had to say about the rights to private life and family life in relation to the issue of same-sex relationships.

62. The ECtHR, in the recent case of *Oliari*[38], held these rights, as similarly expressed in Article 8 of the Convention[39], to be multi-faceted, including the imposition of a positive obligation on the State to ensure effective respect and protection for them. And that this positive obligation required the Italian State, at minimum, to enact legislation that ensures the recognition and enables the enjoyment of the rights.

63. The Petitioners therefore submit that the case of *Oliari* provides a complete answer to the question as to whether section 9(1) of the Bill of Rights has been violated, as the case concerned Italy's lack of any institution available to same-sex couples, as is the case in the Cayman Islands today.

64. Very significantly also, it must be noted that here the ECtHR also accepted that Art. 8 is engaged both as a standalone right and in conjunction with Art. 14 – the right to freedom from discrimination. By parity of reasoning, so therefore are section 9 and section 16 of the Bill of Rights to be read disjunctively as well as in conjunction with each other.

65. This carries the unavoidable and important implication, that in the exercise of the right to family life protected by section 9, one must be allowed to do so by the State, free from any form of unjustified discrimination prohibited by section 16.

66. Indeed, from the judgments it can be seen that multiple, overlapping rights are engaged by the State's exclusion from the important societal institution of marriage on the basis of identity (sexual orientation). These rights, I emphasize for the sake of clarity, include the

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[38] *Oliari v Italy* (2017) 65 EHRR 26.

[39] Viz: *"Everyone has the right to respect for his private and family life, his home and his correspondence."*

rights to private life and family life, "*premised on fundamental notions of human dignity, equality and freedom*".

67. In *Fourie and Bonthuys*,[40], the Constitutional Court of South Africa stated per Sachs J:

> "[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.....*"

68. In *Obergefell*[41] the United States Supreme Court reflected upon the complexities and interconnectedness of the rights in these terms:

> "*...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. See Lawrence, supra, at 574.*
>
> *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." Zablocki, supra, at 386.*
>
> *Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfills 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." Goodridge, 440 Mass., at 322, 798 N.E. 2d, at 955".*

69. The right to found a family is also undeniably involved, whether regarded as a conjunctive right with the right to marry recognized by section 14(1) of the Bill of Rights or as an

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[40] Above at [48]

[41] Obergefell v Hodges 576 U.S (2015), at pp12 and 13, per Justice Kennedy (for the majority).

essential and necessary implication of the section 9 rights to respect for private and family life.

70. In this regard, the Petitioners say that section 14(1) addresses two separate rights: a right to marry and a right to found a family. The Respondents for their part, as already discussed, would read section 14(1) as recognizing a single conjunctive right such that, it must be frankly stated, the State would have no obligation to recognize the right to found a family outside of the context of a heterosexual marriage.

71. The implications of such a construction as that contended by the Respondents, may not be endorsed by this Court given the realities of a pluralistic society in which many families are founded with children who are nurtured and cherished, outside of the context of marriage. The rights to private and family life of such families are no less entitled to respect and protection by the State than any others.

72. But this case is not about such families. This case is about the right of the Petitioners (and other same-sex adults) who wish to found a family within the context of marriage for all the well-established reasons why it might be beneficial to do so.

73. The Petitioners say that the denial by the State of their triangular relationship between themselves as a same-sex couple and their adopted child amounts to a violation of this right to found a family, whether it is to be regarded as recognized by section 14(1) or section 9 of the Bill of Rights. By "*triangular relationship*" it is meant that each of these three people must be legally recognized as being connected to the other two.

Sections 16: Prohibition of discrimination and section 14(1): "definition" of marriage.

74. I begin by noting the central premise of the Petitioners' arguments here in relation to section 14(1). It is that section 14(1)'s guarantee to every unmarried man and woman of a

right to marry someone of the opposite sex, does not preclude locating elsewhere in the Constitution, the Petitioners' right to marry. Otherwise, the section 14(1) definition would be allowed to operate in a way that is unjustifiably discriminatory against them, on the basis only of their sexual orientation.

75. For the reasons which follow upon an examination of the full implications especially of the section 16 right to freedom from unjustifiable discrimination in the enjoyment of all rights enshrined by the Bill of Rights, I find this premise of the Petitioners' case to be well founded and requiring of recognition and enforcement under the Constitution.

"Other status"

76. The Petitioners submit and it is well established that "*other status*" as a basis for discrimination against a person is a prohibited ground of discrimination. And that it is well-established that the term "*other status*" incorporates into non-discrimination clauses an obligation not to discriminate on the ground of sexual orientation.

77. So, for example, the ECtHR in *Salgueiro da Silva Mouta v Portugal*[42] held that:

> *"...the Court can only conclude that there was a difference in treatment between the applicant and M's mother, which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention."*

78. The Petitioners submit that they are in an analogous position to opposite-sex couples who wish to marry. The Respondents for their part, without explaining why, simply assert[43] that same-sex couples are not similarly situated (ie: not in an analogous position) for the

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[42] (2001) 31 EHRR 47 at [28] where the applicant, relying on Article 8 of the Convention (the right to respect for family life) in conjunction with Article 14 (the equivalent of section 16), successfully complained that the Lisbon Appeal Court had granted custody of his daughter to his former wife rather than to him purely because of his sexual orientation.

[43] In the Respondents' List of Issues – response to Issue 7.

purposes of marriage by virtue of the meaning of section 14(1) of the Bill of Rights and that therefore, there is no differential treatment on the ground of sexual orientation.

79. But it does appear as the Petitioners submit, that the Respondents' position, in seeking to deny the Petitioners access to the institution of marriage, is tantamount to asserting that either:

(i) homosexual relationships are lesser than heterosexual relationships so that they are not analogous. As to this, even while accepting that "*same-sex couples and married, opposite-sex couples are, for many (if not most purposes), properly regarded as being in an analogous situation*", the Respondents go on to argue that "*it does not follow that gay and straight , married couples are for all purposes similarly situated*[44]", or

(ii) The definition itself of marriage – as a union between a man and a woman - *per se* defeats the analogy.

80. But Mr. Fitzgerald also relied upon dicta from the ECtHR from the very same cases cited by Professor Jowell which, even while confirming that the discriminatory treatment must fall within the ambit of another right protected by the Convention, also confirms that that other right need not itself be breached. For example in *Schalk and Kopf,* the ECtHR described how Article 14 is engaged, at [89] :

> "*89. As the Court has consistently held, art 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of art. 14 does not presuppose a breach of those provisions- and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter*".

[44] See paragraphs 109- 116 0f their skeleton arguments

81. Accepting that this is the interpretation to be also applied to section 16 of the Bill of Rights, the Petitioners say that "*the facts at issue*" in this case show that they are unjustifiably discriminated against and that that discrimination is felt in conjunction with a number of distinct rights protected by the Bill of Rights:

a) section 9 (the rights to private life and family life)- that these rights are engaged for the reasons discussed above, when section 9 is pleaded as a standalone right;

b) section 10 (freedom of conscience) for the reasons examined above, when section 10 is pleaded as a standalone right;

c) section 11 (freedom of expression), due to the overlap in protection between this right and the right to privacy, and as the State prevents the Petitioners from expressing their commitment via a State-sanctioned institution;

d) section 13 (freedom of movement), due to the restrictions placed upon the Second Petitioner's and the Petitioners' daughter's rights to remain in the Cayman Islands, due to lack of recognition of their relationship by the State;

e) section 14(1) (as it protects the right to found a family), for the reasons already discussed and to be discussed further below, when the section 14 right to found a family is pleaded as a disjunctive standalone right;

f) section 15 (freedom from interference with the peaceful enjoyment of property), due to them being denied the same recognition of conjugal rights to property as couples whom the State allows to marry; and

g) section 17 (protection of the child's right to family and parental care), due to the State not recognizing the triangular relationship between the Petitioners and their daughter.

82. Accordingly, as the Petitioners submit and I am compelled to accept, they are in a position analogous to opposite-sex couples in their need for protection and that the absence of such protection is felt in relation to the many rights to which they are entitled under the Bill of Rights. I am also satisfied that the Respondents may not rely on the ECtHR decisions in *Oliari, Schalk and Kopf* or in *Chapin and Charpentier (all above),* to exclude the Petitioners from the institution of marriage on the asserted basis that the Government has the purported margin of appreciation - to the relegation of the Court's adjudication process – over the admission of the Petitioners to the institution of marriage or over the introduction of an alternative institution.

The justification analysis

83. As already noted, the question whether the Respondents can justify the discriminatory treatment of the Petitioners therefore becomes unavoidable. Here especially, the case law from around the common law world is instructive. This is despite Professor Jowell's admonition that comparative case law is of limited applicability because none of the jurisdictions from which these cases come has a marriage clause in their Bills of Rights which operates, as section 14(1) is said to operate, to preclude access to the institution of marriage for same-sex couples.

84. The fundamental flaw in that argument as I see it, is that it completely overlooks the significance of the other provisions of the Bill of Rights upon which the Petitioners rely. Even in the absence of a provision which enshrines the right to marry (let alone one which could be seen as enshrining that right only for heterosexuals), we see that the Courts from around the common law world refuse to countenance discriminatory treatment in the enjoyment of rights, in the absence of clear justification.

85. The case law from the ECtHR itself makes it clear that differences based on sexual orientation require "*particularly serious reasons by way of justification*", as do differences based on race, sex and (arguably) religion; it will therefore only be in exceptional circumstances that the State can justify treating a person or persons differently on grounds of their sexual orientation (*Gas v France*, above at [59]; *Oliari* above, at [143]).

86. As discussed above, it is no coincidence that the State-controlled institution of marriage has evolved to erase discrimination on each of the other protected characteristics. It might well be seen therefore as anomalous, that discrimination has not similarly been erased on the ground of sexual orientation in the Cayman Islands.

87. Further, it is no coincidence that judgments on same-sex marriage from other common law jurisdictions are abounding with references to dignity. It is no coincidence, too, that these judgments roundly reject "tradition" as a justification and, in doing so, refer back to past injustices such as segregation and apartheid that were once grounded in so-called 'tradition".

88. In *Fourie and Bonthuys* (above), the Constitutional Court of South Africa cited its earlier judgment in *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (the so-called Sodomy case)* (also above) to reiterate that integral to the Court's task was the protection of the dignity of the same-sex applicants (at [54]):

> *"[54] ....*
> *The message and impact are clear. Section 10 [the right to dignity] of the Constitution recognizes and guarantees that everyone has inherent dignity and the right to have their dignity respected and protected. The message is that gays and lesbian lack the inherent humanity to have their families and family lives in such same-sex relationships respected or protected. It serves in addition to perpetuate and reinforce existing prejudices and stereotypes. The impact constitutes a crass, blunt, cruel and serious invasion of their dignity. The discrimination, based on sexual orientation, is*

severe because no concern, let alone anything approaching equal concern, is shown for the particular sexual orientation of gays and lesbians".

The judgment adds that *"protecting the traditional institution of marriage as recognized by law may not be done in a way which unjustifiably limits the constitutional rights of partners in a permanent same-sex partnership".*

89. Likewise, the South African court's conclusion was framed in terms of dignity, at [78]:

> "[*78] Sections 9(1) and 9 (3) [the non-discrimination clause] cannot be read as merely protecting same-sex couples from punishment or stigmatization. They also go beyond simply preserving a private space in which gay and lesbian couples may live together without interference from the state. Indeed, what the applicants in this matter seek is not the right to be left alone, but the right to be acknowledged as equals and to be embraced with dignity by the law... Accordingly, taking account of the decisions of this Court, and bearing in mind the symbolic and practical impact that exclusion from marriage has on same-sex couples, there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree."*

90. Nor did the Constitutional Court of South Africa shy away from comparisons with the indignity of race-based exclusions (at [74]):

> *"... the antiquity of a prejudice is no reason for its survival. Slavery lasted for a century and a half in this country, colonialism for twice as long, the prohibition of interracial marriages for even longer, and overt male domination for millennia. All were based on apparently self-evident biological and social facts; all were once sanctioned by religion and imposed by law; the first two are today regarded with total disdain, shame or embarrassment. Similarly, the fact that the law today embodies conventional majoritarian views in no way mitigates its discriminatory impact. It is precisely those groups that cannot count on popular support and strong representation in the legislature that have a claim to vindicate their fundamental rights through application of the Bill of Rights."*

91. Similarly, the conclusion of the United States Supreme Court in *Obergefell* (above) was also expressed in terms of dignity [at page 28]:

> "*No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a*

love that may endure even past death[45]*. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.*

The judgment of the Court of Appeals for the Sixth Circuit is reversed. It is so ordered".

Conclusions on the justification analysis.

92. While perhaps only an unintended consequence of its religious aim of maintaining marriage as the exclusive preserve of the heterosexual, the effect of the 2008 Amendment to the Marriage Law has been to impose indignity, inequality of treatment and inequality of legal status upon same-sex couples.

93. No justification has been established to sustain this severe form of discrimination.

94. The possible desires of the heterosexual majority to maintain a perceived tradition of marriage of its liking, or to impose dominant religious beliefs on the homosexual minority, cannot, as the extensive survey of the case law has shown, constitute valid justification.

95. All sorts of iniquities have existed in the name of tradition. Tradition alone cannot form a rational basis for a law, nor for the promotion and maintenance of a discriminatory legal system of rights. The "ancient lineage" of a discriminatory classification does not make it rational. Rather, the State must have an objectively rational basis for the "traditional" aim which it seeks to advance, in order to justify discrimination, apart from the tradition itself.

96. And assuming that privileging heterosexual marriage is important for the preservation of stable environments for procreation and child-rearing, the denial of the right to marry to

[45] A reference to the fact that by the time the case came before the Court, partners of some of the applicants had died but the surviving partners nonetheless wished here to the dignity of their relationships recognized by the courts.

same-sex couples does not logically advance that objective. Indeed, and to the contrary, opening the institution of marriage to them is likely to advance the objective as it is ultimately the encouragement of the stable and secure family relationships that is the aim of the policy. The respect of which section 14(1) of the Bill of Rights speaks for the right of heterosexual couples to marry, is in no sense diminished by allowing same-sex couples to marry. The institution of marriage has been undergoing evolutionary change for over 250 years, ever since the State took control of it. The Respondents must justify the present exclusion of same-sex couples, rather than attempt to fix the institution at a place that accords to their perception of a majoritarian view.

97. In sum, a system that refuses to grant same-sex couples access to marriage will encourage a difference in treatment that is directly based on sexual orientation. It is now well established that discrimination based on sexual orientation is prohibited by Article 14 of the Convention[46], and so, equally prohibited by section 16(3) of the Bill of Rights.

98. The Respondents have not and cannot justify the discrimination. Section 16(3) of the Bill of Rights has been violated.

Summary of conclusions

99. The Petitioners have the rights to private and family life and are entitled to the State's manifestation of its respect for those rights by the provision of a legal institution which protects those rights. Those rights include the right to found a family, which, if not located within section 14(1) of the Bill of Rights as a right disjunctive from the right to marry which is also there enshrined, then in section 9 of the Bill of Rights as an essential aspect of the rights to private and family life.

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[46] See *Mouta v Portugal* (above)

100. The fact that section 14(1) enshrines the right to marry for opposite- sex couples does not mean that the similar right is not to be located for same-sex couples in section 9, where the rights to private and family life are equally enshrined.

101. No principle of constitutional construction allows for the preclusive and discriminatory reading of section 14(1) for which the Respondents contend. Rather, the Constitution and the Bill of Rights in particular, must be given a generous and purposive construction "suitable to give to individuals the full measure of the fundamental rights and freedoms referred to."[47] The Respondents' contrary contention based on their highly technical construction would, in my view, promote the kind of "austerity of tabulated legalism" discountenanced a long time ago by the Privy Council in Fisher.[48]

102. By its ongoing refusal to recognize and respect these rights of the Petitioners, the State has been and remains in violation of their rights under section 9 of the Bill of Rights.

103. The passage of the 2008 Amendment to the Law with the aim of precluding same-sex couples from the institution of marriage and for the purpose of promoting a particular religious and "traditional" view of marriage above all others, was impermissible and has since the introduction of the Bill of Rights, placed the Law as an existing law, in violation of the Petitioners' rights (and of all those similarly placed) to freedom of conscience and freedom to manifest their belief in marriage, by being allowed to enter into the institution.

104. These violations of the Petitioners' rights are imposed because of their sexual orientation and are therefore unconstitutional for being imposed on a basis prohibited by the Bill of Rights. The Law is therefore in violation of the Petitioners' rights to respect for their human dignity and to freedom from discrimination in the enjoyment of their rights under

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[47] Per Lord Wilberforce from *Fisher* (above)
[48] Above

the Bill of Rights. The effect is felt by the Petitioners in relation to the rights under sections 9 and 10 of the Bill of Rights, as well as in relation to the several other rights which have been identified.

105. The Respondents have established no justification for this discriminatory treatment on any basis allowed by section 16 of the Bill of Rights.

The remedies to which the Petitioners are entitled.

106. As already noted at the outset of this judgment, the Respondents accept that the Law as amended in 2008 to introduce the definition of marriage as "*the union between a man and a woman as husband and wife*" is an "*existing law*" for the purposes of section 5 of the Constitutional Order. The Respondents also accept that the application of section 5 (1) of the Constitutional Order is mandatory where there is unconstitutionality.[49]

107. Accordingly, the matter falls to be dealt with under section 5(1) of the Order.[50] Section 5(1) is clear: existing laws shall be read and construed with such modifications etc., as may be necessary (emphasis added) to bring them into conformity with the Constitution (and to prevent avoidance pursuant to the Colonial Laws Validity Act 1865, due to repugnancy).

108. In urging the Court to exercise this power to modify the Law so as to bring it into conformity with the Bill of Rights, the Petitioners make the following points which are worth noting notwithstanding the mandatory nature of the duty imposed upon the Court.

109. They say that the Legislature could itself have opened marriage to same-sex couples (or passed legislation providing the bare minimum mandated by *Oliari*[51]). The Legislature chose not to do so. Consequent on this failure, it now falls to the judicial arm of government

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[49] See Respondents' List of Issues, response to issue 11.
[50] As set out above at [33].
[51] Above.

to apply section 5 of the Order to modify existing law. That is the constitutional settlement provided for by the Order. That is the power granted by the United Kingdom Parliament to enforce the Bill of Rights. It is also the power delegated to the Courts of the Overseas Territories to ensure that the United Kingdom is not in breach of its international obligations under the Convention (insofar as the Convention is reflected in the Bill of Rights). It is part of the check and balance that addresses past actions or current inactions of the local legislative or executive arms of government.

110. Similar provisions to section 5 of the Order exist in the constitutional arrangements of other British Overseas Territories[52] and former British territories which are now independent nations[53].

111. There is settled case law which confirms that in cases of repugnancy, the courts must apply section 5 to make "*such modifications, adaptations, qualifications and exceptions as may be necessary to bring (the Law) into conformity with the Constitution*".

112. And, for the sake of completeness, the case law also explains that the power to modify is extensive and may be applied as required to bring existing law into conformity with the Constitution.

113. In this regard, the Petitioners relied on the following passage from the judgment of the Privy Council in *Mollison* per Lord Bingham (above at p 17), approving of a passage from Michael de la Bastide CJ in his judgment on behalf of the Court of Appeal of Trinidad and

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[52] Such as The Anguilla Constitution Order 1982, section 6; The Bermuda Constitution Order 1968, section 5; The (British) Virgin Islands Constitution Order 2007, section 115, The Montserrat Constitution Order 2010, section 117 and The Turks and Caicos islands Constitution Order 2011, section 5.

[53] Such as The Bahamas Independence Order 1973, section 4; The Constitution of Belize, section 134; The Saint Christopher and Nevis Constitution Order 1983, Schedule 2 section 2; The Saint Lucia Constitution Order 1978 and The Jamaica (Constitution) Order in Council 1962, section 4.

Tobago in *Roodal v The State*[54] dealing with existing laws under the 1976 Constitution Act of that country:

> *"Having made this review of the authorities, we are now in a position to assess the purport and effect of section 5(1) of the 1976 Act. The first thing we can say about that section is that though it speaks of existing laws being 'construed', the type of 'construing' which is involved is not the examination of the language of existing laws for the purpose of abstracting from it their true meaning and intent, nor is it attributing to existing laws a meaning which, though not their primary or natural meaning, is one that they are capable of bearing. In fact, the function which the court is mandated to carry out in relation to existing laws under this section, goes far beyond what is normally meant by 'construing.' It may involve the substantial amendment of laws, either by deleting parts of them or making additions to them or substituting new provisions for old. It may extend even to the repeal of some provision in a statute or a rule of common law. Mr. Daly's submission that the section should be regarded as conferring very limited powers is, I am afraid, a brave but unavailing attempt to turn back the clock."*

114. As the passage above from *Mollison* (citing *Roodal v The* State) shows, the power of modification under section 5(1) (as under similar Constitutional Orders throughout the Commonwealth) extends to making "*substantial amendment to laws, either by deleting parts of them or making additions to them to substitute new provisions for old*".

115. These considerable powers of modification are plainly wide enough to enable the amendments to the Marriage Law that are put forward as necessary on behalf of the Petitioners to bring the Law into conformity with the Bill of Rights and the Petitioners' rights as determined to be protected by it.

116. The definition of marriage in the Law as being between a man and a woman, while it is in conformity with section 14(1) of the Bill of Rights, is not in conformity with the rights of the Petitioners under section 9 of the Bill of Rights to private and family life and under section 10, to their right to freedom of conscience and freedom of expression of their belief

[54] (Above)

in the institution of marriage, by being allowed to marry. Nor, therefore, is the definition in conformity with the right to freedom from discrimination in the enjoyment of those other rights as mandated by section 16 of the Bill of Rights. The definition of marriage is therefore that provision of "existing law" which must, by the Court, be brought into conformity with those sections of the Bill of Rights.

117. As Lord Bingham declared on behalf of the Privy Council in *Roodal v the State* (above) in modifying the death penalty legislation of Trinidad and Tobago to bring it into conformity with the Constitution:

> "*The Constitution is the Supreme law... The Constitution itself has placed on an independent, neutral and impartial judiciary the duty to construe and apply the Constitution and statutes and to protect guaranteed fundamental rights, where necessary. It is not a responsibility which the courts may shirk or attempt to shift to Parliament. Loyalty to the democratic legal order of the Constitution required the Privy Council to grapple with the question and to decide it*".

118. This Court is similarly bound not to allow the violation of the Petitioners rights to continue without redress. The Constitution, in its mandatory requirement that the Law be brought into conformity, must prevail. The Petitioners and their daughter are entitled to the indignities to which they have been subjected being put to an immediate end by the Court.

119. At least three different ways of amending the section 2 definition of marriage have been proposed for bringing the Law into conformity with the Bill of Rights, but that which I think is most suitable, and supported by precedent (see *Godwin v DeRoche* above) and which I now therefore order, is as follows:

> *"marriage" means the union between two people as one another's spouses*".

120. It is declared that the Law is amended accordingly by the substitution of the foregoing for the existing definition of marriage in section 2 of the Law.

121. For the sake of completeness, counsel for the Petitioners also brought my attention to section 27 of the Law which prescribes the marriage declaration: *"... I A.B. do take (or have now taken) thee C.D. to be my lawful wife (or husband)"*

122. In keeping with the modification to section 2, this provision also needs to be modified. It can be appropriately modified (see again *Godwin v DeRoche*, above at [136] as precedent from Bermuda), by substituting for "*wife* (or *husband*)" the word "*spouse*". It is also so ordered and declared.

123. When, consequentially, one now reads the Law as a whole, the institution of marriage itself is maintained, the formalities are maintained, the requirements for consent are maintained, the requirements for objections are maintained and the procedures for solemnization are maintained. So too are the duties of the Registrars and the provisions for enforcing the law. What has changed, to bring the Law into conformity with the Bill of Rights, is that the more limited definition contained in section 2 of the Law has been changed so as to cover unions between same-sex couples.

124. This process of modification in no way threatens the institution of marriage. Rather, as has been repeatedly emphasized by the courts of the United Kingdom[55], the United States[56], South Africa[57] and other jurisdictions, in fact the institution is strengthened[58].

125. And it is to be hoped, perhaps even more fervently, that our constitutional democracy will itself have been strengthened by the affirmation of the State's obligation to respect the

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[55] See Rodriquez (above)
[56] See Obergefell (above)
[57] See *Fourie and Bounthys* (above)
[58] See for instance, *Rodriquez* (above) where Baroness Hale commented on the stabilizing effect of committed, secure same-sex partnership and *Obergefell* (above at p 7) where it was stated that changes to modernize marriage "have strengthened, not weakened, the institution of marriage".

fundamental rights and in so doing, to preserve that crucial balance between the different aspirations and ideals which might otherwise be at tension in society.

Costs

126. While the Petitioners seek no order for damages they do seek and are entitled to an order for their costs, to be taxed if not agreed. It is so ordered.

Dated the 29th day of March, 2019