IN THE GRAND COURT OF THE CAYMAN ISLANDS

CAUSE NO: 111 OF 2018

BETWEEN:

(1) CHANTELLE DAY

(2) VICKIE BODDEN BUSH

Applicants

- 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

APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW

To the Clerk of the Court, Law Courts, George Town, Grand Cayman	
Name, address and description of applicant(s)	Chantelle Day and Vickie Bodden Bush c/o McGrath Tonner
Judgment, order, decision or other proceeding in respect of which relief is sought	The decision of the First and Second Respondents dated 13 April 2018 to refuse the Applicants application for a special marriage licence dated 12 April 2018 was unlawful and void.
Relief Sought a. A declaration that, unless it is read and construed with such modifications,	

THIS APPLICATION FOR LEAVE was filed by McGrath Tonner, Attorneys-at-Law for the Applicants, whose address for service is 5th Floor, Genesis Building, PO 446 GT, Grand Cayman.

adaptions, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution (pursuant to section 5 of the Cayman Islands Constitutional Order 2009), the Marriage Law (as revised) does not conform with the Applicants' rights and freedoms enshrined in the Bill of Rights, namely the right to private and family life under s.9(1), the right to freedom of conscience under s.10(1), the right to found a family under s.14(1) and the right to non-discrimination under s.16(1);

b. A declaration that the Marriage Law (specifically the definition of "marriage" at s.2) shall be read and construed with such modifications, adaptions, qualifications and exceptions as may be necessary to bring it into conformity with the sections 9, 10, 14 and 16 of the Bill of Rights;

c. A declaration that the Applicants are entitled to be married;

d. A declaration that the First and Second Respondents' refusal of the Applicants' application to marry is unlawful;

e. Such further or other relief as this Honourable Court deems fit (including alternative declaratory relief that the law should at least provide for the Applicants to enter into a civil partnership); and

f. Costs of these proceedings.

Name and address of applicant's attorneys, or, if no attorneys acting, the address for service of the applicant	McGrath Tonner, 5th Floor, Genesis Building, PO 446 GT, Grand Cayman.
Signed	

THIS APPLICATION FOR LEAVE was filed by McGrath Tonner, Attorneys-at-Law for the Applicants, whose address for service is 5th Floor, Genesis Building, PO 446 GT, Grand Cayman.

GROUNDS ON WHICH RELIEF IS SOUGHT

Relief is sought because, in response to the Applicants' application for a special marriage license dated 12 April 2018, the Respondents misdirected themselves in relation to the proper construction of the Marriage Law (as revised) read in conjunction with the Cayman Islands Constitutional Order 2009. The Respondents refusal decision dated 13 April 2018 is unlawful and void.

Full particulars are contained in the attached Draft Notice of Originating Motion and in the affidavits of Chantelle Day and Vickie Bodden Bush dated 18 June 2018 made in support of this application.

Dated the 19th day of June 2018
Filed the day of June 2018

McGrath Tonner

McGrath Tonner
Attorneys-at-Law for the Plaintiff

To: The Clerk of the Courts

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(3) THE ATTORNEY GENERAL OF THE CAYMAN ISLANDS

Respondents

NOTICE OF ORIGINATING MOTION

TAKE NOTICE that the Court at the Law Courts, George Town, Grand Cayman will be moved on at or as soon thereafter as counsel can be heard on behalf of Chantelle Day and Vickie Bodden Bush to grant the following relief:

a. A declaration that, unless it is read and construed with such modifications, adaptions, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution (pursuant to s.5 of the Cayman Islands Constitutional Order 2009), the Marriage Law (as revised) does not conform with the Applicants' rights and freedoms enshrined in the Bill of Rights, namely the right to private and family life under s.9(1), the right to freedom of conscience under s.10(1), the right to found a family under s.14(1) and the right to non-discrimination under s.16(1);

b. A declaration that the Marriage Law (specifically the definition of "marriage" at s.2) shall be read and construed with such modifications, adaptions, qualifications and exceptions as may be necessary to bring it into conformity with the sections 9, 10, 14 and 16 of the Bill of Rights;

c. A declaration that the Applicants are entitled to be married;

d. A declaration that the First and Second Respondents' refusal of the Applicants' application to marry is unlawful;

e. Such further or other relief as this Honourable Court deems fit (including alternative declaratory relief that the law should at least provide for the Applicants to enter into a civil partnership); and

f. Costs of these proceedings.

AND FURTHER TAKE NOTICE that the grounds upon which relief is sought are set out below.

THE PARTIES

1. Ms. Chantelle Day (the "**First Applicant**") and Ms. Vickie Bodden Bush (the "**Second Applicant**") (together the "**Applicants**") are two adult females in a committed relationship with each other. The First Applicant is Caymanian. The Second Applicant is a dual citizen of Honduras and the United Kingdom. The Applicants and their adopted daughter live together as a family unit in London, England. The Applicant's wish to return to the Cayman Islands to live, work and be married.

2. The Governor of the Cayman Islands (the "**First Respondent**") is the representative of the British monarch in the United Kingdom's overseas territory of the Cayman Islands. The Governor shall have such functions as are prescribed by The Cayman Islands Constitutional Order 2009, S.I. 2009 No. 1379 (the "**Order**") and any other law, and such other functions as Her Majesty may assign him or her. The Governor is a 'public official' as defined by Schedule 2 Part 1 Section 28 of the Order. The Governor is bound to exercise his or her functions in accordance with the Order. One such function arises under section 22(1) of the Marriage Law (2010 Revision)(the "**Marriage Law**") whereby any non–resident persons intending that their marriage be solemnised in the Cayman Islands are required to make an application to the Governor for a special license to marry. The Governor may, upon being satisfied of certain formalities, grant the license sought.

3. The Deputy Registrar (the "**Second Respondent**") is a representative of the Cayman Islands Government General Registry which, for the time being, has been appointed by the Governor to perform the duties of the Governor under the Marriage Law. The Second Respondent is a 'public official' as defined by Schedule 2, Part 1, s.28 of the Order.

4. The Attorney General (the "**Third Respondent**") is the principal legal advisor to the Government of the Cayman Islands and the Legislative Assembly.

INTRODUCTION

5. The First Applicant is a Cayman qualified attorney working for a Cayman offshore law firm. She is currently working in London. The Applicants "chose" to live outside the Cayman Islands due to the lack of legal protection in the Cayman Islands for same-sex couples. The Applicants have decided they no longer wish to settle for a life abroad when their clear preference is to live in the Cayman Islands. The Applicants plan to re-locate their family unit to the Cayman Islands in August 2018 where the First Applicant's family, friends and employer are based.

6. On 26th September 2017, the First Applicant wrote to Premier Alden McLaughlin, the First Respondent and the Third Respondent. She stated that it was the Applicants' intention to marry in the Cayman Islands in 2018. She urged the Government to make explicit changes to the law in the Cayman Islands to end discrimination on grounds of sexual orientation and to avoid litigation.

7. In April 2018, some six and a half months after the initial correspondence was received by Premier McLaughlin et al, and in the absence of any remedial action whatsoever being taken by the Premier and his Government or the Governor, the Applicants flew to Grand Cayman to apply to be married.

8. On 12 April 2018, the Applicants applied to the First Respondent, through the Cayman Islands Government General Registry, for a special licence to marry. They followed the procedure that any heterosexual couple would follow.

9. The Applicants' application for a special license to marry was refused.

10. On 25th May 2018 the Applicants served letters before action on the Respondents. No substantive response has been received from any of the Respondents at the time of filing.

11. The refusal decision of the First and Second Respondents (the "**Refusal**") is the subject matter of this judicial review application.

MARRIAGE IN THE CAYMAN ISLANDS

12. The Government of the Cayman Islands has chosen to build a myriad of rights and obligations around, and upon, the institution of marriage. Both the common law and the statute books are permeated with references to rights and responsibilities in such diverse fields as immigration, adoption, property ownership, health care, bereavement benefits, pensions and so forth which derive exclusively from, and are accessible exclusively to, persons who are married.

13. Until 2008, the term "marriage" was undefined in Cayman Islands statutory law. Prior to this time, it is accepted that the Cayman Islands relied on the common law definition of marriage. The classic common law formulation of marriage is articulated by Lord Penzance in *Hyde v Hyde and Woodmansee* (1866) L.R. 1 P&D 130 at 133:

> *"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."*

14. On 8 July 2008 the Government published a bill ("**the 2008 Bill**")[1] "*to amend the Marriage Law (2007 Revision)* **("the 2007 Revision")** *to expressly provide that a marriage is a union between a man and a woman*".

15. On 8th September 2008, the Legislative Assembly[2] passed The Marriage (Amendment) Law 2008 in the same terms as the Bill ("**the 2008 Amendment**")[3].

16. On 16th day of June 2009 the Marriage Law was consolidated and revised in the form of the Marriage Law (2009 Revision) ("**the 2009 Revision**") thereby combining the 2007 Revision and 2008 Amendment in one document. The power of the Governor to consolidate and revise legislation is contained in the Law Revision Law (as amended)[4].

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[1] (Gazette No. 14 8 July 2014 Supplement No. 2)

[2] Official Hansard Report, Friday 5 September 2008, page 326 – 341.

[3] The Governor assented to the 2008 Amendment on 15 October 2008 and it was gazetted on 27 October 2008 (Gazette No. 22 Supplement No. 1).

[4] The power to (re)publish an existing law in revised form is contained in the Law Revision Law (1999 Revision). Section 3 states:

> *"The Governor may authorise the republication of any existing law in amended or revised form as hereinafter provided and such law shall in its revised form be, for all purposes, the only proper version of such law in the Islands: Provided that nothing in this section shall be taken to imply any power to make any alternation or amendment in any matter of substance of any law or part thereof."*

17. On 6th November 2009 the Order came into force. The relevance of this date will be explained below.

18. Since the 2008 Amendment the Marriage Law has received no further amendments save for a minor alternation in the form of an increase in the special license fee (from $150 to $200) on 26 November 2009[5].

19. On 8 November 2010 the Marriage Law was once again consolidated and revised (pursuant to the above mentioned Governor's powers under the Law Revision Law) in the form of the Marriage Law (2010 Revision) ("**the 2010 Revision**"). The 2010 Revision merely served to combine in one document the 2009 Revision and the 2009 fees amendment.

THE CAYMAN ISLANDS CONSITUTIONAL ORDER 2009

20. On Friday 23rd October 2009 the Order[6] came into force[7].

21. The Order contained, at Schedule 2, the revised Constitution of the Cayman Islands ("**the Constitution**") which, for the first time, contained a Bill of Rights for the Cayman Islands ("**the Bill of Rights**") at Part 1 of Schedule 2 of the Order.

22. The Bill of Rights recognises, and guarantees, the human dignity, equality and freedom of all persons. It is submitted for the reasons which follow that the Marriage Law is in clear conflict with the constitutionally protected provisions of sections 9, 10, 14 and 16 of the Bill of Rights.

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[5] On 22 October 2009 the Government published a bill ("**the 2009 Bill**')(Gazette No. 68 22 October 2009 Supplement No. 3) "*to amend the Marriage Law (2009 Revision) so as to increase the fee relating to special licences*". On 21 October 2009 the Legislative Assembly passed The Marriage (Amendment) Law 2009 ("**the 2009 Amendment**") in the same terms as the 2009 Bill. The Governor assented to the amendment on 24 November 2009 and the 2009 Amendment was gazetted on 26 November 2009 (Gazette No. 83 Supplement No. 2).

[6] Which had previously been published on 7 July 2009 with Cayman Islands Gazette No.14 Supplement No. 1.

[7] Section 1(2) states "This Order shall come into force on such day as the Governor, acting in his or her discretion, shall appoint by proclamation published in a Government Notice." In a Proclamation No. 4 of 2009, printed in Extraordinary Gazette No. 69/2009 dated Friday 23rd October 2009, the Governor announced the "appointed day" to be 6th November 2009.

PRIVATE AND FAMILY LIFE (s.9(1))

23. Section 9(1) provides as follows:

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

24. The right to a private and family life is multi-faceted, including the imposition of a positive obligation on the State to ensure effective respect for that right. This positive obligation requires the State to have in place legislation that enables the enjoyment of the right.

25. It is well-established that a Court adjudicating on domestic rights is to prefer an interpretation of those rights that is consonant with international obligations (for example, *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 AC 696 (HL); *R v Whorms* [2008] CILR 188).

26. The European Court of Human Rights (the "**European Court**") has established that the right to a private and family life, as protected by the European Convention on Human Rights (the "**ECHR**") art.8, is violated when the State does not offer to same-sex couples a package of benefits equivalent to marriage.

27. The case of *Oliari v Italy* (2017) 65 EHRR 26 concerned two male Applicants who had petitioned to marry in Italy, but were refused. The European Court held at paragraphs 185 and 187:

> *"... the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions. ... There has accordingly been a violation of art.8 of the Convention."*

28. The right to a private and family life at ECHR art.8 is the same right as protected by s.9(1) of the Constitution. For the same reasons that art.8 was violated in *Oliari*, the Applicants submit that this Court must find a violation of s.9(1) of the Constitution.

FREEDOM OF CONSIENCE AND RELIGION (s.10(1))

29. Section 10(1) and (2) of the Constitution state as follows:

> *"10.—(1) No person shall be hindered by government in the enjoyment of his or her freedom of conscience."*

"10.—(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 in private, to manifest and propagate his or her religion or belief in worship, teaching, practice, observance and day of worship."

30. The Privy Council in *Commodore of the Royal Bahamas Defence Force and others v Laramore* [2017] UKPC 13; [2017] 1 WLR 2752, at paragraph 14 defined "freedom of conscience". It also set the test to determine whether the right has been breached, namely a subjective test based on what the relevant beliefs mean to the applicant. Lord Mance stated for the Privy Council:

    "… Freedom of conscience is in its essence a personal matter. It may take the form of belief in a particular religion or sect, or it may take the form of agnosticism or atheism. It is by reference to a person's particular subjective beliefs that it must be judged whether there has been a hindrance. No doubt there is an objective element in this judgment but it arises only once the nature of the individual's particular belief has been identified"

31. The Applicants in the present case believe in the institution of marriage. Their right to hold these beliefs is protected by s.10 of the Bill of Rights.

32. As articulated by Justice Kawaley in *Roderick Ferguson v The Attorney General* [2018] SC (Bda) 45 Civ (6 June 2018) at paragraph 80:

    "The battle over the ownership of the very idea of marriage in Bermuda and elsewhere is irresistible proof of the fact that a belief in marriage matters. It is self-evident that the beliefs (as regards same-sex marriage) qualify for protection."

33. The Applicants wish to *manifest* their beliefs by getting married to each other. Their right to manifest their belief is protected by s.10. Section 10 is violated in circumstances where the State denies the Applicants the ability to manifest their beliefs by denying them access to the institution of marriage. The secular institution of Government must not, without valid justification, direct the way in which a citizen may manifest his or her beliefs.

34. Not only are the Applicants denied the ability to manifest such beliefs but the denial is based on the religious beliefs of others. The common law definition of marriage is derived from Christianity. Likewise, the relatively new statutory definition of marriage (which was written into

the 2008 Amendment) was introduced for a religious purpose (as evidenced by the debate of the Bill in the Legislative Assembly on 5 September 2008)[8].

35. Lord Justice Laws held in *McFarlane v Relate Avon* [2010] EWCA Civ 880 at paragraphs 23-25:

> *"[23] ...the conferment of any legal protection or preference upon a particular substantive moral position on the ground only that it is espoused by the adherents of a particular faith, however long its tradition, however rich its culture, is deeply unprincipled; it imposes compulsory law not to advance the general good on objective grounds, but to give effect to the force of subjective opinion....*
>
> *[24] The promulgation of law for the protection of a position held purely on religious grounds cannot be therefore justified. It is irrational ... but it also divisive, capricious and arbitrary. We do not live in a society where all the people share uniform beliefs. The precepts of any one religion – any belief system – cannot, by force of their religious origins, sound any louder in the general law than the precepts of any other. If they did, those out in the cold would be less than citizens; and our constitution would be on the way to a theocracy....*
>
> *[25] So it is that the law must firmly safeguard the right to hold and express religious belief; equally firmly, it must eschew any protection of such a belief's content in the name only of its religious credentials. Both principles are necessary conditions of a free and rational regime."*

36. In *Ferguson*, the Supreme Court of Bermuda held that freedom of conscience is violated under the Bermudian constitution when a person's belief in same-sex marriage as an institution has been hindered by the State. Justice Kawaley held at paragraphs 108-109:

> *"[108] Bermuda's Constitution is a secular one designed to require the State to give maximum protection for freedom of conscience. It only permits interference with such freedoms in the public interest for rational and secular grounds which are permitted by the Constitution. The present decision vindicates the principle that Parliament cannot impose the religious preferences of any one group on the society as a whole through legislation of general application....*
>
> *"[109] One side of the freedom of conscience coin is that as a general rule no one can be compelled to participate in activities which contravene their beliefs. The other side of the same coin is that the State cannot use the legislative process to pass laws of general application which favour some beliefs at the expense of others...."*

[8] Official Hansard Report 5 September 2008 pp.326-341

37. The Constitution of the Cayman Islands is also secular. In *Laramore*, Lord Mance for the Privy Council stated at paragraph 7 in relation to the Bahamian Constitution:

> *"While the recitals to the Constitution express a commitment to the supremacy of God and to an abiding respect for Christian values, it is not suggested that this qualifies or limits the freedoms guaranteed by the substantive text of Chapter III of the Constitution, though it could, arguably, have some relevance to an issue of justification…"*

38. The Applicants are entitled to complain that their beliefs in same-sex marriage as an institution deserve legal protection. It is respectfully submitted that they have established that those protected fundamental rights have been violated and that there can be no religious justification for this curtailment.

THE RIGHT TO FOUND A FAMILY (s.14(1))

39. Section 14(1) provides as follows:

> "*14.—(1) 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.*"

40. This s.14(1) contains two rights: a right to marry and a right to found a family. The State denying the triangular relationship between a same-sex couple and their adopted children would amount to a violation of this second right. By "triangular relationship" it is meant that each of these three people must be legally recognised as being connected to the other two. Per the European Court in *Wagner v Luxembourg* [2007] ECHR 76240/01, once a foreign adoption has been completed, it must be recognised. In *Wagner*, the legal barrier to recognition was that Luxembourg law did not recognise adoption by single parents. A breach of art.8 ECHR was found.

41. In the Applicants' case, it is anticipated that the lack of same-sex marriage or legal recognition of same-sex partnership will prevent both Applicants from being recognised as the adoptive mother of the child. In the Applicants' submission, this would amount to a violation of both s.9(1) and s.14(1) of the Bill of Rights.

NON-DISCRIMINATION (s.16(1))

42. Section s.16(1) of the Bill of Rights and the interpretive s.16(2) provide as follows:

> "*16.—(1) Subject to subsections (3), (4), (5) and (6), government shall not treat any person in a discriminatory manner in respect of the rights under this Part of the Constitution.*
>
> *(2) In this section, "discriminatory" means affording different and unjustifiable treatment to different persons on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, age, mental or physical disability, property, birth or other status.*"

43. The absence of the term "sexual orientation" from the list of grounds in s.16(2) is immaterial. It is well-established that the class of "other status" imports into non-discrimination clauses an obligation not to discriminate on the ground of "sexual orientation" (for example, see the European Court in *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47).

44. The prohibition of discrimination on the ground of sexual orientation is a fundamental feature of the case law of the European Court as well as the case law of the United Kingdom (for example, see the European Court in *Gas v France* (2014) 59 EHRR 22, at paragraph 8: "*just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification*"). It will therefore only be exceptional circumstances that can justify treating a person or persons differently on the grounds of their sexual orientation.

45. It is the Applicants' case that it is self-evident that they are discriminated against on the ground of their sexual orientation. Their relationship being a homosexual relationship was the reason why it was not solemnised as a marriage in the Cayman Islands. As a consequence, they are denied the same rights and responsibilities as heterosexual couples. The Marriage Law, since it was amended in 2008 to explicitly define marriage as being between people of the opposite sex only, denies same-sex couples the numerous legal rights and responsibilities which flow exclusively from the legal institution of "marriage"[9].

46. This discrimination is felt in the Applicants' enjoyment of multiple rights under the Bill of Rights, including:

    a) s.9 (privacy and family life), for the same reasons as stated above;

b) s10 (freedom of conscience), for the same reasons as stated above;

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

d) s.13 (movement), due to the restrictions placed on the second Applicant's rights to remain in the Cayman Islands due to the lack of recognition of their relationship by the State;

e) s.14 (founding a family), for the same reasons as stated above;

f) s.15 (property), due to their being denied the same property rights as couples whom the State allows to marry; and

g) s.17 (protection of children), due to the State not recognising the triangular relationship with their soon-to-be daughter.

47. Moreover, due to their relationship not attracting the same legal protections as marriage and being of a lesser societal status than marriage, the current situation amounts to an affront to their dignity of the sort that the Bill of Rights, in general, guards against (per s.1 of the Bill of Rights).

48. Non-discrimination clauses protect against a different type of violation from the positive obligation in privacy clauses. In the present context, the right to privacy imposes a positive obligation on the State to enact legislation in order to provide a package of rights. A matter of relevance for the Court may be whether that package of rights is to be given via marriage or via same-sex civil partnerships; the Applicants submit marriage is required for the reasons set out below. The right to non-discrimination, by contrast, requires the State to offer to the discriminated group that which is available to the comparator group. The comparator in the instant case is a male-female couple who are entitled to marry; thus, marriage must be the Applicants' remedy.

49. The Applicants acknowledge, by way of distinction, that in *Oliari* the European Court rejected the submission of the Applicants in that case on art.14 ECHR (non-discrimination, in conjunction with the art.12 right to marry). Yet, it is pertinent to address how this conclusion was reached. At paragraphs 189 and 192 the European Court stated and then held:

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[9] Such a result was recognised during the debate in the Legislative Assembly (for example page 329 line 15 and also page 334)

"*189 The Plaintiffs in Application No.18766/11 relied on art.12 on its own, and argue that since the judgment in Schalk , 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 redetermine 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 11 CoE states that have recognised same-sex marriage) the findings reached in the cases mentioned above remain pertinent. In consequence the Court reiterates that art.12 of the Convention does not impose an obligation on the Defendant Government to grant a same-sex couple like the Plaintiffs access to marriage.*"

50. It must be remembered that the ECHR provides a *minimum* level of protection and affords individual Council of Europe members a margin of appreciation in how ECHR rights are given effect. Against that background, the European Court in *Oliari* did not find a violation of art.14 (with art.12), having already found a violation of art.8. In the context of the plurality of the Council of Europe, Italy's margin of appreciation was no reason to allow the denial of the legal recognition of same-sex partnerships, but did - in that specific context - allow the denial of marriage.

51. The Supreme Court of Bermuda rejected the argument that the Domestic Partnership Act was constitutional simply by virtue of meeting the minimum requirements of the ECHR (*Ferguson*, ibid).

52. It is the Applicants' case that the same barriers to finding a violation of s.16(1) of the Bill of Rights are not present. To the extent that the concept of a margin of appreciation applies, the correct body of jurisdictions with which to compare the Cayman Islands is the other constituent parts of the United Kingdom. The Schedule to this Notice of Originating Motion records the highest institution available to same-sex couples in each of these jurisdictions and any forthcoming changes. Same-sex marriage is available in the numerical majority,[10] with such

[10] (1) England and Wales, (2) Scotland, (3) South Georgia and the South Sandwich Islands, (4) Akrotiri and Dhekelia , (5) British Indian Ocean, (6) Pitcairn Islands, (7) British Antarctic Territory, (8) Gibraltar, (9) Falkland Islands, (10) Saint Helena, Ascension and Tristan da Cunha, (11) Isle of Man, and (12) Guernsey. Further, laws to allow same-sex marriage in (13) Jersey and (14) Guernsey's dependency Alderney have received royal assent,

jurisdictions representing the vast majority of the United Kingdom's citizens. Only five of the constituent parts of the United Kingdom have not yet allowed same-sex marriage or made no moves to provide it, namely Anguilla, British Virgin Islands, Monserrat, Turks and Caicos and the Cayman Islands. United Kingdom citizens have access to same-sex marriage almost from pole to pole from Antarctica to Shetland, and around the equator from Pitcairn to Ascension via the Indian Ocean Territory. It is respectfully submitted that it is incumbent on the Respondents to state why the Cayman Islands (or all the Caribbean Overseas Territories) ought to be different, why they alone may deny marriage to same-sex couples when that institution is or will be available to them in the other constituent parts of the United Kingdom. In that regard, it is the policy of the United Kingdom Government, expressed via the Prime Minister Theresa May, that all of its citizens must be entitled to marry, regardless of their gender:

> "*I want all British citizens to enjoy the fullest freedoms and protections. That includes equal marriage – because marriage should be for everyone, regardless of their sexuality.*"[11]

53. To correctly delineate the correct level of protection afforded by s.16 of the Bill of Rights, the Applicants rely on comparative case law on same-sex marriage from other common law countries where constitutional challenges were brought. These include, the US Supreme Court's decision in *Obergefell v Hodges*, 576 U.S. _ (2015), where the unavailability of same-sex marriage was held to violate the Equal Protection Clause within the Fourteenth Amendment to the US Constitution, 1787; and the Constitutional Court of South Africa in *Minister of Home Affairs and Another v Fourie* (CCT 60/04) [2005] ZACC 19, where the unavailability of same-sex marriage was held to violate the non-discrimination clause of the post-apartheid Constitution of South Africa, 1993. The judgments of these courts were underpinned not only by the right to non-discrimination, but by the State having to act in a manner that recognises the dignity of the human person.

54. In *Obergefell*, in the Opinion of the Court, Justice Kennedy rightly viewed the issue through the lens of dignity, and compared the denial of same-sex marriage with the denial of inter-racial marriage that was found to be unconstitutional by the US Supreme Court in 1967 in *Loving v Virginia* 388 US 1 (1967). In *Obergefell*, Justice Kennedy said at page 13:

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though are not yet in effect. Furthermore, legislation has been introduced in the Westminster Parliament to allow same-sex marriage in (15) Northern Ireland. Finally, in (16) Bermuda see the recent decision in *Ferguson*.

"*The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See Windsor, 570 U. S., at ___– ___ (slip op., at 22–23). There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. Loving, supra, at 12 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State")."*

55. Justice Kennedy's concluding paragraph at page 28, again, demonstrates that the rights to be considered by this Court must be interpreted with dignity at the forefront of the judicial mind, and that the dignity of the Applicants will only be recognised if their remedy is marriage:

"*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. 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 fulfilment 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.*"

56. A similar conclusion was drawn by the Constitutional Court of South Africa in <u>*Fourie*</u>, in which Sachs J held for the court at paragraph 114:

"*Conclusion*

[114] I conclude that the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1), and not to be discriminated against unfairly in terms of section 9(3) of the Constitution. Furthermore, and for the reasons given in Home Affairs, such failure represents an unjustifiable violation

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[11] Pink News, May, Theresa '*Exclusive: Theresa May writes for PinkNews on the 50th anniversary of the Sexual Offences Act*', 19 July 2017 (https://www.pinknews.co.uk/2017/07/19/exclusive-theresa-may-writes-in-pinknews-on-the-50th-anniversary-of-the-sexual-offences-act/)

of their right to dignity in terms of section 10 of the Constitution. As this Court said in that matter, the rights of dignity and equality are closely related. The exclusion to which same-sex couples are subjected, manifestly affects their dignity as members of society."

57. In the Applicants' submission, the same conclusion as in *Obergefell* and *Fourie* must be reached by this Court; that is, the discrimination faced by them is cured by marriage and marriage alone.

58. The correctness of the proposition that this Court may go beyond judgments of the European Court to arrive at marriage can be seen, too, by the application of Bermudian and English case law. The English High Court in *Gurung v Ministry of Defence* [2002] EWHC 2463 (Admin) demonstrated that domestic rights to non-discrimination are broader than those in the ECHR. McCombe J cited an extrajudicial statement of former Privy Council judge Lord Steyn, at paragraph 36:

> "*[T]he constitutional principle of equality developed domestically by English courts is wider [than Article 14 of the ECHR]. The law and the government must accord every individual equal concern and respect for their welfare and dignity. Everyone is entitled to equal protection of the law, which must be applied without fear or favour. Except where compellingly justified distinctions must never be made on the grounds of race, colour, belief, gender or other irrational ground.*"

59. Likewise, in *R (on the application of Chester) v Secretary of State for Justice* [2013] UKSC 63; [2014] AC 271, Baroness Hale makes the same analogy as in *Obergefell* that stripping away rights based on sexual orientation is equally as abhorrent as stripping away rights based on race. Baroness Hale used by way of analogy the absurdity of denying the right to vote to homosexuals, African-Caribbeans and women when she considered whether prisoners should have the right to vote stripped from them. She said at paragraphs 90-91:

> "*90 To take an obvious example, we would not regard a Parliament elected by an electorate consisting only of white, heterosexual men as uniquely qualified to decide whether women or African-Caribbeans or homosexuals should be allowed to vote. If there is a Constitution, or a Bill of Rights, or even a Human Rights Act, which guarantees equal treatment in the enjoyment of its fundamental rights, including the right to vote, it would be the task of the courts, as guardians of those rights, to declare the unjustified exclusion unconstitutional. Given that, by definition, Parliamentarians do not represent the disenfranchised, the usual respect which the courts accord to a recent and carefully considered balancing of individual rights and community interests … may not be appropriate.*

60. Denying the Applicants the right to marry discriminates on the ground of sexual orientation. As case law demonstrates, such a denial is as justifiable as denying marriage based on the colour of a couple's skin. This discrimination will not and cannot be remedied by same-sex civil partnership. Section 16(1) of the Bill of Rights is violated and will continue to be violated until the State allows the Applicants to marry.

61. In summary, if the Marriage Law were to be used to refuse the Applicants permission to marry, its operation would conflict with the following rights:

    i. Private and family life, as protected by s.9(1) of the Bill of Rights;

    ii. Freedom of conscience and religion, as protected by s.10 (1) of the Bill of Rights;

    iii. The right to found a family, as protected by s.14(1) of the Bill of Rights;

    iv. Non-discrimination, as protected by s.16(1) of the Bill of Rights; and

SECTION 5 OF THE ORDER

"Existing Law"

62. If this Court determines that the Marriage Law is in conflict with the Constitution, one must consider how properly to address that conflict. The Applicants submit the answer lies in Section 5(1) of the Order which states:

> *"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.*

21. Section 5(3) of the Order states:

> *(3) In this section "existing laws" means laws and instruments (other than Acts of Parliament of the United Kingdom and instruments made under them) having effect as part of the law of the Cayman Islands immediately before the appointed day."*

Case law

63. Similar provisions to Section 5 of the Order exist in the constitutional arrangements of other British Overseas Territories[12] and former British territories that are now independent nations[13].

64. *Browne v R* [2000] 1 AC 45 was an appeal to the Privy Council from St Christopher and Nevis. The appellant, Browne, had been convicted of murder when he was 16 years old. He was sentenced pursuant to the Offences against the Person Act (OAPA), s. 3(1), to detention "during the Governor-General's pleasure."

65. Browne argued that, under the Constitution of Saint Christopher and Nevis, since the duration of the sentence was to be determined by the Governor-General (the executive) and not by the court (the judiciary), s.3(1) of the OAPA was a deprivation of liberty otherwise than in execution of a sentence of the court and therefore contrary to the Constitution. The Privy Council allowed the appeal and declared the sentence to be unlawful.

66. Using the "existing laws" provision at Schedule 2, paragraph 2 of the 1983 Order, the Privy Council stated that it was the duty of the Court to modify the offending law so as to give effect to the requirements of the Constitution and Browne's constitutional rights. Rather than declare the offending law void, it modified the s.3 OAPA, so as to render it compliant with the Constitution, by substituting the word "Court" for "Governor-General".

67. It is noteworthy that the OAPA had been amended and revised numerous times between the introduction of the 1983 Constitution and the date of the murder in 1993[14]. Yet, the offending provision of the OAPA (s.3), which pre-dated the 1983 Constitution and which had not been affected by the post-constitutional amendments to the OAPA, was treated as an "existing law". It is the Applicants' submission that the same principle applies in the Cayman Islands, and it must operate on the definition of "marriage" in the Marriage Law notwithstanding the minor and inconsequential post-Constitution amendment to the special license fee in late 2009.

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[12] 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; The Turks and Caicos Islands Constitution Order 2011, Section 5.

[13] 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, Schedule 2 Section 2; The Saint Vincent Constitution Order 1979 Schedule 2 Section 2.

[14] Amended by Act 19 of 1983, Act 9 of 1986, Act 7 of 1990 and Act 5 of 1991.

68. The existing laws provision has been used across the Commonwealth in similar circumstances where laws conflict with, and are *prima facie* incompatible with the respective constitutions of those territories. Examples include *DPP of Jamaica v Mollison* [2003] UKPC 6; [2003] 2 AC 411; *Kanda v Government of the Federation of Malaya* [1962] AC 322, *Vasquez v The Queen* [1994] 1 WLR 1304; *Roodal v The State* (unreported) (17 July 2002) (Trinidad and Tobago, CRA No 64 of 99) and *Orozco v Attorney General* (Belize, No. 668 2010).

69. The definition of marriage as being between a man and a woman is plainly an existing law as defined by s.5 of the Order and as interpreted by the case law referenced above. It must be modified and construed accordingly.

THE IMPUGNED DECISION

70. On 12 April 2018, the Applicants attended the Cayman Islands General Registry and applied to be married by submitting the requisite form and paying the necessary fee.

71. By his letter of response dated 13 April 2018, the Second Respondent refused to grant the special licence (the "**Refusal Decision**"), stating:

> "*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) (the "Law") 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.*"

72. The reasoning upon which the refusal decision of the First and Second Respondents is based is incomplete and flawed. The decision which flows from this faulty reasoning is unlawful and void.

73. The First and Second Respondents failed to take into consideration the Applicants' constitutionally protected rights and freedoms (such as those enshrined in Schedule 2 Part 1 ss.9, 10, 14 and 16).

74. The First and Second Respondents further failed to consider and give effect to the supremacy of the Order, which introduced the Constitution, over the local laws (which includes the Marriage Law) pursuant to s.2 of the Colonial Laws Validity Act 1865.

75. The First and Second Respondents failed to consider and apply s.5 of the Order which requires existing laws to be construed so as to conform with, and give effect to, those constitutionally protected rights and freedoms.

76. The First and Second Respondents failed to recognise that both the common law and statutory definitions of marriage are "existing law" within the scope of the definition of such term under s.5(3) of the Order.

77. The First and Second Respondents failed read and construe the definition of "marriage" with "*such modifications, adaptions, qualifications and exceptions as may be necessary*" to bring it into conformity with the Constitution.

78. The First and Second Respondents' refusal decision was flawed in as much as the refusal decision was based upon an aspect of an "existing law" that had not been saved by the Order.

79. The First and Second Respondents' refusal decision was unlawful because the First and Second Respondents breached their legal obligation, under s.5(1) of the Order (an imperial law that takes supremacy over local legislation) to read the definition of "marriage" with the necessary modifications to bring it into conformity with the Constitution.

80. The unlawfulness of the decision renders it open to challenge by means of judicial review and/or s.26 of the Bill of Rights.

REMEDY SOUGHT

81. Where the Court is confronted by pre-existing legislation that denies an individual any right, it is the Court's duty, pursuant to s.5(1) of the Order to modify that legislation to bring about conformity.

82. The definition of marriage in the Marriage Law (as revised) is:

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

83. The definition is inconsistent with the Bill of Rights and must be modified. For example, it may be modified thus:

"marriage" means the union between two adults.

84. This simple and necessary modification, in accordance with the Court's duty under s.5, would bring the Marriage Law into conformity with the Bill of Rights, permit the First and Second Respondents to issue a marriage license to the Applicants and allow same-sex couples access to the institution of marriage and all the various legal rights and responsibilities which flow exclusively from that status.

ALTERNATIVE REMEDY

85. For the avoidance of doubt, should the Court find that the Refusal Decision was not unlawful, the Applicants will invite the Court to make a declaration that the Marriage Law (as revised) is incompatible with the Bill of Rights pursuant to its power under s.23 of the Constitution and seek appropriate remedies pursuant to s.27 of the Constitution.

AND THE APPLICANTS CLAIM

86. The Applicants invite the Court to grant the following relief:

    a. A declaration that, the Marriage Law is read and construed with such modifications, adaptions, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution (by the use of s.5 of the Order), as the Marriage Law (and the lack of any alternative legal framework for same-sex couples) does not conform with the Applicants rights' and freedoms under the Bill of Rights, namely the right to private and family life under s.9(1), the right to freedom of conscience under s.10(1), the right to found a family under s.14(1) and the right to non-discrimination under s.16(1) of the Constitution;

    b. A declaration that the Marriage Law shall, pursuant to s.5 of the Order be read and construed with such modifications, adaptions, qualifications and exceptions as may be necessary to bring it into conformity with the Constitution (which includes ss.9, 10, 14 and 16 listed above);

    c. A declaration that the definition of "marriage" at s.2 of the Marriage Law ("the union between a man and a woman as husband and wife") shall be modified to read "the

legal union of two adult persons" or words to that effect plus any consequent and attendant modifications;

d. A declaration that the Applicants are entitled to be married;

e. A declaration that the First and Second Respondents' refusal of the Applicants' application to marry was unlawful;

f. Such further or other relief as this Honourable Court deems fit (including alternative declaratory relief that the law should at least provide for the Applicants to enter into a civil partnership); and

g. Costs of these proceedings.

Dated the 19th day of June 2018
Filed the 19th day of June 2018

McGrath Tonner
Attorneys-at-Law for the Applicant

To: The Clerk of the Courts

SCHEDULE: The availability of same-sex unions in the United Kingdom, British Overseas Territories, and Crown Dependencies

A. The UK, British Overseas Territories, and Crown Dependencies with same-sex marriage or have legally committed to it

Territory	Enabling legislation	Entry into force
1. Akrotiri and Dhekelia	Overseas Marriage (Armed Forces) Order 2014	3rd June 2014 for UK military personnel
2. Bermuda	Same-sex marriage was lawful in Bermuda after the decision in *Godwin and DeRoche v The Registrar General and others* [2017] SC (Bda) 36 Civ), until 1st June 2018 when it was replaced with same-sex domestic partnership by the Domestic Partnership Act 2018.[15] Thereafter, the Supreme Court in *Ferguson v The Attorney General* [2018] SC (Bda) 45 Civ (6 June 2018) declared that the replacement was unconstitutional.	Awaiting date when law is reinstated
3. British Antarctic Territory	The Marriage Ordinance 2016	13th October 2016
4. British Indian Ocean	Overseas Marriage (Armed Forces) Order 2014	3rd June 2014 for UK military personnel
5. England and Wales	Marriage (Same Sex Couples) Act 2013	13th March 2014
6. Falkland Islands	Marriage Ordinance 1996 (as amended)	29th April 2017
7. Gibraltar	Civil Marriage Amendment Act 2016	15th December 2016
8. A) Guernsey B) Alderney	Same-Sex Marriage (Guernsey) Law 2016 Same-Sex Marriage (Alderney) Law 2017 There is no provision for same-sex marriage or partnership in Sark.	2nd May 2017 Awaiting commencement

[15] 'Domestic Partnership Act Frequently Asked Questions (FAQs)', Government of Bermuda, available at: https://www.gov.bm/domestic-partnership-act-frequently-asked-questions-faqs, accessed 25th May 2018.

9. Isle of Man	Marriage and Civil Partnership (Amendment) Act 2016	22nd July 2016
10. Jersey	Marriage and Civil Status (Jersey) Law 201- (*Bill awaits Royal Assent).*[16] Civil Partnership (Jersey) Law 2012	Not yet in effect. 2nd April 2012
11. Pitcairn Islands	Same Sex Marriage and Civil Partnerships Ordinance 2015	14th May 2015
12. Scotland	Marriage and Civil Partnership (Scotland) Act 2014	16th December 2014
13. South Georgia and the South Sandwich Islands	Same sex marriage has been legal in South Georgia & the South Sandwich Islands since 2014[17]	2014
14. A) St Helena, B) Ascension and C) Tristan da Cunha	Marriage Ordinance 2017 Marriage (Ascension) Ordinance 2016 Marriage (Tristan da Cunha) Ordinance 2017	20th December 2017 1st January 2017 4th August 2017

B. The UK, British Overseas Territories, and Crown Dependencies with same-sex partnership provisions only

Territory	**Enabling legislation**	**Entry into force**
15. Northern Ireland	Civil Partnership Act 2004 Marriage (Same Sex Couples) (Northern Ireland) Bill[18]	5th December 2005 Introduced in the House of Lords 27th March 2018

C. British Overseas Territories without any provision for the legal recognition of same-sex unions

[16] 'Superintendent Registrar's advice for same-sex marriage planning' (8 February 2018), available at https://www.gov.je/News/2018/Pages/Adviceonmarraigelaw.aspx, accessed 20th May 2018.
[17] 'Getting Married on South Georgia', Government of South Georgia, available at http://www.gov.gs/docsarchive/visitors-2/#tab-6, accessed 20th May 2018.
[18] Marriage (Same Sex Couples) (Northern Ireland) Bill [HK] 2017-19, parliament.uk, https://services.parliament.uk/bills/2017-19/marriagesamesexcouplesnorthernirelandhl.html, accessed 25th May 2018.

1. Anguilla
2. British Virgin Islands
3. Cayman Islands
4. Montserrat
5. Turks and Caicos Islands