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SAME SEX RELATIONSHIPS AND THE HOUSE OF LORDS

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This year is the 40th anniversary of the selective legalisation of homosexual acts between males in England and Wales and the 50th anniversary of the Wolfenden Report which led to it. The rest of the United Kingdom took a little longer. Scotland did so in 1980, but Northern Ireland had to wait until after the decision of the European Court of Human Rights in *Dudgeon v United Kingdom* (1981) 4 EHRR 149. The Court held that having the offences on the statute book, even if they were never prosecuted, was still an unjustified interference in the right to respect for private life which is protected by article 8 of the European Convention on Human Rights.

Dudgeon may have begun the long march towards the equal treatment of same sex relationships which, in the whole of the United Kingdom, has led to the Civil Partnership Act 2004. But it took until 2001 for the age of consent to same and opposite sex activity to be equalised north and south of the border, following an adverse decision of the European Commission on Human Rights in *Sutherland v United Kingdom* [1997] EHRLR 117. In 2003 the criminal law of England and Wales took the logical step of treating all kinds of sexual activity on an equal, gender and sex neutral basis. Historically, sex law was constructed from the point of view of the hetero-sexual male. Hetero-sexual males were interested in protecting themselves against unwanted sexual approaches or attacks and in protecting the virtue and reputation of 'their' own women. Prostitution had to be tolerated but not protected. In

1885, Labouchere and his colleagues opposed the criminalisation of sexual intercourse with girls aged 13 to 15, apparently because they were afraid that it would penalise young upper class men who seduced their teenage servant girls. Male homosexuality, on the other hand, was seen as a threat which had to be repelled: hence the Labouchere amendment which penalised acts of gross indecency between males whether in public or in private. It has been suggested that this was not meant to be taken seriously, but merely as an awful warning of what might happen if the law took too close an interest in such things. But the logic from the hetero-sexual male's point of view is impeccable. Female homosexuality, on the other hand, was seen as an unthreatening curiosity. It is not surprising, then, that hetero-sexual women have often made common cause with homosexual men and women in the fight for liberation and equality. Whether it is a coincidence that the most famous judgments in favour of gay marriage have come from courts in Massachusetts and Canada headed by women is not for me to say.

We have indeed come a long way. But we are not there yet. Privacy is not enough. As Justice Albie Sachs famously put it (in *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6, paras 116-117):

> "There is no good reason why the concept of privacy should be restricted simply to sealing off from State control what happens in the bedroom, with the doleful subtext that you may behave as bizarrely and shamefully as you like, on the understanding that you do so in private. . . . [A]utonomy must mean far more than the right to occupy an envelope of space in which a socially detached individual can act free from interference by the State. . . [P]eople live

in their bodies, their communities, their cultures, their places and their times. The expression of sexuality requires a partner, real or imagined."

The claim, then, is for recognition of same sex relationships on equal terms with opposite sex relationships. This does not, of course, mean that they are necessarily the same in every respect. Professor Norrie has pointed to some significant differences (see "Marriage is for hetero-sexuals – may the rest of us be saved from it" (2000) 12 CFLQ 363). We must beware imposing upon them our stereotypical assumptions drawn from opposite sex relationships. No doubt we shall begin to explore these issues when civil partnerships come to be dissolved. But I am interested in how far we have come towards according equal respect to same sex relationships. This has been the underlying theme of three recent decisions of the House of Lords: *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, *M v Secretary of State for Work and Pensions* [2006] 2 AC 91, and *Re G (Children) (Residence: Same Sex Partner*) [2006] 1 WLR 2305. I see one as good news, one as bad news, and one as a bit of both. Others may think differently.

The first two cases were concerned with discrimination in legislation between opposite and same sex relationships. Any attack on primary legislation has, of course, to be mounted either through European Union law (which was not in point here) or through the Human Rights Act 1998. The complaint in both cases was that the legislation, as currently interpreted, violated the claimant's rights under article 14 of the European Convention on Human Rights taken with article 8. Article 14 reads:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

Sexual orientation is not in the list. But Strasbourg has added it by analogy: see *Salgueiro da Silva Mouta v Portugal* (2001) 31 EHRR 47. This is important. The common thread running through the list is that these are personal characteristics of the individual which he or she can either do nothing about – such as race or sex – or should not be expected to do anything about – such as religion or political opinion. The acceptance that sexual orientation falls into at least one of these categories denies the view that it is simply a 'life-style choice' or a contagious disease (a view espoused in some surprising quarters in the 1950s but rejected by the Wolfenden Report).

Article 14 prohibits only discrimination in "the enjoyment of the rights and freedoms set forth in this Convention". The rights in question were those set forth in article 8.1:

> "Everyone has the right to respect for his private and family life, his home and his correspondence."

These are qualified by the justifications set out in article 8.2:

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the

economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

However, there was no mention of the Convention at all in *Re G*, still less of these guarantees, even though they might have been thought relevant in a number of important ways.

Let us begin with *Ghaidan v Godin-Mendoza* [2004] 2 AC 91. This concerned the right of a surviving partner in a same sex relationship to succeed to his deceased partner's Rent Act tenancy in the home which they had shared. The Rent Act 1977 (in paragraphs 2 and 3 of Schedule 1) gives greater rights to a surviving spouse than it does to a member of the deceased tenant's family who was living there at the time of his death. Equivalent provisions have been on the statute book since 1920 when security of tenure was first given to the tenants of private landlords. Post war case law began to recognise that an unmarried opposite sex partner could be a "member of the deceased tenant's family" (the "high-water mark" was *Dyson Holdings v Fox* [1976] QB 503 but cf *Helby v Rafferty* [1979] 1 WLR 13). As amended in 1988, the Act gives the same rights as a surviving spouse to a "person who was living with the original tenant as his or her wife or husband".

The next step was to recognise that a surviving same sex partner could also be a member of the deceased tenant's family. Before the Human Rights Act the courts were prepared to go that far, but not to recognise the survivor as the equivalent of a surviving spouse. Indeed, the House of Lords only took the first step by a majority of

three to two: see *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27. In *Ghaidan v Godin-Mendoza*, the House was invited to take the further step in the light of the Human Rights Act. Significantly, given what happened in the second case, the Government intervened on the side of the surviving partner.

The first question is always whether the alleged discrimination concerns the enjoyment of a convention right. This was not an issue. It was common ground that the article 8 right to respect for the home was engaged. There is no convention right to be supplied with a home. But if one has a home, it is entitled to respect. If the law protects the security of the home, it must not discriminate in a way which falls foul of article 14. The second question is whether the reason for the difference in treatment is one of the grounds prohibited by article 14. Again, this was not an issue. Sexual orientation had already been added to the list.

The issues were whether there was in fact any difference in treatment at all and if so whether it could be justified. Discrimination means an unjustified difference in treatment between two cases which ought to be treated alike. It can also mean an unjustified likeness in treatment of two cases which ought to be treated differently but that is another story. In assessing whether there has been a difference in treatment, Strasbourg always asks whether the two cases are the same or whether there is a material difference between them. So it was argued for the landlord that opposite and same sex couples are intrinsically different – opposite sex couples are the foundation of the family and of society but same sex couples are not because they cannot have children together. The objections to this argument are numerous. First they can indeed have children together in any meaningful sense of the term – of which more anon.

Secondly, if they cannot have children together, they can and frequently do bring them up together. Thirdly, the capacity to have children together is completely irrelevant. It has never been a requirement for a valid marriage. No-one inquires of an opposite sex couple whether they can or wish to have children together. There is nothing in the Rent Act to suggest that it is protecting procreators or their children. Children are protected directly as members of the family. Surviving partners are protected because they stand to lose the home which they have shared with the deceased.

But to my mind, there is another and more fundamental reason why this argument should not succeed. When asking whether the cases are comparable, we should normally leave out of account the prohibited distinction. Thus, when asking whether the case of a man is comparable with the case of a woman, or the case of a black person is comparable with the case of a white, or the case of a homosexual is comparable with the case of a hetero-sexual, one should leave that characteristic out of account. Otherwise, it is easy to say that there has been no discrimination between the man and the woman because women are different from men, or between black and white because blacks are different from white, or between homo-sexual and hetero-sexual because they too are different from one another. The whole point of equality law is that people with differences such as those should nevertheless be treated alike unless there is a good reason to differentiate. In a democracy we celebrate difference and accord it equal dignity and respect. As I said in *Ghaidan*, "democracy values everyone equally even if the majority do not" (para 132).

I appreciate that this point is easy to make when the complaint is of an unjustified *difference* in treatment between two cases which ought to be treated alike. It is less easy to apply when the complaint is of an unjustified *likeness* in treatment between two cases which ought to be treated differently. But I shall cross that bridge when I come to it – it shows the complexity of working out which cases should be treated alike and which differently. My main argument, which we shall come to in more detail in the case of *M v Secretary of State for Work and Pensions*, is that we should take a broad view of the rights, recognise a difference in treatment when there is one, and then get down to the careful analysis of the justifications. Justification is a much more sensitive tool than difference in treatment.

Hence the real point of *Ghaidan* was whether or not the difference in treatment could be justified. Justification requires there to be a legitimate aim, here alleged to be the protection of the traditional family. Strasbourg accepts that this is in principle capable of being a very weighty reason for a difference in treatment: see *Karner v Austria* (2003) 14 BHRC 674. But the traditional family means the family based on marriage. What was in issue here was a difference in treatment between two kinds of non-marital relationship. The difference in treatment must always have a rational connection with the aim. No-one could satisfactorily explain how giving a benefit to unmarried opposite sex couples which was denied to unmarried same sex couples could protect the traditional family. It is not going to persuade anyone who might otherwise want to marry not to do so, or to persuade anyone who might otherwise want to form a lasting same sex relationship to get married instead. It might perhaps discourage the formation of lasting same sex relationships, but no-one has suggested that that is a legitimate aim: quite the reverse. Stephen Cretney has argued that one

reason for the political sea-change which led to the Civil Partnership Act 2004 may have been the desire to promote lasting and committed same sex relationships in the wake of the spread of HIV/AIDS.

Nor did the Government suggest that this was a case in which the law should be given time to catch up with the Convention, even though the Civil Partnership Bill and the necessary amendments to the Rent Act were then before Parliament. Hence all five Law Lords held that the law as decided in *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27 was not compatible with the survivor's Convention rights. But what to do about it? Section 3(1) of the Human Rights Act 1998 requires that "so far as it is possible to do so", all legislation must be read and given effect in a way which is compatible with the Convention rights. Was it possible to read "a person who was living with the original tenant as his or her wife or husband" to include the survivor of a same sex relationship? Lord Millett thought that it was not. The words "husband" and "wife" necessarily connote a partner of the opposite sex: much the same was said by Government Ministers when explaining that civil partnership would not be marriage.

Four of us thought that it was possible. These days, the law draws virtually no formal distinction between husbands and wives: each has the same rights and remedies against the other. It was not always so: English family law assigned them very different positions until the early 1970s. The Matrimonial Homes Act 1967 began the trend towards sex neutral legislation which is now virtually complete. This was, of course, a necessary pre-condition to giving registered same sex partnerships the same

legal consequences as marriage: no-one then has to work out who is the husband and who is the wife.

The Government had supported the surviving partner in *Ghaidan v Godin-Mendoza*. But then came *M v Secretary of State for Work and Pensions* [2006] 2 AC 91. This concerned the treatment of same sex relationships in the calculation of child support. In common with the benefits system as a whole, the child support scheme treated same sex partners as two separate individuals, whereas married or unmarried opposite sex partners were treated as a couple. Sometimes their liability was reduced as a result and sometimes it was increased. For this particular lesbian couple, their liability was increased. But their main concern was that their relationship should be recognised as having the same validity as an opposite sex relationship. They complained that the law was incompatible with their Convention rights under article 14 taken with article 8. They won before the child support tribunal, the Commissioner, and (by a majority) the Court of Appeal. But they lost before the House of Lords. (I say "they" but the actual case was concerned with the liability of one of them; the case of the other was awaiting the outcome of the first.)

This time, therefore, the Government was in the opposing camp. I do not know why it had felt able to take the survivor's part in *Ghaidan* but not to concede the couple's case in *M*. Very few same sex couples would be affected. The law was about to be changed by the Civil Partnership Act 2004. But there may have been wider concerns about the potential effect upon the benefits system generally: opposite sex couples might complain about treating them as a single unit when same sex couples were treated as two individuals because this was usually to their disadvantage. The

Government fought on two fronts. Did the difference in treatment affect "the enjoyment of the rights and freedoms set forth in this Convention"? And if it did, was it justified?

It was strongly argued that Article 14 must be distinguished from the general guarantee of equal treatment by the laws and by public officials which is contained in Article 26 of the International Covenant on Civil and Political Rights and in Article 1 of the 12th Protocol to the European Convention. This reads:

> (1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> (2) No-one shall be discriminated against by a public authority on any ground such as those mentioned in paragraph 1.

Only 15 Council of Europe states have ratified the 12th Protocol, mostly from the former Eastern block). The UK has neither signed nor ratified it. So the UK is only bound not to discriminate in securing the enjoyment of the Convention rights. Discrimination need not involve an actual breach of those rights – otherwise article 14 would add nothing to the substantive articles: see *Abdulaziz v United Kingdom* (1985) 7 EHRR 471. But the difference in treatment has to "fall within the ambit" or "affect the modalities of the exercise" of the right. Lord Nicholls explained the difference between these two concepts. Falling within the ambit or the scope of a Convention rights is a loose expression which can be interpreted widely or narrowly (para 13) but the Strasbourg approach has been "that the more seriously and directly the

discriminatory provision or conduct impinges upon the values underlying the particular substantive article, the more readily it will be regarded as within the ambit of the article" (para 14). Lord Bingham too referred to the connection with the "core values" protected by the right (para 4). They, it would seem, did not regard respect for same sex relationships as a "core value" protected by article 8.

Lord Walker pointed out that the concept of respect for private and family life in article 8 is potentially so wide and open-ended that "virtually every act of discrimination on grounds of personal status" could potentially be covered, because these are all important elements in a person's private life. If so, there would have been no need for Article 1 of the 12th Protocol (para 82). The connection between the discrimination and the right has to get closer than that, even though there need not be a breach. So this discrimination did not affect the couple's private life sufficiently for article 14 to be engaged. Nor did it affect their family life, because Strasbourg has not yet recognised a same sex couple as having a family life with one another: the latest word was the admissibility decision in *Mata Estevez v Spain* (app no 56501, 10 May 2001), which concerned the survivor's claim to death benefit:

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

Lord Mance stressed that the case was concerned with events in 2001 to 2002. He "had very little doubt that the Strasbourg court would see the position now as having changed very considerably, and that, if such an issue were to come before it in respect of the position in 2006, Mrs M's same sex relationship could very well be regarded both in Strasbourg and in the United Kingdom, as involving family life for the purpose of article 8" (para 152). I would like to agree, but I have some doubts about Strasbourg, given the continued resistance of Italy, Greece and most of the new Eastern European entrants to the recognition of gay relationships. But the United Kingdom has recognised same sex partners as members of one another's family since *Fitzpatrick v Sterling Housing Association* [2001] 1 AC 27. This raises an interesting question about the "margin of appreciation".

If the matter falls within the margin, would Strasbourg expect consistency within the member state? So if the state recognises a family relationship for one purpose, will Strasbourg expect it to recognise it for other purposes? This would pose a problem for us. We have so far taken the line that we will only find a statutory provision incompatible with the Convention rights if Strasbourg would do so. In Lord Bingham's famous words in *R (on the application of Ullah) v Special Adjudicator* [2005] 2 AC 323, "The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less." (para 20) One might add: no less but certainly no more. The premise is that the Convention rights, being contained in an international treaty, have the same content in all member states. States are permitted to go further, but are not required to do so. And we could only use the Convention rights to read down United Kingdom legislation if required by

Strasbourg to do so. At bottom, the view of the majority seems to be that Strasbourg requires us to respect the sexual identity of lesbians and gays but not their relationships: this particular difference in treatment impacted upon the latter but not the former.

But Strasbourg has long held that homo-sexuals can have a family life with their own and other people's children. The leading case which recognised that article 14 covered discrimination on grounds of sexual orientation, *Salgueiro da Silva Mouta v Portugal* [2001] 1 FCR 653, concerned the claim of a divorced father who had entered into a same sex relationship to the custody of his daughter. In *Frette v France* [2003] 2 FCR 39, it appears that a French ban on a homosexual man being considered as a prospective adopter was also considered under the ambit of family life, although it was found justified.

There was no doubt that these mothers enjoyed a family life with their own and one another's children. The children spent most of the time with their fathers, but spent at least two days a week with their mothers. The tribunal found that the operation of the child support scheme fell within the ambit of the mother's right to respect for her family life with her children. So did I. It did not constitute an interference with that right, but that is not required. Just as the Rent Act succession provisions were one way in which the state demonstrated its respect for the home, the child support scheme is one of the ways in which the state shows its respect for family life. The UK had acknowledged that in *Logan v United Kingdom* (1996) 22 EHRR CD 178.

Lord Nicholls pointed out that "Article 14 is engaged whenever the subject matter of the disadvantage comprises one of the ways a state gives effect to a Convention right" (para 16). This is what is meant by "one of the modalities of the exercise of the right guaranteed". In *Petrovic v Austria* (1998) 4 BHRC 232 a father complained that he was not entitled to a parental leave allowance to support him in looking after his new baby, whereas the mother was. The allowance was intended to promote family life. The state was not obliged to grant such allowances, but if it did, it had to do so in a non-discriminatory manner. I thought the same applied to the calculation of child support. Nobody was preventing Mr Petrovic from looking after his child either; the state was simply not helping him to do so. The others, however, thought that the discrimination in *M* did not have a sufficiently adverse effect upon her family life with her children to qualify.

Lord Bingham rejected the suggestion (originally made by Grosz, Beatson and Duffy, *Human Rights – The 1998 Act and The European Convention, 2000*, C14 – 10) that "even a tenuous link" with a Convention right is enough, because "that would be a recipe for artificiality and legalistic ingenuity of an unacceptable kind" (para 4). Some have questioned whether an intense focus on the precise way in which, and extent to which, the discrimination impacts upon the exercise of the right is just as likely to lead to artificiality and ingenuity: certainly the arguments about how exactly this discrimination impacted upon these Convention rights were ingenious if not artificial. A broad approach to the scope of the right may be preferable, so that the real debate can turn on the question of justification. As I have already said, justification in all human rights instruments has become a sensitive tool. It requires a legitimate aim, a rational connection between the means and the aim, and that the means be no more

than necessary to accomplish the aim. Even if all this can be shown, there may be some means which no end, however legitimate, can justify. In sum, the harm done by the difference in treatment must be proportionate to the legitimate aim pursued.

Lord Bingham and Lord Walker considered that, even if the difference in treatment had fallen within the ambit of article 8, it would have been justified. Parliament had now legislated to put the matter right and it was unfair to blame the UK for not doing so sooner. As Lord Bingham put it, "It is unrealistic to stigmatise as unjustifiably discriminatory a regime which, given the size of the overall task and the need to recruit the support of the public, could scarcely have been reformed sooner" (para 6). Lord Walker was to the same effect: "Although discrimination against homosexuals could never have been justified, by today's standards, the fact is that for centuries a homosexual couple living together were (even if they escaped criminal sanctions and social ostracism) regarded as quite different from a married couple, or a heterosexual unmarried couple. Profound cultural changes do take time . . ." (para 95) Accordingly, the difference in treatment was within the UK's margin of appreciation. Lord Nicholls, who had written the lead opinion in *Ghaidan v Godin Mendoza*, found it unnecessary to decide but said that had it been necessary he would have agreed with Lord Bingham and Lord Walker (para 34). Lord Mance did not consider the point.

I took the view that the difference in treatment could not be justified. No one had suggested that it had any legitimate aim. No-one had even attempted the now conventional proportionality exercise which we had conducted in *Ghaidan v Godin-Mendoza*. The only suggestion was that states may be given some time to put matters right: see *Walden v Liechtenstein* (App no 33916/96, 16 March 2000). There the

complaint was that the Liechtenstein court had given the legislature time to remedy a difference in treatment between husbands and wives in the state pension scheme which the court had found unconstitutional. The principle of legality could justify rectifying matters for the future only. But that scarcely helps us with applying the Human Rights Act, which requires us to interpret and apply legislation compatibly if we can. Furthermore, as I said,

> ". . . it is one thing to use historical disadvantage and exclusion to justify some compensatory treatment for the excluded group which is denied to others. It may then be fair to allow the system some time to catch up. This is in effect what happened in *Petrovic v Austria* (1998) 4 BHRC 232. Mothers had been given an allowance because they were traditionally expected to give up work to care for their children whereas fathers were not. It is another thing entirely to use historical disadvantage to justify the continued disadvantage and exclusion *of the excluded group*." (para 115)

If the difference in treatment had been unjustified in *Ghaidan v Godin Mendoza*, I could not see how the equivalent difference in treatment could be justified in *M's case*. The timings were identical. Discrimination in 2001. Legislation in 2004. So why did the Civil Partnership Act solve the problem in one and not the other? If there had been no legislation, the difference in treatment would still have been wrong. This time, no-one had even tried to say that it was not. Perhaps, therefore, although the actual outcome was not what the couple wanted, they have attained a substantial moral victory.

The third case did not involve the Human Rights Act at all, although some think that it should have done. *Re G (Children) (Residence: Same Sex Partner)* [2006] 1 WLR 2305 was a dispute between lesbian partners about the upbringing of two little girls. They had been born to one partner, CG, as a result of anonymous donor insemination at a clinic abroad. But this had been a joint venture upon which she and her partner, CW, had embarked together. At the outset they regarded the children as "their" children and brought them up together until their relationship broke down. Thereafter the children had lived with their birth mother; but she had been unable to accept the importance of their relationship with their other mother and with her son, whom they saw as their big brother. The mother had moved away secretly and in defiance of a court order not to do so without permission. However, once they had been located, weekend and holiday contact were reinstated and the mother had complied with the court's orders. But the trial judge decided that the children should move to live with their other mother and the Court of Appeal upheld that decision. The question of principle was: what do we mean by a "parent" of a child and how does it matter?

This couple were to all intents and purposes in the same situation as an opposite sex couple who embark together upon anonymous donor insemination at a UK licensed clinic. If they are married, the mother's husband is automatically the legal father of the child, unless it is shown that he did not consent to the insemination: section 28(2) of the Human Fertilisation and Embryology Act 1990. If they are not married, but the woman is artificially inseminated "in the course of treatment services provided for her and a man together by a person to whom a licence applies", the man is to be treated in law as the father of the child: section 28(3). Section 28 was not amended by the Civil Partnership Act 2004, which treats the civil partner of a parent as a step-parent.

However, in a white paper published in December 2006, the Government does now propose applying section 28 to same sex couples (in effect to lesbians), and also the procedure in section 30 for commissioning parents to apply for a parenting order in respect of their surrogate children (which would apply to gay men as well) (Department of Health, *Review of the Human Fertilisation and Embryology Act 1990,* December 2006, Cm 6989, paras 2.65 to 2.69).

Here was an undoubted difference in treatment between an opposite and a same sex partner. Yet no-one tried to argue that this was incompatible with the Convention rights. Why might this be? Possibly because only one of the children was born after the Human Rights Act came into force: a good parent would be reluctant to differentiate between them in this way. Probably because the family law principles applicable to the dispute would have been the same in any event. But recognition as a legal parent can sometimes make a difference. It would certainly make a difference to the children's inheritance rights and their relationships with the wider family. And legal recognition is also a matter of respect – the self respect of the parent and the respect in which each parent is held by other people.

It would be difficult to argue that this matter did not fall within the ambit of the Convention right to respect for family life. It would be possible to argue that the difference is justified: in *Frette v France* [2003] 2 FCR 39 it was held that the protection of the children's interests was a legitimate aim and child psychologists and psychiatrists were divided in their views on the effects on children of being adopted by homosexual parents. Even so the argument only prevailed by a majority of 4 to 3. A powerful minority (including the UK judge, Sir Nicholas Bratza) held that an

absolute bar was not proportionate to the legitimate aim: it precluded any real consideration of the interests at stake and the possibility of reconciling them. In this country we would not accept the premise of the majority. The Judicial Studies Board, in its *Equal Treatment Bench Book*, explains (para 7.1.6):

> "Extensive psychological research has demonstrated that children brought up by lesbian or gay parents do equally well as those brought up by heterosexual parents in terms of emotional well-being, sexual responsibility, academic achievement and avoidance of crime. There is no body of respectable research which points convincingly to any other conclusion."

On the other hand, neither was any mention made in *Re G* of the impact of article 8. The House upheld the conventional view that the statutory instruction, in section 1(1) of the Children Act 1989, "that the child's welfare shall be the court's paramount consideration", means what it says. There is no question of a parental right as such (para 30). But the fact of parenthood is "an important and significant factor in considering which proposals better advance the welfare of the child" (para 31, quoting Lindenmayer J in the Family Court of Australia in *Hodak v Newman* (1993) 17 Fam LR 1). Some have argued that this does not give sufficient weight to the parent's independent Convention right to respect for the family life between parent and child. Family life undoubtedly exists between every birth mother and her child and probably exists between every birth father and his child irrespective of how much contact there has in fact been between them. But I think this argument begs the question of what we mean by a parent.

Even though there was no mention of the article 8 right, we did discuss what is meant by a parent and the weight to be given to different kinds of parenthood. We said that there were at least three ways in which a person can be or become a "natural" parent. (No doubt this is a gross over-simplification and there are many permutations upon these.) First is genetic parenthood: providing the gametes which produce the child. Knowledge of genetic links can enhance the relationship between parent and child, and possibly also between the child and the wider family, in many ways. Second is gestational parenthood: conceiving and bearing the child. The process of carrying and giving birth does in many cases bring with it a very special relationship between mother and child which cannot be exactly compared with any other. Third is social and psychological parenthood: the relationship which develops from the child demanding and the parent providing for the child's needs. This is just as natural a relationship as the other two. Mothers usually combine all three. Fathers usually combine the first and the third, and some would say that a father's involvement during pregnancy and childbirth brings him very close to the second, so that even a non-genetic father combines the second and the third. If so, of course, CW was in the same position as a non-genetic father.

Views differ about the weight to be attached to the various kinds of parenthood. Family lawyers will normally assess each case on an individual basis. But Lord Nicholls took the view that this dispute was not between two biological parents. I think he must have meant genetic parents, because many scientists would take the view that the intense bonds which develop between a psychological parent and her child are also a matter of biology: or at the very least that biology includes psychology. Lord Nicholls said that "A child should not be removed from the primary

care of his or her biological parents without compelling reason. Where such a reason exists the judge should spell this out explicitly." (para 2) With the qualification indicated, I would of course agree with that statement. Lord Scott emphasised his view that the lower courts had "failed to give the gestational, biological [again he meant genetic] and psychological relationship between Ms G and the girls the weight that that relationship deserved. Mothers are special . . . " (para 3). We all took the view that the lower courts should at least have acknowledged and explored the importance of the relationship between the birth mother and children; and that the extreme step of moving them from one to the other was not justified while the contact order was in fact being observed.

No doubt some will say that we did not go far enough towards recognising the other mother as a true parent of these little girls. I did not refer to her as the "other mother" in my opinion. But my intention was certainly to go as far as possible in that direction. That is why I regret that section 28 of the 1990 Act was not challenged. Some may also say that we should not have interfered with the judgments of the courts below about what would be best for the girls. Once again my intention was to treat this case as a case like any other. The extremely experienced welfare officer, who had spent a great deal of time getting to know the children and each of the households, had recommended against a change of primary care. Had the other mother been a father in similar circumstances, it is virtually inconceivable that a court would have ordered a change of primary care unless the contact arrangements had broken down. The same principles should be applied to these relationships as to any other.

Why do these cases matter now that we have the Civil Partnership Act? The cautious approach to gay relationships in *M v Secretary of State for Work and Pensions* may matter if the claim to gay marriage is pursued here as doggedly as it has been over the Atlantic: see N Bamforth, "'The benefits of marriage in all but name?' Same sex couples and the Civil Partnership Act 2004" ((2007) 19 CFLQ 133. As the Boston Globe commented last week:

> "Time is on the side of equality. The state's first same–sex married couples have already celebrated their third wedding anniversaries. With each year that passes, it becomes ever clearer that the sky will not fall; that the institution of marriage has been strengthened, not weakened; and that giving everyone the right to marriage makes Massachusetts a happier place overall."

More importantly, however, these cases matter because, in the words of Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. Once again to quote the JSB:

> "Gay men and lesbians face a daily dilemma – whether to be open as to their sexual orientation, and risk bigotry, prejudice, discrimination and the adverse judgements of others, or keep the issue hidden and face accusations of cover-up, dishonesty and a lack of candour."

Only when people can be open about themselves and their relationships without fear or shame will true equality have arrived.