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**Would Strasbourg solve the conundrum of same-sex marriage in Northern Ireland?**

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**Wednesday, 23 August 2017**

Last week, the High Court of Northern Ireland rejected petitions challenging the prohibition of same-sex marriage in Northern Ireland. The petitions were brought by two same-sex couples who entered into civil partnerships in 2005 but want to be married couples, and by a man who lawfully married another man in England and wishes his marriage to be recognized in Northern Ireland. The petitioners claim that denying them the opportunity to marry or refusing to recognize a lawful marriage violates their rights under the European Convention on Human Rights.

The context of these cases is the legislative arrangements for marriage in the UK that must, to anyone outside of the UK and most people in the UK, appear byzantine. Same-sex marriage was made lawful in England and Wales by the UK Parliament in 2013, and in Scotland by the Scottish Parliament in 2014. However, the Northern Ireland Assembly, which has competency to deal with the “transferred matter” of marriage in Northern Ireland by virtue of the devolution settlement created by the Northern Ireland Act 1998, has not legislated to make same-sex marriage lawful.

Although a majority of Northern Ireland Assembly Members voted in November 2015 in support of a Private Member’s proposal to call on the Executive to table legislation to allow for same-sex marriage (the vote was Ayes 53 and Noes 52), the proposal was negatived because a “petition of concern” had been submitted by certain Members which meant that the proposal required “cross-community” support rather than a simple majority – which it did not receive. As a consequence, the relevant marriage legislation in Northern Ireland – the Marriage (Northern Ireland) Order 2003– continues to prohibit marriage if “both parties are of the same sex”.

**The High Court of Northern Ireland - Mr Justice O’Hara’s judgments**

In rejecting the same-sex marriage petitions, Mr Justice O’Hara recognized “the compelling evidence put before me about the effect on the gay and lesbian community of being treated less favourably than others so repeatedly and for so long” and noted “the psychiatric damage caused by isolation, insult and disapproval”. However, he rejected the petitions on the basis that “[i]t is not the role of a judge to decide on social policy. That is for the Executive and the Assembly under our constitution.”

Mr Justice O’Hara reached his judgment principally by following the jurisprudence of the European Court of Human Rights. He was bound to do so by the requirement of the Human Rights Act 1998 – the legislation which gives the European Convention on Human Rights direct effect in the domestic courts of the UK – that a court determining a question which has arisen in connection with a Convention right must take into account any judgment, decision, declaration or advisory opinion of the Strasbourg Court.

There was, on this basis, little chance that Mr Justice O’Hara was ever going to reach a different conclusion to the one set out in his judgments. He was, as he put it, “driven to conclude that the Convention rights of the applicants have not been violated” because “the Strasbourg Court does not recognise a ‘right’ to same sex marriage. That being the case, the current statutory provisions in Northern Ireland do not violate any rights. Those rights do not exist in any legal sense.”

**Would the European Court of Human Rights reach a different conclusion?**

If the petitioners in these cases took their complaints to the UK Supreme Court and that court reached the same conclusion as the High Court of Northern Ireland, would “going to Strasbourg” with these complaints be worthwhile?

The simple answer is that it is almost certain that any complaint of this kind heard in Strasbourg today would fail. This is because the European Court of Human Rights has been consistently clear that “the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State” (Schalk and Kopf v Austria, 2010, para 61) on the basis that, fundamentally, “Article 12 of the Convention [the right to marry] does not impose an obligation on [a] Government to grant a same-sex couple … access to marriage” (Oliari and Others v Italy, 2015, para 192).

However, there is a “twist” in the Northern Ireland cases that may give the applicants some sense of optimism despite the Court’s settled jurisprudence. This relates to the fact that one of the applicants is not claiming the right to marry per se but, rather, the right to have a legally solemnized marriage recognized. This applicant claims that it is a violation of his Convention rights for one jurisdiction of the UK (Northern Ireland) to fail to recognize a marriage that he lawfully entered into in another jurisdiction (England and Wales).

Although the Strasbourg Court has not previously considered a case of this kind – in which the national law of a Contracting State allows same-sex marriage in one jurisdiction but not another – it is unlikely that the Court would interpret the legislative arrangements for same-sex marriage in the UK to be in violation of Convention rights. Although the Northern Ireland cases raise some new legal questions, not least in respect of a difference in treatment based on residence in different jurisdictions of a State, the Strasbourg Court would undoubtedly start from the position that there is no right to same-sex marriage under the Convention.

On this basis, the Strasbourg Court may declare the Northern Ireland complaints inadmissible under Article 12 alone and/or in conjunction with Article 14 of the Convention – that has certainly been the Court’s approach in some recent cases brought before it under Article 12 about marriage discrimination based on sexual orientation. However, if the Northern Ireland complaints were declared admissible – which may be more likely because of their “special circumstances” – then the Court would probably find as follows.

**Same-sex couples who wish to marry in Northern Ireland**

In respect of the complaints by those same-sex couples who are in civil partnerships and wish to get married in Northern Ireland but are prevented from doing so, the Strasbourg Court would probably reiterate its settled view, as recently expressed by its Grand Chamber, that Article 12 of the Convention “secures the fundamental right of a man and woman to marry and to found a family” and, as such, “enshrines the traditional concept of marriage as being between a man and a woman” (Hämäläinen v Finland, 2014, para 96).

On this basis the Court would likely reiterate that Article 12 cannot be construed as imposing an obligation on the Contracting State to grant access to marriage to same-sex couples. Moreover, the Court would probably conclude that “the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State” (in this case, the national law as determined by the Northern Ireland Assembly) and that the Court must “not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society” (Schalk and Kopf v Austria, 2010, paras 61-62). Therefore, a complaint under Article 12 alone would likely be rejected.

What about a complaint about discrimination, brought under Article 12 in conjunction with Article 14 of the Convention? Clearly there is a difference in treatment between same-sex and different-sex couples in Northern Ireland, and between same-sex couples in Northern Ireland and all other couples in the rest of the UK. Such a complaint would also probably fail because the anti-discrimination provisions in Article 14 have no independent existence and have effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by the Convention. Since the right to same-sex marriage is not safeguarded by the Convention, any complaint under Article 14 would likely be rejected (see, most recently, Chapin and Charpentier v France, 2016). In addition, attempting to combine Article 14 with Article 8 of the Convention (right to respect for private and family life) would also probably fail (see Schalk and Kopf v Austria, 2010).

**Same-sex couples who want a lawful marriage solemnized in England to be recognized in Northern Ireland**

In respect of the applicant who claims that denying his same-sex marriage legal recognition in Northern Ireland is a violation of his human rights, there are a number of arguments he could make in Strasbourg. The most obvious argument is that he is legally married but, by virtue of the legislative framework for marriage in the UK, when he travels from one legal jurisdiction to another his marriage is effectively taken away. This was a problem recognized by the United States Supreme Court when it overturned the situation in which a lawful marriage could be “stripped” from a same-sex couple when they “travel across state lines” (Obergefell v Hodges, 576 U. S. \_\_\_\_ (2015) page 6)

Using the argument that a State should not be permitted to “strip” a person of their lawful marriage, the applicant might find some support in the long-standing Strasbourg principle that, although Article 12 “lays down that the exercise of this right [to marry] shall be subject to the national laws of the Contracting States”, a State “must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired” (Rees v the United Kingdom, 1986, para 50).

Would the Strasbourg Court regard the national laws of the UK, which refuse to recognize a lawful same-sex English marriage as a marriage in Northern Ireland, as imposing a restriction or reduction that impairs the very essence of the right to marry? I would suggest not. The reason for this is because the “very essence” principle is relevant only in relation to the scope of Article 12 which, as the Court says, does not extend to same-sex marriage. In 2010, the Court expressed the principle in these terms: “Article 12 secures the fundamental right of a man and woman to marry … It is subject to national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired” (O'Donoghue and Others v the United Kingdom, 2010, para 82). Therefore, if the right to marry relates to marriage between a man and a woman then any restriction or reduction placed on same-sex marriage by national laws would not impair that right.

Another problem for the applicant to contend with is the Strasbourg Court’s comfort with a State depriving a couple of their legal marriage based on the fact that the State does not wish to recognize a same-sex marriage. For instance, the Court declared inadmissible a complaint by a legally married couple who were required to end their different-sex marriage (and transform it into a same-sex civil partnership, if they wished) because one of the couple wanted legal recognition for their gender reassignment. Requiring them to end their marriage because the State did not recognize same-sex marriage was, the couple said, a violation of Article 12 because it impaired the very essence of their right to marry and, importantly, remain married. The Court rejected this complaint on the grounds that Article 12 does not protect same-sex marriage (Parry v the United Kingdom, 2006).

The Court would, I believe, reach a similar conclusion in respect of an English same-sex marriage being transformed into a civil partnership in Northern Ireland against the will of the couple. This is because the Court would likely say that when the national law of the State (the law of England of Wales) provided same-sex couples with the opportunity to marry it did not create a right for same-sex couples to marry under Article 12 of the Convention. As the High Court of Northern Ireland concluded, such a right does not exist in any legal sense. Therefore, requiring a legally married same-sex couple to have their marriage treated as a civil partnership in Northern Ireland does not violate that couple’s human rights.

Moreover, the fact that the UK Parliament explicitly legislated in the Marriage (Same Sex Couples) Act 2013 to require English same-sex marriages to be recognized as civil partnerships in Northern Ireland would probably not be taken by the Strasbourg Court as a negative. On the contrary, the Court’s current position is that same-sex couples should be provided with “a specific legal framework providing for the recognition and protection of their same-sex unions” other than marriage (Oliari and Others v Italy, 2015, para 185). The Court would likely regard the UK as having done a very “good” thing in ensuring that English same-sex marriages are recognized as civil partnerships in Northern Ireland.

For these reasons, if considered today, I think the Strasbourg Court would reject a complaint against the UK for not recognizing a lawful same-sex English marriage in Northern Ireland.

**Should the Northern Ireland cases go to Strasbourg?**

The fact that complaints may appear likely to fail in Strasbourg should not necessarily deter applicants from making them. When Jeffrey Dudgeon MBE went to Strasbourg to challenge the criminalization of male same-sex sexual acts in Northern Ireland in the mid 1970s (when such acts had been partially decriminalized in England and Wales) Strasbourg had been rejecting similar complaints for over two decades. In Jeffrey Dudgeon’s case, the time was right for Strasbourg to fundamentally change its mind on this issue. As a consequence, Jeffrey Dudgeon achieved a change in the law in Northern Ireland in much the same way that those who may go to Strasbourg about marriage discrimination in Northern Ireland would like to.

The jurisprudence of the Strasbourg Court is always subject to evolution and its jurisprudence on same-sex marriage is no exception. Although the Court would probably reject a complaint about marriage discrimination in Northern Ireland today, it may not do so in the future. If same-sex marriage has not been introduced in Northern Ireland by virtue of a UK Supreme Court judgment, by the UK Parliament legislating directly at Northern Ireland, or by the Northern Ireland Assembly legislating itself, then, because time will have passed, the Strasbourg Court may be in a position to change its mind on same-sex marriage. Judges Spano and Bianku explicitly indicated in 2016 that “things may change” in Strasbourg on same-sex marriage (Taddeucci and McCall v Italy, 2016) and, perhaps, such a change may come in time for a Northern Ireland case to be successful.

One thing is certain: the Strasbourg Court will eventually change its mind on the issue of same-sex marriage. As this short film shows, although it often takes a very long time for Strasbourg to recognize the human rights of lesbians and gay men, it does come around on most issues in the end. That is, perhaps, the principal reason for taking complaints to the Strasbourg Court about discrimination based on sexual orientation: even if success is not likely, each complaint keeps the matter before the Court and on its radar. As Mary Simpson, the first woman in the world to make a complaint about sexual orientation discrimination under international human rights law, puts it: “You’ve got to keep chipping away at the paintwork, bit by bit, until you break through.” If a complaint gets to Strasbourg about marriage discrimination in Northern Ireland then such a case will definitely chip away at the paintwork and, perhaps, even break through.