**NI COURT DISMISSES ADOPTION APPEAL (by Minister of Health)**

**Thursday 27 June 2013**

Summary of Judgment

The Divisional Court today dismissed an appeal against an earlier judicial decision that a ban on unmarried couples, irrespective of sexual orientation, and those in a civil partnership from being considered as potential adopters was discriminatory.

On 18 October 2012 Mr Justice Treacy granted the NI Human Rights Commission’s (“NIHRC”) challenge to the NI adoption legislation on the grounds that it is unjustifiably discriminatory in acting as a bar to unmarried couples and those in a civil partnership from being considered as potential adopters.    The NIHRC case was supported by C, a lesbian who has been in a long term relationship, and who with her partner are keen to be considered as adoptive parents.  They also want to enter into a civil partnership.   The Department of Health, Social Services and Public Safety (“the Department”) appealed the judge’s decision to the Divisional Court.

Article 14 of the Adoption (NI) Order 1997 (“the 1997 Order”) provides that an adoption order may only be made on the application of a married couple.  Article 15 provides that an adoption order may only be made on the application of one person over the age of 21 years where that person is not married or a civil partner, or that person is married and the court is satisfied that his spouse cannot be found, the spouses have been separated and the separation is likely to be permanent, or his spouse is incapable of making an application for an adoption order.

The NIHRC expressed grave concern that NI is out of step with the rest of the UK in that unmarried couples cannot apply to adopt.  In England and Wales and Scotland, unmarried couples irrespective of sexual orientation or whether in a civil partnership or not can apply to be considered to adopt a child.  The NIHRC challenged Article 14 of the 1997 Order as representing a blanket ban on unmarried couples, whether heterosexual, homosexual or those in a civil partnership from being able to apply for adoption as a couple.  It also challenged Article 15 as it represents a blanket ban on any person in a registered civil partnership from being able to adopt, whether as an individual or as a couple.

The Department raised three preliminary points which it contended should have led the judge to dismiss the proceedings:

        The right of the NIHRC to bring the proceedings;

        The proceedings were not brought in time; and

        The Department was not the appropriate respondent in the proceedings.

The Divisional Court rejected these arguments.  Lord Justice Girvan, delivering the judgment of the Court, held that the legislation establishing the NIHRC meant that it had standing to take the case on behalf of C who “had a clear interest in establishing the true state of the law affecting her because it will impact on decision on whether she should or should not enter into a civil partnership and whether she can or cannot or in any or in some circumstances adopt a child”.  He added that it was clear that C was a victim and the Department’s objection on this ground was without substance.

Lord Justice Girvan held that the proceedings could not be considered as being brought out of time as the issues raised relate to alleged rights violations which are ongoing.  He also held that Department was the appropriate respondent as its remit extended to adoption law and practice, it had information on its website relating to adoption eligibility that was incorrect and it had disregarded the effect of a decision of the House of Lords.

The Court referred to a judgment of the House of Lords (In re G) which the Attorney General accepted was binding on the Court of Appeal.  In this judgment, the House of Lords concluded that the European Convention on Human Rights (“ECHR”) rights of the applicants, an unmarried couple in a long-standing relationship, were engaged by the legal bar on them being considered ineligible to be considered as adoptive parents.  While the state was entitled to take the view that in general it was better for children to be brought up by parents who were married to each other it was misleading to generalise that this meant that no unmarried couple could make a suitable adoptive parent.  The House of Lords held that a blanket rule excluding unmarried couples at the outset from the process of being assessed as potential adoptive parents was irrational.

Lord Justice Girvan said that what emerged from this case was that the House of Lords rejected as “irrational, disproportionate and unjustified” the blanket ban on adoption by an unmarried couple.  He added that unless and until the UK Supreme Court (which replaced the House of Lords) decides to overrule its decision in Re G, the prevailing domestic law of NI means that an unmarried heterosexual couple are eligible to be considered for adoption.  Lord Justice Girvan then went on to say that once it is clear that under domestic law an unmarried heterosexual couple in NI will be eligible to be considered for adoption a decision of the ECtHR makes clear that a heavy onus lies on the state to justify a differential treatment of unmarried homosexual couples:

“Thus, in the context of a case such as that of C and her partner, before they enter into a civil partnership, they would be eligible to be considered for adoption as a couple.  It would be unjustifiable discrimination, as compared to unmarried couples in the light of Re G, to treat them differently.  While this does not mean that they have a “right” to adoption they have in effect an entitlement as a matter of law to ask to be considered for adoption.”

Lord Justice Girvan then went on to consider the consequences of C entering into a civil partnership with her partner.  The Department contended that Article 15 of the 1997 Order prohibits a person in a civil partnership from being eligible for adoption in any capacity whether as an individual or as a couple.  He said this outcome produced an “absurd and irrational result” as C could apply to be considered for adoption as an individual or with her partner as a couple.  He added that if the Department was correct in its approach to Article 15, the consequence of same sex partners publicly cementing their relationship (which should normally be considered as enhancing the chances of establishing a stable and committed relationship) was to render each party wholly incapable of adoption.  He noted that the Attorney General had struggled to advance any rational explanation for this other than to suggest that the prohibition was a stop gap until an ultimate decision was taken in relation to any reform of adoption law in NI.  Lord Justice Girvan commented that this could not provide a rational basis or justification for the differential treatment of those in a civil partnership compared to same sex couples outside a civil partnership.

Lord Justice Girvan concluded that if the Department is to interpret Article 15 of the 1997 Order as stated to the court, the discriminatory prohibition to adopt imposed on civil partners could not withstand challenge.  He added that any Departmental guidance to those looking for advice or information about adoption eligibility criteria should state the law clearly and accurately and should take account of relevant case law:  “It is regrettable that until recently the Department website failed to give correct advice in relation to cohabiting couples in relation to eligibility to adopt.  It is equally regrettable and surprising that social workers were operating the adoption system without being made aware of the effect of the decision in Re G and its implications.  If it is to avoid being misleading, Departmental guidance must take account of the effect of the law as it currently stands.  It must thus take account of the outcome of the present appeal.”

The Divisional Court dismissed the appeal.

**Gay and lesbian couples in Northern Ireland may now apply to adopt children in the same way heterosexual couples can, the Belfast Telegraph can reveal.**

**[NI Department of Health finally yields]**

By Jack Brennan

11 December 2013

Until now single homosexual people could apply for adoption –but couples in a gay relationship were prohibited from doing so.

The move brings Northern Ireland in line with the rest of the UK where gay couples are already allowed to adopt.

Gavin Boyd, an education equality officer from the Rainbow Project who also works for Cara-friend, called it a landmark ruling. He said: "Many many gay couples across Northern Ireland have waited so long for this and it will make a profound difference to their lives."

He added the ruling was one step on a road to equality, saying there was "still a long way to go".

"It could take a long time before we get to a place where all citizens, regardless of their sexuality are afforded dignity and equality."

On June 27, the Court of Appeal upheld a claim by the NI Human Rights Commission that the ban on gay adoption was in breach of human rights legislation.

This helped pave the way for same-sex couples in Northern Ireland to adopt.

The Department of Health, headed by DUP MLA Edwin Poots – who was strongly opposed gay and lesbian people adopting children – mounted a challenge to the decision in the Supreme Court.

But judges ruled that the application failed to meet the criteria of raising an arguable point of law of public importance.

A Department of Health spokesman said: "Following the Court of Appeal judgment in June 2013, unmarried couples (including same sex couples) and those in a civil partnership arrangement may apply to adopt. The final decision regarding the granting of an adoption order will lie with the court."

The DUP minister reiterated his views in the Assembly last month.

The minister has also faced criticism in recent times for his stance on gay men donating blood.

Mr Poots said his stance on the matter referred only to the safety of the blood and based on sexual behaviour, not sexual orientation.

The UK-wide ban on gay men donating blood began in the 1980s. In November 2011 the ban was lifted in Great Britain, allowing men whose last sexual contact with another man was more than a year ago to give blood.

**NI COURT ALLOWS CHALLENGE TO LIFETIME BAN ON GAY MEN GIVING BLOOD**

**Friday 11 October 2013**

SUMMARY OF JUDGMENT

Mr Justice Treacy, sitting today in the High Court in Belfast, allowed a judicial review seeking to challenge to the DHSSPS policy which maintains a lifetime ban on males who have had sex with other males donating blood.  The application also challenged the Minister’s decision not to alter the ban and adopt the same position as applied throughout the rest of the UK.

Since 1985, the UK has had in place legislation and procedures which permanently prevent men who have engaged in male to male sexual relations (“MSM”) from donating blood.  In 2011 the Advisory Committee on the Safety of Blood, Tissues and Organs (“SaBTO”) completed a review of the donor selection criteria and recommended that the previous policy of permanent deferral applying to MSM donors be replaced with a temporary 12 month deferral period.  This recommendation was accepted in England, Scotland and Wales and came into force in November 2011 however Northern Ireland did not follow suit.

The applicant in this case (referred to as “JR65”) is a man who has previously engaged in homosexual conduct with other men however he no longer considers himself to be a homosexual but “someone who struggles with homosexuality”.  He was disappointed when the ban was not lifted in NI as he feels the act of giving blood is socially responsible.  He feels that the continuation of the policy of permanent deferral of potential MSM donors sends out a message of rejection to members of the male homosexual community.  JR65 is also concerned that the Health Minister’s membership of the DUP may have prejudiced his consideration of the issue and prevented him from considering the matter fairly.  He sought to quash the ban on the grounds that it was unreasonable and contrary to domestic and EU law, taken without any consultation or without the Minister giving appropriate reasons, and infected by the Minister’s apparent bias.

The court heard that in September 2011 the Minister was presented with information relating to the appropriateness of maintaining the policy of permanent deferral of MSM donors following the SaBTO review.  Mr Justice Treacy said that at this stage the Minister was required to choose whether to maintain the status quo or to change the existing policy.    The Minister chose to keep the status quo but maintained that he is seeking further information before making a final decision on the issue.  The judge said that in effect this meant that the Minister had rejected the persuasiveness of the SaBTO evidence and by choosing between the two competing options had reached a decision.

Mr Justice Treacy said that in continuing the lifetime deferral policy the Minister had deviated from the position taken in England, Scotland and Wales and went on to consider whether this was an unreasonable decision.  He said the decision was made against the recommendation of the Secretary of State who recommended that the SasBTO report should be followed.  The judge said it was clear from the SaBTO report that some homosexual acts do increase the risk of acquiring blood borne disease but that the additional risk from deferring donation for 12 months instead of permanently deferring donation was very minimal.  He said he must consider whether it was open to a reasonable decision maker to choose the permanent deferral option over the temporary deferral option in circumstances where blood is in fact imported from other parts of the UK where MSM donors are not subject to the permanent deferral criteria.  Mr Justice Treacy said that was clearly a defect in reason here:

“If there is a *genuine* concern about the safety of MSM donated blood such that the blood stock must be protected absolutely from such blood then the security of that blood must actually be maintained absolutely.  Applying a different standard to imported blood defeats the whole purpose of permanent deferral of MSM donors.  [It appears] that when blood is imported from the rest of the UK the authorities in NI do not request that such blood is not derived from the MSM community.”

The judge concluded that, for these reasons, the decision was irrational.

Mr Justice Treacy further concluded that as the Secretary of State for Health is the competent authority for the purposes of the EU Directive and the Blood Safety Quality Regulations 2005 he is responsible for the determination of the appropriate deferral periods in NI and whether or not to maintain the lifetime ban.  Accordingly the Minister was not empowered to give any directions in relation to the implementation or interpretation of the Directive.  He also held that the Minister had no power to act incompatibly with EU law in accordance with the Northern Ireland Act 1998.

Mr Justice Treacy went on to consider whether the Minister had breached the Ministerial Code in that this was a decision which required Executive approval (paragraph 2.4 of the Ministerial Code provides that any matter which cuts across the responsibilities of two or more Ministers or is significant or controversial must be brought to the attention of the Executive Committee).   He said that the lifetime ban is both controversial, in that it has generated much publicity and public debate with highly polarised views, and cross-cutting in that it touches on equality issues, and as such the Minister had no authority to act without bringing the matter to the attention of the Executive Committee.  The judge said that in doing so the Minister breached the Ministerial Code and had no legal authority to take this decision.

Mr Justice Treacy accordingly allowed the judicial review.

**BARRISTER’S LEGAL COMMENTARY ON THE NI BLOOD BAN CASE**

The ‘blood ban’ case, where Treacy J is being appealed with both the NI and London Departments of Health involved, is interesting for the following reasons: one, the general liberalism of the judge, open to the advice of the SaBTO advisory committee in 2011, that the lifetime ban on gay men donating blood should be reduced to one year (advice that did not move the NI health minister and the local attorney general); two (and further to the first point) the openness of the NI judge regarding administration in London, contrary to the ‘chauvinism’ of the local political class; three, the judge’s principal finding that the NI health minister had acted irrationally, in that an EU directive and related 2005 regulations – under which the English health secretary of state had UK-wide functions – meant the NI minister could not depart from the sequence in London: a 2004 EU directive binding the UK; UK-wide regulations in 2005, made by the health secretary of state; advice from SaBTO, set up under the regulations; and, in 2011, the policy recommendation – to the devolved administrations, as well as the UK government – of the one-year temporary deferral of the right to donate blood.

Treacy J is likely to be upheld on the no power in Belfast to dissent argument, because of the existence of the EU and the UK’s system of devolution. He is also likely to be upheld on the ministerial code point, because the Northern Ireland Act 1998 was amended in 2006 (after St. Andrews) to make a breach of the ministerial code an unlawful act.

**ARTICLE 12 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)**

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

***Challenging the Heteronormativity of Marriage: The Role of Judicial Interpretation and Authority***

**Paul Johnson**

**University of York**

**Social & Legal Studies 2011**

Extract pp. 12 and 13:

“In contrast to Fourie and Perry, the ECHR did not adopt a critical standpoint in respect of heteronormativity and the judgment does not contain a critical interpretation of marriage. This is made most clear by the Court’s rejection of the applicants’ claim that, since the Convention is a ‘living instrument’ (Tyrer v United Kingdom, 1978: para. 31), Article 12 should be read in light of the present day existence of same-sex relationships. The Court noted that, in light of changes to Article 9 of the Charter of Fundamental Rights of the European Union that has deliberately omitted the reference to men and women in its provision on marriage, ‘it would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex’ (para. 61). However, according greater weight to the ‘deep-rooted social and cultural connotations’ of marriage in Europe, the Court stated that it ‘must not rush to substitute’ the legal provisions of ‘national authorities, who are best placed to assess and respond to the needs of society’ (para. 62).

The Court’s heteronormative standpoint in respect of the ‘connotations’ of marriage underpinned its examination of the wording of Article 12. The Court stated that, in contrast to all of the other substantive Articles of the Convention that grant rights to ‘everyone’, the specification that Article 12 makes to ‘men and women’ must be ‘regarded as deliberate’ (para. 55). It interpreted the inclusion of this deliberate wording as evidence that the original drafters of the Convention ‘clearly understood [marriage] in the traditional sense of being a union between partners of different sex’ (para. 55). Unlike in Fourie, the ECHR engaged in no critical consideration of the ‘assumed reality’ contained within the wording of Article 12. Rather, the Court adopted the ‘traditional sense’ of marriage that it claimed underwrote the textual formulation of Article 12 and justified this interpretation by stating that the majority of contracting states still enforce these ‘traditional’ arrangements in their domestic law (only six out of 47 allow same-sex marriage). Whilst the Court noted that the ‘institution of marriage has undergone major social changes since the adoption of the Convention’ (para. 58), it did not consider ‘tradition’ to have transformed significantly enough to allow it to impose alternative legal conditions.”

**Readiness to hurl the word ‘homophobe’ may not help the liberal reform agenda**

**Opinion: Many liberals seem to be unwilling to let counter-arguments to their own get a hearing**

**Noel Whelan**

**Irish Times**

**25 January 2014**

‘That Homosexuality is Perverse and should be Discouraged” was the title of a debate I organised when auditor of the Commerce and Economics Society (C&E) in [University College Dublin](http://www.irishtimes.com/search/search-7.1213540?tag_organisation=University%20College%20Dublin&article=true) in 1989. The C&E, which as it happens celebrates its 100th anniversary this year, was in the late 1980s the largest society on the Belfield campus.

It packed a 300-seat lecture theatre every Wednesday night with commerce and arts students who came to watch or participate in a debate on a controversial issue.

The C&E committee was on the right wing of the student political spectrum – at least on economic issues – but this debate on homosexuality was organised jointly with the UCD Students Union, then a hotbed of left-wing political activism.

The union took some persuading to go with the deliberately provocative title. Its instinctive preference was for a more worthy event which might discuss the discrimination felt by gay and lesbian students and be addressed by prominent gay rights activists.

**Homosexuality condemned**
Many among the union leadership resisted the notion of the student body being seen to give a platform to those who condemned homosexuality.

We managed to persuade them, however, that putting the other point of view at the centre of a high-profile event and then challenging it before the widest possible audience would do more to change hearts and minds on the need for decriminalisation of homosexuality, which was a topical issue at the time.

We found it difficult to find speakers in favour of the proposition that homosexuality was perverse. Eventually a postgraduate philosophy student stepped up to the podium to make the case for the motion and he was followed by Mark Hamilton, a prominent lay Catholic who was the driving force behind some publications putting the conservative position that were then circulating widely on third-level campuses.

Against the motion the main speakers were then chair of the UCD Gay and Lesbian Equality Society, [Emma Donoghue](http://www.irishtimes.com/search/search-7.1213540?tag_person=Emma%20Donoghue&article=true), now a celebrated writer, and Senator David Norris, who had recently had success in the European Court in his campaign to decriminalise homosexuality.

The debate on the night was lively, informative and entertaining. The audience was very large and the vote overwhelmingly against the motion.

It is hard to believe that more than quarter of century later some of the same apprehensions are still playing out in the debate around gay rights in this country. Many liberals seem to be afraid to let a conservative position be heard in the debate. Do they lack confidence in their own ability to counter it?

It is worrying at this important moment, a year out from when the people will directly decide on the issue, that a pattern has already developed of seeking to edit out opposing views rather than confront and defeat them.

In their anxiety to advance the issue of gay rights, some liberals indeed are seeking to set aside the basic tenets of free speech. Two recent examples illustrate this.

**Libel threats**I did not see RTÉ Television’s The Saturday Night Show last weekend. I have not seen it since because the relevant segment has been taken off the RTÉ player after libel threats from some of those referred to by the guest, Rory O’Neill. Several people have told me since that he suggested that anyone who opposed equality for gay and lesbian people was homophobic.

Homophobia is a horrible word. It is defined as “an extreme and irrational aversion to homosexuality and homosexual people”. In ordinary usage in the current debate, the term is even harsher. Those who accuse others of being homophobes are not only branding them extremists but also suggesting they hate gay and lesbian people. Given its potency, it is an adjective which, if used at all, should be used sparingly.

The suggestion that anyone who disagrees with full equality for gays and lesbians is homophobic is surely a misuse of the word.

An overwhelming majority of our parents’ and our grandparents’ generation opposed equal rights for gays and lesbians; indeed most of them supported the continued criminalisation of homosexuality.

**‘Shower of homophobes’**
To many of us today that seems irrational on their part, but which of us would brand our parents or grandparents as a shower of homophobes?

Calling opponents homophobes may bring some level of satisfaction to those who do it and may attract cheers of applause in their own circles and on microblogs in the liberal realm, but it does nothing to advance the cause of debate.

It is also counterproductive in the effort to engage and persuade the mass of the moderate Irish electorate to support and vote for marriage equality.

Ill-informed or irrational commentary on this, as on all issues, is best confronted by better-informed and better-articulated counter-argument.

Having watched the progress of referendum debates for three decades and participated in some of them, including the most recent one on the Seanad, I have found that the single thing most likely to make Irish people suspicious of any proposal is a sense that they are not being given the opportunity to truly debate it.

I am, and have long been, squarely on the side of those campaigning for marriage equality. My worry at this early stage of the campaign is that the intolerance shown by some liberal advocates on the issue will undermine the prospects of achieving constitutional reform.