HOUSE OF LORDS

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Judgments - Ghaidan (Appellant) v. Godin-Mendoza (FC) (Respondent)

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SESSION 2003-04
[2004] UKHL 30
on appeal from: [2001] EWCA Civ 1533

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Ghaidan (Appellant)

v.

Godin-Mendoza (FC) Respondent

ON

MONDAY 21 JUNE 2004

The Appellate Committee comprised:

Lord Nicholls of Birkenhead

Lord Steyn

Lord Millett

Lord Rodger of Earlsferry

Baroness Hale of Richmond

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[2004] UKHL 30

LORD NICHOLLS OF BIRKENHEAD

My Lords,

1. On the death of a protected tenant of a dwelling-house his or her surviving spouse, if then living in the house, becomes a statutory tenant by succession. But marriage is not essential for this purpose. A person who was living with the original tenant 'as his or her wife or husband' is treated as the spouse of the original tenant: see Rent Act 1977, Schedule 1, para 2(2). In *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 your Lordships' House decided this provision did not include persons in a same-sex relationship. The question raised by this appeal is whether this reading of paragraph 2 can survive the coming into force of the Human Rights Act 1998. In *Fitzpatrick's* case the original tenant had died in 1994.

2. In the present case the original tenant died after the Human Rights Act 1998 came into force on 2 October 2000. In April 1983 Mr Hugh Wallwyn-James was granted an oral residential tenancy of the basement flat at 17 Cresswell Gardens, London SW5. Until his death on 5 January 2001 he lived there in a stable and monogamous homosexual relationship with the defendant Mr Juan Godin-Mendoza. Mr Godin-Mendoza is still living there. After the death of Mr Wallwyn-James the landlord, Mr Ahmad Ghaidan, brought proceedings in the West London County Court claiming possession of the flat. Judge Cowell held that on the death of Hugh Wallwyn-James Mr Godin-Mendoza did not succeed to the tenancy of the flat as the surviving spouse of Hugh Wallwyn-James within the meaning of paragraph 2 of Schedule 1 to the Rent Act 1977, but that he did become entitled to an assured tenancy of the flat by succession as a member of the original tenant's 'family' under paragraph 3(1) of that Schedule.

3. Mr Godin-Mendoza appealed, and the Court of Appeal, comprising Kennedy, Buxton and Keene LJJ, allowed the appeal: [2002] EWCA Civ 1533, [2003] Ch 380. The court held he was entitled to succeed to a tenancy of the flat as a statutory tenant under paragraph 2. From that decision Mr Ghaidan, the landlord, appealed to your Lordships' House.

4. I must first set out the relevant statutory provisions and then explain how the Human Rights Act 1998 comes to be relevant in this case. Paragraphs 2 and 3 of Schedule 1 to the Rent Act 1977 provide:

> '2(1) The surviving spouse (if any) of the original tenant, if residing in the dwelling-house immediately before the death of the original tenant, shall after the death be the statutory tenant if and so long as he or she occupies the dwelling-house as his or her residence.
>
> (2) For the purposes of this paragraph, a person who was living with the original tenant as his or her wife or husband shall be treated as the spouse of the original tenant.
>
> 3(1) Where paragraph 2 above does not apply, but a person who was a member of the original tenant's family was residing with him in the dwelling-house at the time of and for the period of 2 years immediately before his death then, after his death, that person or if there is more than one such person such one of them as may be decided by agreement, or in default of agreement by the county court, shall be entitled to an assured tenancy of the dwelling-house by succession.'

5. On an ordinary reading of this language paragraph 2(2) draws a distinction between the position of a heterosexual couple living together in a house as husband and wife and a homosexual couple living together in a house. The survivor of a heterosexual couple may become a statutory tenant by succession, the survivor of a homosexual couple cannot. That was decided in *Fitzpatrick's* case. The survivor of a homosexual couple may, in competition with other members of the original tenant's 'family', become entitled to an assured tenancy under paragraph 3. But even if he does, as in the present case, this is less advantageous. Notably, so far as the present case is concerned, the rent payable under an assured tenancy is the contractual or market rent, which may be more than the fair rent payable under a statutory tenancy, and an assured tenant may be evicted for non-payment of rent without the court needing to be satisfied, as is essential in the case of a statutory tenancy, that it is reasonable to make a possession order. In these and some other respects the succession rights granted by the statute to the survivor of a homosexual couple in respect of the house where he or she is living are less favourable than the succession rights granted to the survivor of a heterosexual couple.

6. Mr Godin-Mendoza's claim is that this difference in treatment infringes article 14 of the European Convention on Human Rights read in conjunction with article 8. Article 8 does not require the state to provide security of tenure for members of a deceased tenant's family. Article 8 does not in terms give a right to be provided with a home: *Chapman v United Kingdom* (2001) 33 EHRR 399, 427, para 99. It does not 'guarantee the right to have one's housing problem solved by the authorities': *Marzari v Italy* (1999) 28 EHRR CD 175, 179. But if the state makes legislative provision it must not be discriminatory. The provision must not draw a distinction on grounds such as sex or sexual orientation without good reason. Unless justified, a distinction founded on such grounds infringes the Convention right embodied in article 14, as read with article 8. Mr Godin-Mendoza submits that the distinction drawn by paragraph 2 of Schedule 1 to the Rent Act 1977 is drawn on the grounds of sexual orientation and that this difference in treatment lacks justification.

7. That is the first step in Mr Godin-Mendoza's claim. That step would not, of itself, improve Mr Godin-Mendoza's status in his flat. The second step in his claim is to pray in aid the court's duty under section 3 of the Human Rights Act 1998 to read and give effect to legislation in a way which is compliant with the Convention rights. Here, it is said, section 3 requires the court to read paragraph 2 so that it embraces couples living together in a close and stable homosexual relationship as much as couples living together in a close and stable heterosexual relationship. So read, paragraph 2 covers Mr Godin-Mendoza's position. Hence he is entitled to a declaration that on the death of Mr Wallwyn-James he succeeded to a statutory tenancy.

Discrimination

8. The first of the two steps in Mr Godin-Mendoza's argument requires him to make good the proposition that, as interpreted in *Fitzpatrick's* case, paragraph 2 of Schedule 1 to the Rent Act 1977 infringes his Convention right under article 14 read in conjunction with article 8. Article 8 guarantees, among other matters, the right to respect for a person's home. Article 14 guarantees that the rights set out in the Convention shall be secured 'without discrimination' on any grounds such as those stated in the non-exhaustive list in that article.

9. It goes without saying that article 14 is an important article of the Convention. Discrimination is an insidious practice. Discriminatory law undermines the rule of law because it is the antithesis of fairness. It brings the law into disrepute. It breeds resentment. It fosters an inequality of outlook which is demeaning alike to those unfairly benefited and those unfairly prejudiced. Of course all law, civil and criminal, has to draw distinctions. One type of conduct, or one factual situation, attracts one legal consequence, another type of conduct or situation attracts a different legal consequence. To be acceptable these distinctions should have a rational and fair basis. Like cases should be treated alike, unlike cases should not be treated alike. The circumstances which justify two cases being regarded as unlike, and therefore requiring or susceptible of different treatment, are infinite. In many circumstances opinions can differ on whether a suggested ground of distinction justifies a difference in legal treatment. But there are certain grounds of factual difference which by common accord are not acceptable, without more, as a basis for different legal treatment. Differences of race or sex or religion are obvious examples. Sexual orientation is another. This has been clearly recognised by the European Court of Human Rights: see, for instance, *Fretté v France* (2003) 2 FLR 9, 23, para 32. Unless some good reason can be shown, differences such as these do not justify differences in treatment. Unless good reason exists, differences in legal treatment based on grounds such as these are properly stigmatised as discriminatory.

10. Unlike article 1 of the 12th Protocol, article 14 of the Convention does not confer a free-standing right of non-discrimination. It does not confer a right of non-discrimination in respect of all laws. Article 14 is more limited in its scope. It precludes discrimination in the 'enjoyment of the rights and freedoms set forth in this Convention'. The court at Strasbourg has said this means that, for article 14 to be applicable, the facts at issue must 'fall within the ambit' of one or more of the Convention rights. Article 14 comes into play whenever the subject matter of the disadvantage 'constitutes one of the modalities' of the exercise of a right guaranteed or whenever the measures complained of are 'linked' to the exercise of a right guaranteed: *Petrovic v Austria* (2001) 33 EHRR 307, 318, 319, paras 22, 28.

11. These expressions are not free from difficulty. In *R (Carson) v Secretary of State for Work and Pensions* [2003] 3 All ER 577, 592-595, paras 32-41, Laws LJ drew attention to some difficulties existing in this area of the Strasbourg jurisprudence. In the Court of Appeal in the present case Buxton LJ appeared to adopt the approach, espoused in the leading text book *Grosz, Beatson & Duffy*, *Human Rights: The 1998 Act and the European Convention* (2000), p 327, para C14-10, that 'even the most tenuous link with another provision in the Convention will suffice for article 14 to enter into play': [2003] Ch 380, 387, para 9. In your Lordships' House counsel for the First Secretary of State criticised this approach. He drew attention to later authorities questioning its correctness: *R (Erskine) v London Borough of Lambeth* [2003] EWHC 2479 (Admin), paras 21-22, per Mitting J ('it overstates the effect of the Strasbourg case law') and *R (Douglas) v North Tyneside Metropolitan Borough Council* [2004] 1 All ER 709, 722, paras 53-54, per Scott Baker LJ.

12. This is not a question calling for consideration on this appeal. It is common ground between all parties, and rightly so, that paragraph 2 of Schedule 1 to the Rent Act 1977 is a provision which falls within the 'ambit' of the right to respect for a person's home guaranteed by article 8. It is, in other words, common ground that article 14 is engaged in the present case. This being so, and the point not having been fully argued, I prefer to leave open the question whether even the most tenuous link is sufficient to engage article 14.

13. In the present case paragraph 2 of Schedule 1 to the Rent Act 1977 draws a dividing line between married couples and cohabiting heterosexual couples on the one hand and other members of the original tenant's family on the other hand. What is the rationale for this distinction? The rationale seems to be that, for the purposes of security of tenure, the survivor of such couples should be regarded as having a special claim to be treated in much the same way as the original tenant. The two of them made their home together in the house in question, and their security of tenure in the house should not depend upon which of them dies first.

14. The history of the Rent Act legislation is consistent with this appraisal. A widow, living with her husband, was accorded a privileged succession position in 1920. In 1980 a widower was accorded the like protection. In 1988 paragraph 2(2) was added, by which the survivor of a cohabiting heterosexual couple was treated in the same way as a spouse of the original tenant.

15. Miss Carss-Frisk QC submitted there is a relevant distinction between heterosexual partnerships and same sex partnerships. The aim of the legislation is to provide protection for the traditional family. Same sex partnerships cannot be equated with family in the traditional sense. Same sex partners are unable to have children with each other, and there is a reduced likelihood of children being a part of such a household.

16. My difficulty with this submission is that there is no reason for believing these factual differences between heterosexual and homosexual couples have any bearing on why succession rights have been conferred on heterosexual couples but not homosexual couples. Protection of the traditional family unit may well be an important and legitimate aim in certain contexts. In certain contexts this may be a cogent reason justifying differential treatment: see *Karner v Austria* (2003) 2 FLR 623, 630, para 40. But it is important to identify the element of the 'traditional family' which paragraph 2, as it now stands, is seeking to protect. Marriage is not now a prerequisite to protection under paragraph 2. The line drawn by Parliament is no longer drawn by reference to the status of marriage. Nor is parenthood, or the presence of children in the home, a precondition of security of tenure for the survivor of the original tenant. Nor is procreative potential a prerequisite. The survivor is protected even if, by reasons of age or otherwise, there was never any prospect of either member of the couple having a natural child.

17. What remains, and it is all that remains, as the essential feature under paragraph 2 is the cohabitation of a heterosexual couple. Security of tenure for the survivor of such a couple in the house where they live is, doubtless, an important and legitimate social aim. Such a couple share their lives and make their home together. Parliament may readily take the view that the survivor of them has a special claim to security of tenure even though they are unmarried. But the reason underlying this social policy, whereby the survivor of a cohabiting heterosexual couple has particular protection, is equally applicable to the survivor of a homosexual couple. A homosexual couple, as much as a heterosexual couple, share each other's life and make their home together. They have an equivalent relationship. There is no rational or fair ground for distinguishing the one couple from the other in this context: see the discussion in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, 44.

18. This being so, one looks in vain to find justification for the difference in treatment of homosexual and heterosexual couples. Such a difference in treatment can be justified only if it pursues a legitimate aim and there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Here, the difference in treatment falls at the first hurdle: the absence of a legitimate aim. None has been suggested by the First Secretary of State, and none is apparent. In so far as admissibility decisions such as *S v United Kingdom* (1986) 47 DR 274 and *Roosli v Germany* (1996) 85 DR 149 adopted a different approach from that set out above, they must now be regarded as superseded by the recent decision of the European Court of Human Rights in *Karner v Austria* (2003) 2 FLR 623.

19. For completeness I should add that arguments based on the extent of the discretionary area of judgment accorded to the legislature lead nowhere in this case. As noted in *Wilson v First County Trust Ltd (No 2)* [2003] 3 WLR 568, 589, para 70, Parliament is charged with the primary responsibility for deciding the best way of dealing with social problems. The court's role is one of review. The court will reach a different conclusion from the legislature only when it is apparent that the legislature has attached insufficient importance to a person's Convention rights. The readiness of the court to depart from the view of the legislature depends upon the subject matter of the legislation and of the complaint. National housing policy is a field where the court will be less ready to intervene. Parliament has to hold a fair balance between the competing interests of tenants and landlords, taking into account broad issues of social and economic policy. But, even in such a field, where the alleged violation comprises differential treatment based on grounds such as race or sex or sexual orientation the court will scrutinise with intensity any reasons said to constitute justification. The reasons must be cogent if such differential treatment is to be justified.

20. In the present case the only suggested ground for according different treatment to the survivor of same sex couples and opposite sex couples cannot withstand scrutiny. Rather, the present state of the law as set out in paragraph 2 of Schedule 1 of the Rent Act 1977 may properly be described as continuing adherence to the traditional regard for the position of surviving spouses, adapted in 1988 to take account of the widespread contemporary trend for men and women to cohabit outside marriage but not adapted to recognise the comparable position of cohabiting same sex couples. I appreciate that the primary object of introducing the regime of assured tenancies and assured shorthold tenancies in 1988 was to increase the number of properties available for renting in the private sector. But this policy objective of the Housing Act 1988 can afford no justification for amending paragraph 2 so as to include cohabiting heterosexual partners but not cohabiting homosexual partners. This policy objective of the Act provides no reason for, on the one hand, extending to unmarried cohabiting heterosexual partners the right to succeed to a statutory tenancy but, on the other hand, withholding that right from cohabiting homosexual partners. Paragraph 2 fails to attach sufficient importance to the Convention rights of cohabiting homosexual couples.

21. Miss Carss-Frisk advanced a further argument, based on the decisions of the European Court of Human Rights in *Walden v Liechtenstein* (application no 33916/96) and *Petrovic v Austria* (1998) 33 EHRR 307. In the *Walden* case the Liechtenstein constitutional court held that the unequal pension treatment afforded to married and unmarried couples was unconstitutional. The constitutional court did not set aside the existing legislation, given the practical difficulties involved and given also that a comprehensive legal reform guaranteeing gender equality in social security law was in course of preparation. New legislation was enacted and came into force seven months later. The European Court of Human Rights summarily rejected an application complaining of this unequal treatment. The constitutional court's decision served the interests of legal certainty, and given the brevity of the period during which the unconstitutional law remained applicable to the applicant the continued operation of the pension provisions was proportionate. In the *Petrovic* case the applicant was refused a grant of parental leave allowance in 1989. At that time parental leave allowance was available only to mothers. The applicant complained that this violated article 14 taken together with article 8. In dismissing the application the court noted that, as society moved towards a more equal sharing of responsibilities for the upbringing of children, contracting states have extended allowances such as parental leave to fathers. Austrian law had evolved in this way, eligibility for parental leave allowance being extended to fathers in 1990. The Austrian legislature was not to be criticised for having introduced progressive legislation in a gradual manner.

22. Miss Carss-Frisk submitted that, similarly here, society's attitude to cohabiting homosexual couples has evolved considerably in recent years. It was only in July 2003 that the European Court of Human Rights in *Karner v Austria* (2003) 2 FLR 623 effectively overruled contrary decisions as already mentioned. The United Kingdom government responded speedily to the decision in *Karner's* case by including in two government Bills currently before Parliament, the Housing Bill and the Civil Partnership Bill, provisions which if enacted will have the effect of confirming on the face of legislation that the survivor of a cohabiting homosexual couple is to be treated in the same way as the survivor of a cohabiting homosexual couple for the purposes of paragraph 2. The state should not be criticised for this gradual extension of the rights of cohabiting unmarried couples, first to heterosexual couples in 1988, and now more widely. The extension of paragraph 2 to include homosexual couples would be at the expense of landlords, and in the interests of legal certainty this extension should be made prospectively by legislation and not retrospectively by judicial decision. Mr Wallwyn-James died more than two years before the decision in *Karner's* case.

23. I am unable to accept this submission. Under the Human Rights Act 1998 the compatibility of legislation with the Convention rights falls to be assessed when the issue arises for determination, not as at the date when the legislation was enacted or came into force: *Wilson v First County Trust Ltd (No 2)* [2003] 3 WLR 568, 587, para 62. The cases of *Walden* and *Petrovic* concerned the margin of appreciation afforded to contracting states. In the present case the House is concerned with the interpretation and application of domestic legislation. In this context the domestic counterpart of a state's margin of appreciation is the discretionary area of judgment the court accords Parliament when reviewing legislation pursuant to its obligations under the Human Rights Act 1998. I have already set out my reasons for holding that in the present case the distinction drawn in the legislation between the position of heterosexual couples and homosexual couples falls outside that discretionary area.

24. In my view, therefore, Mr Godin-Mendoza makes good the first step in his argument: paragraph 2 of Schedule 1 to the Rent Act 1977, construed without reference to section 3 of the Human Rights Act, violates his Convention right under article 14 taken together with article 8.

Section 3 of the Human Rights Act 1998

25. I turn next to the question whether section 3 of the Human Rights Act 1998 requires the court to depart from the interpretation of paragraph 2 enunciated in *Fitzpatrick's* case.

26. Section 3 is a key section in the Human Rights Act 1998. It is one of the primary means by which Convention rights are brought into the law of this country. Parliament has decreed that all legislation, existing and future, shall be interpreted in a particular way. All legislation must be read and given effect to in a way which is compatible with the Convention rights 'so far as it is possible to do so'. This is the intention of Parliament, expressed in section 3, and the courts must give effect to this intention.

27. Unfortunately, in making this provision for the interpretation of legislation, section 3 itself is not free from ambiguity. Section 3 is open to more than one interpretation. The difficulty lies in the word 'possible'. Section 3(1), read in conjunction with section 3(2) and section 4, makes one matter clear: Parliament expressly envisaged that not all legislation would be capable of being made Convention-compliant by application of section 3. Sometimes it would be possible, sometimes not. What is not clear is the test to be applied in separating the sheep from the goats. What is the standard, or the criterion, by which 'possibility' is to be judged? A comprehensive answer to this question is proving elusive. The courts, including your Lordships' House, are still cautiously feeling their way forward as experience in the application of section 3 gradually accumulates.

28. One tenable interpretation of the word 'possible' would be that section 3 is confined to requiring courts to resolve ambiguities. Where the words under consideration fairly admit of more than one meaning the Convention-compliant meaning is to prevail. Words should be given the meaning which best accords with the Convention rights.

29. This interpretation of section 3 would give the section a comparatively narrow scope. This is not the view which has prevailed. It is now generally accepted that the application of section 3 does not depend upon the presence of ambiguity in the legislation being interpreted. Even if, construed according to the ordinary principles of interpretation, the meaning of the legislation admits of no doubt, section 3 may nonetheless require the legislation to be given a different meaning. The decision of your Lordships' House in *R v A (No 2)* [2002] 1 AC 45 is an instance of this. The House read words into section 41 of the Youth Justice and Criminal Evidence Act 1999 so as to make that section compliant with an accused's right to a fair trial under article 6. The House did so even though the statutory language was not ambiguous.

30. From this it follows that the interpretative obligation decreed by section 3 is of an unusual and far-reaching character. Section 3 may require a court to depart from the unambiguous meaning the legislation would otherwise bear. In the ordinary course the interpretation of legislation involves seeking the intention reasonably to be attributed to Parliament in using the language in question. Section 3 may require the court to depart from this legislative intention, that is, depart from the intention of the Parliament which enacted the legislation. The question of difficulty is how far, and in what circumstances, section 3 requires a court to depart from the intention of the enacting Parliament. The answer to this question depends upon the intention reasonably to be attributed to Parliament in enacting section 3.

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