

**Celebrating 70 years of the Universal Declaration and 20 years of the
Human Rights Act**

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Lady Hale, President of the Supreme Court

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**Delivered at Freshfields, and chaired by Sir Nicholas Bratza (previously the United
Kingdom Judge on the European Court of Human Rights)**

‘All human beings are born free and equal in dignity and rights’ – thus the Universal Declaration of Human Rights begins with the principle of universality. Human rights are there for all of us. Not just the privileged or the underprivileged few. The majority as well as the minority. The popular as well as the unpopular. It was the Human Rights Act which got the ‘black cab’ rapist’s victims their compensation, a remedy they would have been denied by the common law. This grand idea was summed up in a British Institute of Human Rights publication way back in 2002 – *‘Something for Everyone’*.

Nowhere is this more apparent than in relation to the right to respect for private and family life – protected by article 8 of the European Convention on Human Rights. We all have a private life – it’s a very broad concept protecting our core identities, our dignity and our autonomy. I well remember Mr Friend, one of the few litigants in person we have had in the House of Lords and Supreme Court, coming along to challenge the Protection of Wild Mammals (Scotland) Act 2002 as an interference with one of the core aspects of his identity – his love of hunting. Some of the Law Lords would have agreed with him, had it not been for the very public nature of the activity of hunting (*Friend v Lord Advocate* [2007] UKHL 53, 2008 SC (HL) 107). And Mr Friend was assuredly not the sort of person whom the media usually portray as the beneficiaries of human rights. He was an ‘everyman’ figure.

And the concept of family life has also proved capable of developing to recognise different forms of family in line with developments in society.

There are many examples of the recognition of the rights of unmarried couples, parents and their children. One of earliest and most famous Strasbourg cases was *Marckx v Belgium* (1979-80) 2 EHRR 330, about the right of children of unmarried parents to be recognised as having a family relationship with their mothers and members of their mother's family. The state had to avoid any discrimination grounded on birth. This led directly to changes in the law in all parts of the UK. In the Family Law Reform Act 1987, for example, we were able to abandon the pejorative adjective 'illegitimate' attaching to child. If there is a need to differentiate – and there isn't often – we should differentiate between the parents according to whether or not they were married to one another at the relevant time.

Strasbourg has been prepared to tolerate some different rules for married and unmarried fathers. In *McMichael v United Kingdom* (1995) 20 EHRR 205 it was held justifiable to discriminate between married and unmarried fathers in the acquisition of parental rights and authority – automatic for married fathers but requiring a court order for unmarried. The court said that relationships between unmarried fathers and their children 'will inevitably vary, from ignorance and indifference at one end of the spectrum to a close stable relationship indistinguishable from the conventional matrimonial-based family unit' (para 98).

But in *Sabin v Germany* [2000] ECHR 340, the court held that, just as 'very weighty reasons' are required to justify a difference in treatment on the ground of birth outside wedlock, 'the same is true for a difference in treatment of the father of a child born of a relationship where the parties were living together out of wedlock compared with the father of a marriage based relationship' (para 94). So Germany had discriminated against the father in requiring him to demonstrate that contact with his child was in the child's best interests even though the mother objected, whereas with a married father the presumption would have been the other way round. We were already there in this country.

However, both Strasbourg and the UK have been slower to recognise that unmarried partners have the same rights towards one another as they have towards their children. A good example is the recent Supreme Court case of *In re Siobhan McLaughlin's Application for Judicial Review* [2018] UKSC 48, [2018] 1 WLR 4250. This was about widowed parents' allowance – now superseded but at the relevant time a national insurance benefit for a surviving spouse left with dependent children. It was meant to compensate for the loss of a breadwinner. So it depended upon the national insurance contribution record of the deceased. And it was not means-tested so it was

particularly valuable if the survivor was in work and not in receipt of means-tested benefits. (My own mother, for example, benefitted from its predecessor, widowed mothers' allowance, when my father died while my sister and I were children and she went back to work as a teacher.) But it was limited to married couples. If it is seen as for the benefit of the survivor, then that might be justified. Couples who are married (or in a civil partnership) have mutual obligations of support. So it is reasonable for the contributions of one to go to compensate for the loss of support to the other. Couples who are not married or in a civil partnership do not have that obligation. But if it is seen as a benefit for the children, the position is quite different. Children should not suffer because their parents are not married to one another. Indeed 'very weighty reasons' are required for drawing distinctions between them. So where – as in this case – the children involved were the children of the deceased and the survivor, it was not justifiable to distinguish between them. It might be different if the connection between the children and the deceased was looser but that was not this case. As the rules were in primary legislation, we made a declaration of incompatibility.

It was important that children were involved. Strasbourg is clear that states are entitled to have an institution such as marriage bringing with it a special status and entitlements (*Burden v United Kingdom* [2007] 44 EHRR 51). So discrimination between married and unmarried couples can be justified when discrimination between their children would not be. But that does not mean that all discrimination between married and unmarried couples can be justified.

Another recent example in our court is *In re Brewster* [2017] UKSC 8, [2018] 1 WLR 519. The rules of the Northern Ireland Local Government Pension Scheme meant that a surviving spouse automatically got a survivor's pension. A surviving unmarried partner could do so but only if she could prove that the relationship between them was genuine and subsisting *and* if she had been nominated by the deceased member of the scheme. This additional hurdle could not be justified. It added no evidential value to the first requirement and there was no evidence that the rule had been motivated by the sort of socio-economic considerations which might lead the court to respect the choices made by the legislature. As the requirement was in regulations, and not primary legislation, it could simply be disapplied.

Strasbourg also led way in recognising a change of sex and the right of trans people to be recognised in their reassigned gender and to marry in that gender. In *Goodwin v United Kingdom* (2002) 35 EHRR 447, Strasbourg held that the leeway they had given to the UK to change the

law had run out and found a violation. One of the very early House of Lords cases under the Human Rights Act was *Bellinger v Bellinger* [2003] UKHL 21, [2003] 2 AC 467, which concerned the validity of a marriage abroad between a trans person and her husband. The Matrimonial Causes Act 1973 provided that a marriage was void unless the parties were respectively male and female. The House declined to use the interpretative obligation in section 3 of the Act and give the words ‘male’ and ‘female’ a compatible meaning. But they did make a declaration of incompatibility even though steps were already being taken to remedy matters in what became the Gender Recognition Act 2004.

The recognition of same sex relationships as ‘family life’ came later. Strasbourg once again led the way in recognising the right of homosexuals to respect for their private lives (*Dudgeon v United Kingdom* (1982) 4 EHRR 149, (1983) 5 EHRR 573). But it was slower to recognise that same sex couples could enjoy a family life together which was also entitled to respect. *M v Secretary of State for Work and Pensions* [2006] UKHL 11, [2006] 2 AC 91, was about the different treatment of opposite and same sex couples in the calculation of a separated parent’s liability for child support. The majority of the House of Lords held that this was too far removed from the ‘core values’ protected by article 8 to generate an obligation not to discriminate under article 14. Dissenting in the House of Lords, I held that it had to do, not with the relationship between the couple, but with the family life between the mother and her children. Strasbourg agreed with neither of us (*JM v United Kingdom* [2011] 1 FLR 491). They held that there had been a violation of article 14 read with Article 1 of the First Protocol, which protects property rights; so they did not need to consider whether same sex couples had a family life together. But there is little doubt that Strasbourg would now regard it as within article 8 because they have now recognised that same sex couples can have family life together.

Great Britain was ahead of them in that. In 2002, adoption legislation in both England and Wales (and later in Scotland) allowed unmarried couples, of both the same or opposite sexes, to adopt. But Northern Ireland did not follow suit. In *Re G (Adoption: Unmarried Couple)* [2008] UKHL 38, [2009] 1 AC 173, the House of Lords held, unsurprisingly, that being unmarried was a status for the purpose of article 14. But it also held, more surprisingly, that the outright ban could not be justified. Adoption is meant to serve the best interests of the child. While the fact that a couple have not committed themselves to one another in marriage could be relevant to whether allowing them to adopt would be in child’s best interests, it did not follow that it would

never be so. As the limitation to married couples was in delegated legislation, the Northern Ireland Adoption Order, it could simply be ignored as incompatible with the Convention Rights.

That case was also an important step in the development of the UK's own human rights jurisprudence. At that date, denying adoption to unmarried couples might still have been within the margin of appreciation which Strasbourg would allow to member states (although this was becoming less likely given their developing attitude to adoption by people who were in a same sex relationship). The House pointed out that Strasbourg allowing the Member States a margin of appreciation said nothing about the respective responsibilities of the national executive, legislature and judiciary in deciding what the content of the Convention Rights should be in our domestic law. This depended on the relative competence of those institutions under the United Kingdom Constitution. Lord Hope was clear that protection against unjustified discrimination, even in an area of social policy, was a matter for the courts. We are the guardians of the rights of the minority and also of under-represented groups such as women and children of unmarried parents – whether popular or unpopular – against the decisions of the majority or dominant groups.

This is perhaps most significant development UK human rights jurisprudence to date – as we saw being played out in *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, where a majority of five to four took the same view as in *Re G* in relation to the primary legislation which bans assisting suicide. But three of the five thought it premature to make declaration of incompatibility while the matter was under active consideration by Parliament.

Another very important development of UK human rights jurisprudence also concerned same sex couples. The issue in *Ghaidan v Godin Mendoza* [2004] UKHL 30, [2004] 2 AC 557, was whether the survivor of a same sex relationship could qualify to succeed to a Rent Act tenancy as a person who had been living with the deceased 'as husband and wife'. The government argued, and the House of Lords held, that he could. It's one thing to say that 'male' and 'female' must mean what they say and another to say that 'husband' and 'wife' cannot encompass a marriage-like same sex relationship. We established that the interpretative route in section 3 should where possible be preferred to making a declaration of incompatibility under section 4. What was possible under section 3 went further than either a literal or a purposive interpretation of what Parliament had said. We could draw upon the experience of conforming interpretation in

European Union law for the techniques. But we must not adopt an interpretation which went ‘against the grain’ or contradicted some fundamental principle of the legislation.

It is interesting that the government argued, not only that the law was incompatible, but also that it could be made compatible by the use of section 3. The government usually argues in favour of compatibility, but its fall back position, as between interpretation and a declaration, can often be very influential.

Protecting the rights of same sex couples comes up more frequently under the Equality Act rather than the Human Rights Act. From time to time there may be a clash with the convention rights to freedom of religion or freedom of expression. In *Hall v Bull* [2013] UKSC 73, [2013] 1 WLR 3741, the Supreme Court held that refusing to provide a double-bedded room to same sex civil partners was unlawful discrimination on the ground of their sexual orientation; and so holding was not an unjustified interference in the right of Christian hotel keepers to manifest their religion. But in *Lee v Ashers Baking Co Ltd* [2018] UKSC 73, [2018] 3 WLR 1294, we held that refusing to supply a cake iced with a message supporting gay marriage was not discrimination on grounds of sexual orientation at all – the objection was to the message and not to the man. The court recognised that large sections of society support same sex marriage: anyone might have ordered the same cake and would have been refused regardless of their own sexual orientation. Nor was the message only for the benefit of same sex couples. It is for the benefit of their families, their children and wider society that they should be able to recognise their commitment to one another in this way.

The same applied to a complaint of discrimination on the ground of political opinion – but in any event the law against such discrimination should not be read as requiring people to express a political opinion that they did not hold. This was contrary to article 10 of the European Convention, which protects the freedom not to express an opinion just as it protects the freedom to express one.

Northern Ireland does not have gay marriage, but it does have civil partnership: the Civil Partnership Act 2004 introduced this throughout the UK for same sex couples. In 2013, gay marriage was introduced in England and Wales and Scotland but not in Northern Ireland. This produced the curious situation that same sex couples who want to enter into legal binding commitments to one another have choice between marriage and civil partnership but opposite

sex couples do not. Yet, difficult thought it is for some of us to understand, there are opposite sex couples who have genuine and deep-seated conscientious objections to what they see as the ‘patriarchal and hetero-normative’ institution of marriage. Many gay couples feel the same. But others want to feel that they are being treated equally and have equal access to the institution which is available to the straight majority.

When a straight couple brought this obvious discrimination before the courts, in *Steinfeld v Secretary of State for Education*, the Government even argued that it was not within the ambit of article 8 – relying on the ‘core values’ argument from *M v Secretary of State for Work and Pensions*. They won at first instance: [2016] EWHC 128 (admin), [2016] 4 WLR 41; but lost in the Court of Appeal: [2017] EWCA Civ 81, [2018] QB 519; and gave up the argument before us: [2018] UKSC 32, [2018] 3 WLR 415. But they still argued that this continued less favourable treatment was justified because they were trying to work out what to do about it. Many discrimination cases raise the problem of how to cure the problem – should there be levelling up or levelling down? Open up civil partnerships to opposite sex couples or abolish them for everyone or even abolish marriage for everyone – each is theoretically possible. But the fact that there is a choice of how to put it right does not stop its being unjustified discrimination.

I have focussed on the contribution made by the Human Rights Act to responding to developments in our private and family lives because we all have a private life and most of us have some experience of family life. It is an example of one sort of dialogue between the Strasbourg court and the member states – where at one point in time Strasbourg may be ahead of a member state, as with same sex relationships and the rights of trans people, and at another point we may be ahead of them, as with adoption by unmarried and gay couples and civil partnerships. But that we have each learned from one another is obvious and the Human Rights Act has enabled us to put that learning into practice.

It has been successful in other ways too. In July, the Joint Committee on Human Rights launched an inquiry into 20 years of the Human Rights Act. They asked whether the Act had succeeded in its aims as they were in 1998; whether any of the concerns raised about it have been realised or there have been unforeseen consequences; whether it could be improved; and what social challenges will need to be addressed in the future?

There is a good deal of evidence that it has been successful in its principal aim of 'bringing rights home'. Far fewer cases are being taken to Strasbourg – applications fell from 2047 in 2002 to 507 in 2017. Judgments in cases brought against the UK fell from 24 in 2002 to five in 2017. Violations found fell from 10 to two. There are no doubt two main reasons for this. First, the rights are now rights in UK law – in the past, we may have thought that the Convention represented what was already UK law but of course it did not always do so and there was nothing to prevent Parliament from limiting them or even taking them away. Second, our courts can now address Convention questions in the same terms that Strasbourg will address them. So if we find that there has not been a violation, Strasbourg is more likely to understand our reasoning. We can have a real debate about it.

Another great success, as it seems to me, is the clever way in which the Act respects both the need for public authorities to act compatibly with the Convention rights and the legislative supremacy of Parliament. The evidence of the Ministry of Justice is that there have been 40 declarations of incompatibility since the HRA came into force. 10 were over-turned on appeal and two are currently under appeal. Of the remaining 28, five related to provisions which had already been changed at the time of the declaration; 11 have since been addressed by primary or secondary legislation; three have been addressed by a remedial order under section 10 of the Act (the Mental Health Act 1983 (Remedial) Order 2001, after *R (H) v Mental Health Review Tribunal for North and East London Region* [2001] EWCA Civ 415, [2002] QB 1; the Asylum and Immigration (Treatment of Claimants etc) Act 2004 Remedial Order 2011, after *R (Baiai) v Secretary of State for the Home Department* [2008] UKHL 17, [2009] 1 AC 287; and the Sexual Offences Act 2003 (Remedial) Order 2012, after *R (F) v Secretary of State for the Home Department* [2010] UKSC 17, [2011] 1 AC 331); four are to be addressed by a remedial order; four are under consideration (*Benkharbouche v Secretary of State for Foreign and Commonwealth Affairs* [2017] UKSC 62, [2017] 3 WLR 957 – state immunity for acts relating to the employment of domestic staff by embassies; *Smith v Lancashire Teaching Hospitals NHS Foundation Trust* [2017] EWCA Civ 1916, [2018] QB 804 – bereavement damages for cohabitants; *Steinfeld* - above; and *Siobhan McLaughlin* - above); and one is being addressed by administrative measures – this is the notorious problem of prisoners' voting rights.

In December 2017, the Government proposed that Judges must tell prisoners what the effect of their sentence is on their voting rights and that those released on temporary licence should be able to vote. These are minute adjustments to a system which means that a shoplifter sentenced

to 28 days' imprisonment which happens to fall over an election day cannot vote. But the Council of Ministers has accepted that these proposals are sufficient to comply with the judgment in *Hirst v United Kingdom* (2006) 42 EHRR 41.

There have also been three remedial orders addressing violations found by Strasbourg rather than the UK courts. First, the Naval Discipline Act 1957 (Remedial) Order 2012, after *Grievs v United Kingdom* (2004) 39 EHRR 2, where the composition of naval courts-martial was held incompatible with the impartiality required by article 6. Secondly, the Marriage Act 1949 (Remedial) Order, after *B and L v UK* (App no 36536/02, judgment of 13 December 2005) found the prohibition of marriage between a father-in-law and daughter-in-law was contrary to the right to marry in article 12 of the Convention. The case is interesting also because it was held that the applicants did not need bring proceedings for a declaration of incompatibility in order to exhaust their domestic remedies as this would not be an effective remedy. Thirdly the Terrorism Act 2000 (Remedial) Order 2011, after the Strasbourg court, in *Gillan v United Kingdom* (2010) 50 EHRR 45 disagreed with the House of Lords in *R (Gillan) v Metropolitan Police Commissioner* [2006] UKHL 12, [2006] 2 AC 307, about the compatibility of broad stop and search powers.

It is fair to say that there has been a range of views within the Supreme Court on two issues of principle. First, to what extent is it for the courts, rather than the primary decision-makers within government, to assess the proportionality of interferences with the qualified Convention rights? We eventually got to the position that it is for the courts to do this – public authorities have to act compatibly with the Convention rights and this includes the courts when ruling on the legality of the actions of other public authorities. But there are issues which government is more competent to assess than we are, so the extent to which we should defer to that institutional competence can be debated. The issue is particularly acute in matters of socio-economic policy, where Strasbourg will allow member states a wide margin of appreciation. An illustration is *R (SG) v Secretary of State for Work and Pensions* [2015] UKSC 16, [2015] 1 WLR 1449, where the Supreme Court was divided on whether the benefit cap, admitted to be indirectly discriminatory on grounds of sex in relation to the right to claim welfare benefits, was nevertheless justified.

Secondly, given that declarations of incompatibility are discretionary, when should we decline to make one even if we are satisfied that the law is incompatible with the Convention rights? Some of us see no constitutional reason not to exercise the power which Parliament has given us. It is always for government and Parliament to decide what, if anything, to do about it. But others feel

that we should not trespass into areas which ought to be decided by Parliament even if we are satisfied that there is an incompatibility. An illustration is *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38, [2015] AC 657, where the Supreme Court was divided about whether the ban on assisted suicide was justified and, even if it was not, whether it was appropriate to make a declaration of incompatibility when the matter was under consideration in Parliament.

But these are matters of continuing debate which do not detract from the overall success of the legislation which we are celebrating today, along with its grandmother in the Universal Declaration (which is only slightly younger than the grandmother before you).