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

HOUSE OF LORDS

SESSION 2003-04
[2004] UKHL 30
on appeal from: [2002] 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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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.

31. On this the first point to be considered is how far, when enacting section 3, Parliament intended that the actual language of a statute, as distinct from the concept expressed in that language, should be determinative. Since section 3 relates to the 'interpretation' of legislation, it is natural to focus attention initially on the language used in the legislative provision being considered. But once it is accepted that section 3 may require legislation to bear a meaning which departs from the unambiguous meaning the legislation would otherwise bear, it becomes impossible to suppose Parliament intended that the operation of section 3 should depend critically upon the particular form of words adopted by the parliamentary draftsman in the statutory provision under consideration. That would make the application of section 3 something of a semantic lottery. If the draftsman chose to express the concept being enacted in one form of words, section 3 would be available to achieve Convention-compliance. If he chose a different form of words, section 3 would be impotent.

32. From this the conclusion which seems inescapable is that the mere fact the language under consideration is inconsistent with a Convention-compliant meaning does not of itself make a Convention-compliant interpretation under section 3 impossible. Section 3 enables language to be interpreted restrictively or expansively. But section 3 goes further than this. It is also apt to require a court to read in words which change the meaning of the enacted legislation, so as to make it Convention-compliant. In other words, the intention of Parliament in enacting section 3 was that, to an extent bounded only by what is 'possible', a court can modify the meaning, and hence the effect, of primary and secondary legislation.

33. Parliament, however, cannot have intended that in the discharge of this extended interpretative function the courts should adopt a meaning inconsistent with a fundamental feature of legislation. That would be to cross the constitutional boundary section 3 seeks to demarcate and preserve. Parliament has retained the right to enact legislation in terms which are not Convention-compliant. The meaning imported by application of section 3 must be compatible with the underlying thrust of the legislation being construed. Words implied must, in the phrase of my noble and learned friend Lord Rodger of Earlsferry, 'go with the grain of the legislation'. Nor can Parliament have intended that section 3 should require courts to make decisions for which they are not equipped. There may be several ways of making a

provision Convention-compliant, and the choice may involve issues calling for legislative deliberation.

34. Both these features were present in *In re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291. There the proposed 'starring system' was inconsistent in an important respect with the scheme of the Children Act 1989, and the proposed system had far-reaching practical ramifications for local authorities. Again, in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 section 29 of the Crime (Sentences) Act 1997 could not be read in a Convention-compliant way without giving the section a meaning inconsistent with an important feature expressed clearly in the legislation. In *Bellinger v Bellinger* [2003] 2 AC 467 recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would have had exceedingly wide ramifications, raising issues ill-suited for determination by the courts or court procedures.

35. In some cases difficult problems may arise. No difficulty arises in the present case. Paragraph 2 of Schedule 1 to the Rent Act 1977 is unambiguous. But the social policy underlying the 1988 extension of security of tenure under paragraph 2 to the survivor of couples living together as husband and wife is equally applicable to the survivor of homosexual couples living together in a close and stable relationship. In this circumstance I see no reason to doubt that application of section 3 to paragraph 2 has the effect that paragraph 2 should be read and given effect to as though the survivor of such a homosexual couple were the surviving spouse of the original tenant. Reading paragraph 2 in this way would have the result that cohabiting heterosexual couples and cohabiting heterosexual couples would be treated alike for the purposes of succession as a statutory tenant. This would eliminate the discriminatory effect of paragraph 2 and would do so consistently with the social policy underlying paragraph 2. The precise form of words read in for this purpose is of no significance. It is their substantive effect which matters.

36. For these reasons I agree with the decision of the Court of Appeal. I would dismiss this appeal.

LORD STEYN

My Lords,

37. In my view the Court of Appeal came to the correct conclusion. I agree with the conclusions and reasons of my noble and learned friends Lord Nicholls of Birkenhead, Lord Rodger of Earlsferry and Baroness Hale of Richmond. In the light of those opinions, I will not comment on the case generally.

38. I confine my remarks to the question whether it is possible under section 3(1) of the Human Rights Act 1998 to read and give effect to paragraph 2(2) of Schedule 1 to the Rent Act 1977 in a way which is compatible with the European Convention on Human Rights. In my view the interpretation adopted by the Court of Appeal under section 3(1) was a classic illustration of the permissible use of this provision. But it became clear during oral argument, and from a subsequent study of the case law and academic discussion on the correct interpretation of section 3(1), that the role of that provision in the remedial scheme of the 1998 Act is not always correctly understood. I would therefore wish to examine the position in a general way.

39. I attach an appendix to this opinion which lists cases where a breach of an ECHR right was found established, and the courts proceeded to consider whether to exercise their interpretative power under section 3 or to make a declaration of incompatibility under section 4. For the first and second lists (A and B) I am indebted to the Constitutional Law Division of the Department of Constitutional Affairs but law report references and other information have been added. The third list (C) has been prepared by Laura Johnson, my judicial assistant, under my direction. It will be noted that in 10 cases the courts used their interpretative power under section 3 and in 15 cases the courts made declarations of incompatibility under section 4. In five cases in the second group the declarations of incompatibility were subsequently reversed on appeal: in four of those cases it was held that no breach was established and in the fifth case (*Hooper)* the exact basis for overturning the declaration of incompatibility may be a matter of debate. Given that under the 1998 Act the use of the interpretative power under section 3 is the principal remedial measure, and that the making of a declaration of incompatibility is a measure of last resort, these statistics by themselves raise a question about the proper implementation of the 1998 Act. A study of the case law reinforces the need to pose the question whether the law has taken a wrong turning.

40. My impression is that two factors are contributing to a misunderstanding of the remedial scheme of the 1998 Act. First, there is the constant refrain that a judicial reading down, or reading in, under section 3 would flout the will of Parliament as expressed in the statute under examination. This question cannot sensibly be considered without giving full weight to the countervailing will of Parliament as expressed in the 1998 Act.

41. The second factor may be an excessive concentration on linguistic features of the particular statute. Nowhere in our legal system is a literalistic approach more inappropriate than when considering whether a breach of a Convention right may be removed by interpretation under section 3. Section 3 requires a broad approach concentrating, amongst other things, in a purposive way on the importance of the fundamental right involved.

42. In enacting the 1998 Act Parliament legislated "to bring rights home" from the European Court of Human Rights to be determined in the courts of the United Kingdom. That is what the White Paper said: see Rights Brought Home: The Human Rights Bill (1997) (cm 3782), para 2.7. That is what Parliament was told. The mischief to be addressed was the fact that Convention rights as set out in the ECHR, which Britain ratified in 1951, could not be vindicated in our courts. Critical to this purpose was the enactment of effective remedial provisions.

43. The provisions adopted read as follows:

"3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section -

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility.

4. Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) - (6)."

If Parliament disagrees with an interpretation by the courts under section 3(1), it is free to override it by amending the legislation and expressly reinstating the incompatibility.

44. It is necessary to state what section 3(1), and in particular the word "possible", does not mean. First, section 3(1) applies even if there is no ambiguity in the language in the sense of it being capable of bearing two *possible* meanings. The word "possible" in section 3(1) is used in a different and much stronger sense. Secondly, section 3(1) imposes a stronger and more radical obligation than to adopt a purposive interpretation in the light of the ECHR. Thirdly, the draftsman of the Act had before him the model of the New Zealand Bill of Rights Act which imposes a requirement that the interpretation to be adopted must be reasonable. Parliament specifically rejected the legislative model of requiring a reasonable interpretation.

45. Instead the draftsman had resort to the analogy of the obligation under the EEC Treaty on national courts, as far as possible, to interpret national legislation in the light of the wording and purpose of directives. In *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, 4159 the European Court of Justice defined this obligation as follows:

"It follows that, in applying national law, whether the provisions in questions were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty"

Given the undoubted strength of this interpretative obligation under EEC law, this is a significant signpost to the meaning of section 3(1) in the 1998 Act.

46. Parliament had before it the mischief and objective sought to be addressed, viz the need "to bring rights home". The linch-pin of the legislative scheme to achieve this purpose was section 3(1). Rights could only be effectively brought home if section

3(1) was the prime remedial measure, and section 4 a measure of last resort. How the system modelled on the EEC interpretative obligation would work was graphically illustrated for Parliament during the progress of the Bill through both Houses. The Lord Chancellor observed that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility" and the Home Secretary said "We expect that, in almost all cases, the courts will be able to interpret the legislation compatibly with the Convention": Hansard (HL Debates,) 5 February 1998, col 840 (3rd reading) and Hansard (HC Debates,) 16 February 1998, col 778 (2nd reading). It was envisaged that the duty of the court would be to strive to find (if possible) a meaning which would best accord with Convention rights. This is the remedial scheme which Parliament adopted.

47. Three decisions of the House can be cited to illustrate the strength of the interpretative obligation under section 3(1). The first is *R v A (No. 2)* [2002] 1 AC 45 which concerned the so-called rape shield legislation. The problem was the blanket exclusion of prior sexual history between the complainant and an accused in section 41(1) of the Youth Justice and Criminal Evidence Act 1999, subject to narrow specific categories in the remainder of section 41. In subsequent decisions, and in academic literature, there has been discussion about differences of emphasis in the various opinions in *A*. What has been largely overlooked is the unanimous conclusion of the House. The House unanimously agreed on an interpretation under section 3 which would ensure that section 41 would be compatible with the ECHR. The formulation was by agreement set out in paragraph 46 of my opinion in that case as follows:

    "The effect of the decision today is that under section 41(3)(c) of the 1999 Act, construed where necessary by applying the interpretive obligation under section 3 of the Human Rights Act 1998, and due regard always being paid to the importance of seeking to protect the complainant from indignity and from humiliating questions, the test of admissibility is whether the evidence (and questioning in relation to it) is nevertheless so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6 of the Convention. If this test is satisfied the evidence should not be excluded."

    This formulation was endorsed by Lord Slynn of Hadley at p 56, para 13 of his opinion in identical wording. The other Law Lords sitting in the case expressly approved the formulation set out in para 46 of my opinion: Lord Hope of Craighead, at pp 87-88, para 110, Lord Clyde, at p 98, para 140; and Lord Hutton, at p 106, para 163. In so ruling the House rejected linguistic arguments in favour of a broader approach. In the subsequent decisions of the House in *In re S (Minors) (Care Order: Implementation of Case Plan)* [2002] 2 AC 291 and *Bellinger v Bellinger* [2003] 2 AC 467, which touched on the remedial structure of the 1998 Act, *the decision* of the House in the case of *A* was not questioned. And in the present case nobody suggested that *A* involved a heterodox exercise of the power under section 3.

48. The second and third decisions of the House are *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1 AC 546 which involve the interpretative obligation under EEC law. *Pickstone* concerned section 1(2) of the Equal Pay Act 1970, (as amended by section 8 of the Sex Discrimination Act 1975 and regulation 2 of the Equal Pay (Amendment) Regulations 1983 (SI

1983/1794) which implied into any contract without an equality clause one that modifies any term in a woman's contract which is less favourable than a term of a similar kind in the contract of a man:

"(a) where the woman is employed on like work with a man in the same employment …

(b) where the woman is employed on work rated as equivalent with that of a man in the same employment . . .

(c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment".

Lord Templeman observed (at pp 120-121):

"In my opinion there must be implied in paragraph (c) after the word 'applies' the words 'as between the woman and the man with whom she claims equality.' This construction is consistent with Community law. The employers' construction is inconsistent with Community law and creates a permitted form of discrimination without rhyme or reason."

That was the ratio *decidendi* of the decision. *Litster* concerned regulations intended to implement an EC Directive, the purpose of which was to protect the workers in an undertaking when its ownership was transferred. However, the regulations only protected those who were employed "immediately before" the transfer. Having enquired into the purpose of the Directive, the House of Lords interpreted the Regulations by reading in additional words to protect workers not only if they were employed "immediately before" the time of transfer, but also when they would have been so employed if they had not been unfairly dismissed by reason of the transfer: see Lord Keith of Kinkel, at 554. In both cases the House eschewed linguistic arguments in favour of a broad approach. *Picksone* and *Litster* involved national legislation which implemented EC Directives. *Marleasing* extended the scope of the interpretative obligation to unimplemented Directives. *Pickstone* and *Litster* reinforce the approach to section 3(1) which prevailed in the House in the rape shield case.

49. A study of the case law listed in the Appendix to this judgment reveals that there has sometimes been a tendency to approach the interpretative task under section 3(1) in too literal and technical a way. In practice there has been too much emphasis on linguistic features. If the core remedial purpose of section 3(1) is not to be undermined a broader approach is required. That is, of course, not to gainsay the obvious proposition that inherent in the use of the word "possible" in section 3(1) is the idea that there is a Rubicon which courts may not cross. If it is not possible, within the meaning of section 3, to read or give effect to legislation in a way which is compatible with Convention rights, the only alternative is to exercise, where appropriate, the power to make a declaration of incompatibility. Usually, such cases should not be too difficult to identify. An obvious example is *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. The House held that the Home Secretary was not competent under article 6 of the ECHR to decide on

the tariff to be served by mandatory life sentence prisoners. The House found a section 3(1) interpretation not "possible" and made a declaration under section 4. Interpretation could not provide a substitute scheme. *Bellinger* is another obvious example. As Lord Rodger of Earlsferry observed ". . . in relation to the validity of marriage, Parliament regards gender as fixed and immutable": [2003] 2 WLR 1174, 1195, para 83. Section 3(1) of the 1998 Act could not be used.

50. Having had the opportunity to reconsider the matter in some depth, I am not disposed to try to formulate precise rules about where section 3 may not be used. Like the proverbial elephant such a case ought generally to be easily identifiable. What is necessary, however, is to emphasise that interpretation under section 3(1) is the prime remedial remedy and that resort to section 4 must always be an exceptional course. In practical effect there is a strong rebuttable presumption in favour of an interpretation consistent with Convention rights. Perhaps the opinions delivered in the House today will serve to ensure a balanced approach along such lines.

51. I now return to the circumstances of the case before the House. Applying section 3 the Court of Appeal interpreted "as his or her wife or husband" in the statute to mean "*as if they were* his wife or husband". While there has been some controversy about aspects of the reasoning of the Court of Appeal, I would endorse the reasoning of the Court of Appeal on the use of section 3(1) in this case. It was well within the power under this provision.

52. I would also dismiss the appeal.

APPENDIX

to the opinion of Lord Steyn

A. Declarations of incompatibility made under section 4 of the Human Rights Act 1998

Case	Relevant ECHR provision	Provision declared incompatible
R (H) v London North and East Region Mental Health Review Tribunal (Secretary of State for Health intervening) [2002] QB 1	**Articles 5(1) and 5(4)**	**Mental Health Act 1983 s. 73**
International Transport Roth GmbH v Secretary of State for the Home Department [2003] QB 728	**Article 6 and Protocol 1 article 1**	**Penalty Scheme contained in Part II of the Immigration and Asylum Act 1999**
R v McR (2002) NIQB 58 unreported except on the Northern Ireland Court Service website.	**Article 8**	**Offences Against the Person Act 1861 s. 62**
R (Wilkinson) v Commissioners of Inland Revenue [2002] STC 347, upheld by the Court of Appeal [2003] 1 WLR 2683	**Article 14 when read in conjunction with Protocol 1 article 1**	**Income and Corporation Taxes Act 1988 s. 262**
R (Anderson) v Secretary of State for the Home Department [2003] 1 AC 837	**Article 6(1)**	**Crime (Sentences) Act 1997 s.29**

R (D) v Secretary of State for the Home Department [2003] 1 WLR 1315	**Article 5(4)**	**Mental Health Act 1983 s. 74**
Blood and Tarbuck v Secretary of State for Health **Declaration by consent**	**Article 8 and/or article 8 when read with article 14**	**Human Fertilisation and Embryology Act 1990 s. 28(6)(b)**
Bellinger v Bellinger [2003] 2 AC 467	**Article 8 and article 12**	**Matrimonial Causes Act 1973 s. 11(c)**
R (on the application of FM) v Secretary of State for Health [2003] ACD 389	**Article 8**	**Mental Health Act 1983 ss. 26(1) and 29**
R (Uttley) v Secretary of State for the Home Department [2003] 1 WLR 2590	**Article 7**	**Criminal Justice Act 1991 ss. 33(2), 37(4)(a) and s. 39**

B. Declarations of incompatibility overturned on appeal

Case	ECHR provision	Provision declared incompatible	Overturned: Court, Date and Reason
R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2003] 2 AC 295	**Article 6(1)**	**Ss. 77, 78, 79 and paragraphs 3 and 4 of Schedule 6 of the Town and Country Planning Act 1990; ss. 1, 3 and 23(4) of the Transport and Works Act 1992; ss. 14(3)(a), 16(5)(a), 18(3)(a), 125 and paragraphs 1, 7 and 8 of Part 1 of Schedule 1 to the Highways Act 1980; s. 2 (3) and paragraph 4 of Schedule 1 to the Acquisition of Land Act 1981.**	**House of Lords 9 May 2001 No incompatibility with Article 6(1)**
Wilson v First County Trust (No 2) [2004] 1 AC 816	**Article 6(1) and article 1 Protocol 1**	**Consumer Credit Act 1974 s. 127(3)**	**House of Lords 10 July 2003 S.3(1) and s. 4 did not apply to causes of action accruing before the HRA 1998 came into force.**
Matthews v Ministry of Defence [2003] 1 AC 1163	**Article 6(1)**	**Crown Proceedings Act 1947 s. 10**	**Court of Appeal 29 May 2002 ([2002] 1 WLR 2621) and upheld on appeal by the House of Lords 13 February 2003. The claimant had no civil right to which article 6 might apply.**
R (Hooper) v Secretary of State for Work and Pensions [2003] 1WLR 2623	**Article 14 read together with article 8**	**Social Security Contributions and Benefit Act 1992 ss. 36 and 37**	**The Court of Appeal 18 June 2003 Leave to appeal to the House of Lords granted**
A v Secretary of State for the Home Department [2004] QB 335	**Article 5(1)**	**Anti-Terrorism, Crime and Security Act 2001 s. 23**	**The Court of Appeal 25 October 2002 No incompatibility with the Convention.**

C. Interpretations under s. 3(1) Case	ECHR provision	Provision in issue	Interpretation adopted
R v Offen [2001] 1 WLR 253, CA	**Articles 3, 5, 7**	**Crime (Sentences) Act 1997 (c43), s. 2**	**The imposition of an automatic life sentence as required by s. 2 could be disproportionate if the defendant poses no risk to the public, thereby breaching articles 3 and 5. The phrase "exceptional circumstances" was to be given a less restrictive interpretation.**
R v A (No 2) [2002] 1 AC 45	**Article 6**	**Youth Justice and Criminal Evidence Act 1999 s. 41**	**Prior sexual contact between the complainant and the defendant could be relevant to the issue of consent. The blanket exclusion of this evidence in s. 41 was disproportionate. By applying s. 3, the test of admissibility was whether the evidential material was so relevant to the issue of consent that to exclude it would endanger the fairness of the trial under article 6.**
Cachia v Faluyi [2001] 1 WLR 1966, CA	Article 6(1)	Fatal Accidents Act 1976 s. 2(3)	The restriction that "not more than one action shall lie for and in respect of the same subject matter of complaint" served no legitimate purpose and was a procedural quirk. "Action" was therefore interpreted as "served process" to enable claimants, whose writs had been issued but not served, to issue a new claim.
R v Lambert [2002] QB 1112	Article 6	Misuse of Drugs Act 1971 s. 28	The legal burden of proof placed on the defendant pursuant to the ordinary meaning of the phrase "if he proves" in the s. 28 defences was incompatible with article 6. Accordingly it is to be read as though it says "to give sufficient evidence".
Goode v Martin [2002] 1 WLR 1828, CA	Article 6	Civil Procedure Rule 17.4(2)	To comply with article 6(1), the rule should be read as though it contains the words in italics: "The court may allow an amendment whose effect will be to add … a new claim, but only if the new claim arises out of the same facts or substantially the same facts as are already in issue on a claim in respect of which the party applying for permission has already claimed a remedy in the proceedings."
R v Carass [2002] 1 WLR 1714, CA	Article 6(2)	Insolvency Act 1986 s. 206	There is no justification for imposing a legal rather than evidential burden of proof on a defendant accused of concealing debts in anticipation of winding up a company, who raises a defence under s. 206(4). Accordingly "prove" is to be read as "adduce sufficient evidence".
R (Van Hoogstraten) v Governor of Belmarsh Prison [2003] 1 WLR 263	Article 6	Prison Rules 1999 s. 2(1)	Reading the rule compatibly with s. 3 HRA, a prisoner's legal adviser, defined in s. 2(1) as "his counsel or solicitor, and includes a clerk acting on behalf of his solicitor ..." must embrace any lawyer who (a) is chosen by the prisoner, and (b) is entitled to represent the prisoner in criminal proceedings to which the prisoner is a defendant and therefore includes an Italian "avvocato" who falls within the definition of "EEC lawyer" in the European Communities (Services of Lawyers) Order 1978 (SI 1978/1910).
Sheldrake v Director of Public	Article 6(2)	Road Traffic Act 1988, ss. 5(1)(b)	The s. 5(2) defence to the offence of driving while under the influence of alcohol over the prescribed limit,

Prosecutions [2003] 2 WLR 1629, DC		and 5(2)	which requires the defendant to meet the legal burden of proving that there was no likelihood of his driving the vehicle while over the limit, is to be read down as imposing only an evidential burden on the defendant.
R (Sim) v Parole Board [2003] 2 WLR 1374	Article 5	Criminal Justice Act 1991 s. 44A(4)	In order to be compatible with Article 5, s. 44A(4) should be read as requiring the Parole Board to direct a recalled prisoner's release unless it is positively satisfied that the interests of the public require that his confinement should continue.
R (Middleton) v Her Majesty's Coroner for the Western District of Somerset [2004] 2 WLR 800	Article 2	Coroners Act 1988 s. 11(5)(b)(ii); Coroners Rules 1944, r. 36(1)(b)	"How" in the phrase "how, when and where the deceased came by his death" is to be read in a broad sense, to mean "by what means and in what circumstances" rather than simply "by what means".

LORD MILLETT

My Lords,

53. Paragraphs 2 and 3 of Schedule 1 to the Rent Act 1977 as amended by the Housing Act 1988 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 of the dwelling-house by succession if and so long as he or she occupies the dwelling-house as his or her home.

(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."

54. As my noble and learned friend Lord Nicholls of Birkenhead has observed, and as this House decided in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, on an ordinary reading of paragraph 2(2) the survivor of two persons of the opposite sex living together as man and wife in a dwelling house which is subject to the Rent Acts has a statutory right to succeed to the statutory tenancy of the deceased tenant; but the survivor of two persons of the same sex living together in similar circumstances has no such right. He or she merely has a right, in competition with other members of the deceased tenant's family, to claim an assured tenancy; but not only is an assured tenancy less advantageous than a statutory tenancy but the survivor's entitlement, if disputed by other members of the late tenant's family, is at the discretion of the court.

55. I agree with all my noble and learned friends, whose speeches I have had the advantage of reading in draft, that such discriminatory treatment of homosexual couples is incompatible with their Convention rights and cannot be justified by any identifiable legitimate aim. I am, moreover, satisfied by the powerful and convincing speech of my noble and learned friend Baroness Hale of Richmond that for the reasons she gives such treatment is not only incompatible with the Convention but is unacceptable in a modern democratic society at the beginning of the 21st century. This is not to say that it was always, or even until fairly recently, unacceptable; but times change, and with them society's perceptions change also (a commonplace usually dignified by being rendered in Latin).

56. It follows that, unless the court can apply section 3 of the Human Rights Act 1998 to extend the reach of para 2(2) to the survivor of a couple of the same sex, it must consider making a declaration of incompatibility under section 4. The making of such a declaration is in the court's discretion (section 4 provides only that the court "may" make one); and it may be a matter for debate whether it would be appropriate to do so at a time when not merely has the Government announced its intention to bring forward corrective legislation in due course (as in *Bellinger v Bellinger* [2003] 2 AC 467) but Parliament is currently engaged in enacting remedial legislation. It is, however, unnecessary to enter upon this question, for there is a clear majority in favour of the view that section 3 can be applied to interpret para 2(2) in a way which renders legislative intervention unnecessary.

57. I have the misfortune to be unable to agree with this conclusion. I have given long and anxious consideration to the question whether, in the interests of unanimity, I should suppress my dissent, but I have come to the conclusion that I should not. The question is of great constitutional importance, for it goes to the relationship between the legislature and the judiciary, and hence ultimately to the supremacy of Parliament. Sections 3 and 4 of the Human Rights Act were carefully crafted to preserve the existing constitutional doctrine, and any application of the ambit of section 3 beyond its proper scope subverts it. This is not to say that the doctrine of Parliamentary supremacy is sacrosanct, but only that any change in a fundamental constitutional principle should be the consequence of deliberate legislative action and not judicial activism, however well meaning.

58. Sections 3 and 4 of the Human Rights Act 1998, so far as material, provide as follows:

"3. Interpretation of legislation

(1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

4. Declaration of incompatibility

(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility….

(6) Such a declaration

(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given…."

59. Several points may be made at the outset. First, the requirement in Section 3 is obligatory. In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 373 Lord Cooke of Thorndon described the section as "a strong adjuration" by Parliament to read and give effect to legislation in a way which is compatible with Convention rights. With respect, it is more than this. It is a command. Legislation "*must*" be read and given effect to in a way which is compatible with Convention rights. There is no residual discretion to disobey the obligation which the section imposes.

60. Secondly, the obligation arises (or at least has significance) only where the legislation in its natural and ordinary meaning, that is to say as construed in accordance with normal principles, is incompatible with the Convention. Ordinary principles of statutory construction include a presumption that Parliament does not intend to legislate in a way which would put the United Kingdom in breach of its international obligations. This presumption will often be sufficient to enable the court to interpret the statute in a way will make it compatible with the Convention without recourse to section 3. It is only where this is not the case that section 3 comes into play. When it does, it obliges the court to give an abnormal construction to the statutory language and one which cannot be achieved by resort to standard principles and presumptions.

61. This is a difficult exercise, for it is one which the courts have not hitherto been accustomed to perform, and where they must accordingly establish their own ground rules for the first time. It is also dangerously seductive, for there is bound to be a temptation to apply the section beyond its proper scope and trespass upon the prerogative of Parliament in what will almost invariably be a good cause.

62. Thirdly, there are limits to the extent to which section 3 may be applied to render existing legislation compatible with the Convention. The presence of section 4 alone shows this to be the case, for it presupposes the existence of cases where the offending legislation cannot be rendered compatible with the Convention by the application of section 3.

63. There are two limitations to its application which are expressed in section 3 itself. In the first place, the exercise which the court is called on to perform is still one of interpretation, not legislation: (legislation must be "*read* and given effect to"). Section 3 is in marked contrast with the provisions in the constitutions of former colonial territories in relation to existing laws which are incompatible with constitutional rights. Such provisions commonly authorise the court to construe such laws "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the constitution".

64. This is a quasi-legislative power, not a purely interpretative one; for the court is not constrained by the language of the statute in question, which it may modify (ie amend) in order to bring it into conformity with the constitution. In *R v Hughes* [2002] 2 AC 259 the Privy Council deleted (ie repealed) express words in the

statute. In doing so it exercised a legislative, not an interpretative, power. Such a power is appropriate where the constitution (particularly one based on the separation of powers) is the supreme law, and where statutes inconsistent with the constitution are to the extent of the inconsistency automatically rendered void by the constitution. A finding of inconsistency may leave a lacuna in the statute book which in many cases must be filled without delay if chaos is to be avoided and which can be filled only by the exercise of a legislative power. But it is not appropriate in the United Kingdom, which has no written constitution and where the prevailing constitutional doctrine is based on the supremacy of Parliament rather than the separation of powers. Accordingly section 4(6) provides that legislation which is incompatible with a Convention right is not thereby rendered void; nor is it invalidated by the making of a declaration of incompatibility. It continues in full force and effect unless and until it is repealed or amended by Parliament, which can decide whether to change the law and if so from what date and whether retrospectively or not.

65. In some cases *(In re S (Minors)(Care Order: Implementation of Care Plan)* [2002] 2 AC 291 and *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 are examples) it would have been necessary to repeal the statutory scheme and substitute another. This is obviously impossible without legislation, and cannot be achieved by resort to section 3. That is not the present case. In other cases (*Bellinger v Bellinger* [2003] 2 AC 467 is an example) questions of social policy have arisen which ought properly to be left to Parliament and not decided by the judges. I shall return to this point later.

66. In the second place, section 3 requires the court to read legislation in a way which is compatible with the Convention only "*so far as it is possible to do so*". It must, therefore, be possible, *by a process of interpretation alone*, to read the offending statute in a way which is compatible with the Convention.

67. This does not mean that it is necessary to identify an ambiguity or absurdity in the statute (in the sense of being open to more than one interpretation) before giving it an abnormal meaning in order to bring it into conformity with a Convention right: see *R v A (No 2)* [2002] 1 AC 45, 67, 87 *per* Lord Steyn and Lord Hope of Craighead. I respectfully agree with my noble and learned friend Lord Nicholls of Birkenhead that even if, construed in accordance with ordinary principles of construction, the meaning of the legislation admits of no doubt, section 3 may require it to be given a different meaning. It means only that the court must take the language of the statute as it finds it and give it a meaning which, however unnatural or unreasonable, is intellectually defensible. It can read in and read down; it can supply missing words, so long as they are consistent with the fundamental features of the legislative scheme; it can do considerable violence to the language and stretch it almost (but not quite) to breaking point. The court must

    "strive to find *a possible* interpretation compatible with Convention rights" (emphasis added)

    R v A [2002] 1 AC 45, 67, para 44 *per* Lord Steyn. But it is not entitled to give it an impossible one, however much it would wish to do so.

68. In my view section 3 does not entitle the court to supply words which are inconsistent with a fundamental feature of the legislative scheme; nor to repeal, delete, or contradict the language of the offending statute. As Lord Nicholls said in *Rojas Berllaque (Attorney General for Gibraltar intervening)* [2004] 1 WLR 201, 208-209, para 24:

"There may of course be cases where an offending law does not lend itself to a sensible interpretation which would conform to the relevant Constitution".

This is more likely to be the case in the United Kingdom where the court's role is exclusively interpretative than in those territories (which include Gibraltar) where it is quasi-legislative.

69. I doubt that the principles which I have endeavoured to state would be disputed; disagreement is likely to lie in their application in a particular case. So it may be helpful if I give some examples of the way in which I see section 3 as operating.

70. In the course of his helpful argument counsel for the Secretary of State, who did not resist the application of section 3, acknowledged that it could not be used to read "black" as meaning "white". That must be correct. Words cannot *mean* their opposite; "black" cannot *mean* "not black". But they may *include* their opposite. In some contexts it may be possible to read "black" as meaning "black or white"; in other contexts it may be impossible to do so. It all depends on whether "blackness" is the essential feature of the statutory scheme; and while the court may look behind the words of the statute they cannot be disregarded or given no weight, for they are the medium by which Parliament expresses its intention.

71. Again, "red, blue or green" cannot be read as meaning "red, blue, green or yellow"; the specification of three only of the four primary colours indicates a deliberate omission of the fourth (unless, of course, this can be shown to be an error). Section 3 cannot be used to supply the missing colour, for this would be not to interpret the statutory language but to contradict it.

72. The limits on the application of section 3 may thus be in part at least linguistic, as in the examples I have given, but they may also be derived from a consideration of the legislative history of the offending statute. Thus, while it may be possible to read "cats" as meaning "cats or dogs" (on the footing that the essential concept is that of domestic pets generally rather than felines particularly), it would obviously not be possible to read "Siamese cats" as meaning "Siamese cats or dogs". The particularity of the expression "Siamese cats" would preclude its extension to other species of cat, let alone dogs. But suppose the statute merely said "cats", and that this was the result of successive amendments to the statute as originally enacted. If this had said "Siamese cats", and had twice been amended, first to read "Siamese or Persian cats" and then to read simply "cats", it would not, in my opinion, be possible to read the word "cats" as including "dogs"; the legislative history would demonstrate that, while Parliament had successively widened the scope of the statute, it had consistently legislated in relation to felines, and had left its possible extension to other domestic pets for future consideration. Reading the word "cats" as meaning "cats or dogs" in these circumstances would be to usurp the function of Parliament.

73. In *R v A* [2002] 1 AC 45 the offending statute had laid down an elaborate scheme to prevent the defendant to a charge of rape from adducing certain kinds of evidence at his trial. Read without qualification this could exclude logically relevant evidence favourable to the accused and deny him a fair trial contrary to article 6 of the Convention. The House read the statute as subject to the implied proviso that evidence or questioning which was required to ensure a fair trial should not be treated as inadmissible. The House supplied a missing qualification which significantly limited the operation of the statute but which did not contradict any of its fundamental features. As Lord Steyn observed (at p 68, para 45) it would be unrealistic to suppose that Parliament, if alerted to the problem, would have wished to deny an accused person the right to put forward a full and complete defence by advancing truly probative material.

74. For my own part, I have no difficulty with the conclusion which the House reached in that case. The qualification which it supplied glossed but did not contradict anything in the relevant statute. Neither expressly nor implicitly did the statute require logically probative evidence to be excluded if its exclusion would have the effect of denying the accused a fair trial. The meaning of the statute was not ambiguous, and in the absence of section 3 the proviso could not have been implied. But if it had been expressed it would not have made the statute self-contradictory or produced a nonsense.

75. Lord Hope of Craighead, who had more difficulty in the application of section 3, observed (*loc cit*) that compatibility was to be achieved only so far as this was possible, and that it would plainly not be possible if the legislation contained provisions which expressly contradicted the meaning which the enactment would have to be given to make it compatible. He added that the same result must follow if they did so by necessary implication, as this too was a means of identifying the plain intention of Parliament. Lord Steyn said the same in *Anderson* [2003] 1 AC 837, p 894, para 59:

    "Section 3(1) is not available where the suggested interpretation is contrary to express statutory words *or is by implication necessarily contradicted by the statute"* (emphasis added)

    citing Lord Nicholls in *In re S (Minors)* [2002] 2 AC 291, 313-314, para 41 in support.

76. I respectfully agree with this approach, though I would add a caveat. I do not understand the word "implication" as entitling the court to imply words which would render the statute incompatible with the Convention; that would be entirely contrary to the spirit of section 3. They mean only that the incompatibility need not be explicit; but if not then it must be implicit, that it to say manifest on the face of the statute.

77. It is obvious that, if paragraph 2(2) of Schedule 1 to the Rent Act 1977 as amended had referred expressly to "a person of the opposite sex" who was living with the original tenant as his or her husband or wife, it would not be possible to bring the paragraph into conformity with the Convention by resort to section 3. The question is whether the words "of the opposite sex" are implicit; for if they are, then same result must follow. Reading the paragraph as referring to persons whether of the

same or opposite sex would equally contradict the legislative intent in either case. I agree that the operation of section 3 does not depend critically upon the form of words found in the statute; the court is not engaged in a parlour game. But it does depend upon identifying the essential features of the legislative scheme; and these must be gathered in part at least from the words that Parliament has chosen to use. Drawing the line between the express and the implicit would be to engage in precisely that form of semantic lottery to which the majority rightly object.

78. In the present case both the language of paragraph 2(2) and its legislative history show that the essential feature of the relationship which Parliament had in contemplation was an open relationship between persons of the opposite sex. I take the language first. Paragraph 2(1) provides that "the surviving spouse" of the deceased tenant shall succeed to the statutory tenancy. The word "spouse" means a party to a lawful marriage. It may refer indifferently to a lawfully wedded husband or a lawfully wedded wife, and to this extent is not gender specific. But it is gender specific in relation to the other party to the relationship. Marriage is the lawful union of a man and a woman. It is a legal relationship between persons of the opposite sex. A man's spouse must be a woman; a woman's spouse must be a man. This is of the very essence of the relationship, which need not be loving, sexual, stable, faithful, long-lasting, or contented. Although it may be brought to an end as a legal relationship only by death or an order of the court, its demise as a factual relationship will usually have ended long before that.

79. Another basic feature of marriage is that it is an openly acknowledged relationship. From the earliest times marriage has involved a public commitment by the parties to each other. Whether attended by elaborate ceremonial or relatively informal, and whether religious or secular, its essence consists of a public acknowledgment of mutual commitment. Even primitive societies demand this, because the relationship does not concern only the immediate parties to it. The law may enable them to dispense with formalities, but not with public commitment. In some Polynesian societies, it is said, young men and women marry by the simple process of taking a meal together in public.

80. Paragraph 2(2) provides that 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". Mathematically there are four possibilities: "his wife", "her wife", "her husband" and "his husband." But two of these are nonsense. A man cannot have a husband; and a woman cannot have a wife. In order to be treated as the spouse of the original tenant, a person must have been living openly with the tenant as his wife or her husband. In any given case, of course, only one person can qualify. If the tenant was a man, that person must have been his wife or have lived with him as his wife; if a woman, he must have been her husband or lived with her as such. The paragraph is gender specific.

81. It seems clear that Parliament contemplated an open relationship, whether legal (paragraph 2(1)) or de facto (paragraph 2(2)), the essential feature of which is that, unlike other relationships, it subsists and can subsist only between persons of the opposite sex. A loving relationship between persons of the same sex may share many of the features of a de facto marriage. It may, as Baroness Hale describes it, be "marriage-like"; but it is not even de facto a marriage, because it lacks the defining feature of marriage.

82. In my opinion the words "of the opposite sex" are unmistakably implicit. Although not expressed in terms, they are manifest on the face of the statute. The parties are not required merely to live together but to do so *as husband and wife*. They are not merely given the same rights as married persons but are treated as if they *were* married persons. If the draftsman had inserted the words "being of the opposite sex" expressly he would have produced a comical tautology. If he had inserted the words "whether of the same or opposite sex" he would have produced a self-contradictory nonsense. Persons cannot be or be treated as married to each other or live together as husband and wife unless they are of the opposite sex. It is noticeable that, now that Parliament is introducing remedial legislation, it has not sought to do anything as silly as to treat same sex relationships as marriages, whether legal or de facto. It pays them the respect to which they are entitled by treating them as conceptually different but entitled to equality of treatment.

83. I turn to the legislative history. As originally enacted, the Rent Act 1977 provided, as had earlier Rent Acts, that on the death of a statutory tenant without a widow but leaving a member of his family living with him at his death, that person should become a statutory tenant by succession. If there was more than one such person then, in the absence of agreement between them, the court should decide which of them would become the statutory tenant. If the tenant left a widow who was residing in the dwellinghouse at his death, however, she had a right to a statutory tenancy in priority to other members of his family.

84. It is an important feature of this legislation that the widow succeeded to the tenancy by virtue of her status, much as she would succeed to her late husband's estate on intestacy. She merely had to produce her marriage certificate. She did not have to prove that the marriage was happy, or stable, or long-lasting, or that the parties had been faithful to each other. The marriage could have been unhappy, tempestuous, or very recent; she could have been unfaithful; her husband could have begun divorce proceedings. Provided that she was living *in the dwellinghouse* (not necessarily with her husband) at the date of the tenant's death and he was still her husband, she was entitled to become the statutory tenant. She did not have to prove that she deserved to do so. Merit did not come into it.

85. The primacy given to the widow's claim was not, of course, at the expense of the landlord. She was a member of the tenant's family, and if she was the only member of his family who was residing in the dwellinghouse when he died she would be entitled to a statutory tenancy anyway. It was only when there was more than one member of his family who qualified that her priority was of any significance; and this was at the expense of the others. Even then hers would normally be the most deserving claim. This provides the key to an understanding of the legislative policy behind the Rent Acts. The widow was to succeed by virtue of her status alone; she was not to be required to prove that she was more deserving than (say) her mother-in-law. Parliament sought to avoid provoking bitter and unseemly family disputes over the succession. A similar policy informs the law governing intestate succession. A statutory tenancy was the creature of statute. It was merely "a status of irremovability"; it was not property. It did not form part of a deceased tenant's estate and could not pass under his will or on his intestacy. But Parliament could determine what should happen on the tenant's death; and in effect it provided for it to pass to his widow in much the same way as if it were part of his estate and he had died intestate.

86. Unfortunately, as originally enacted the Rent Act 1977 conferred the right on the tenant's widow, and the Court of Appeal held that this was gender specific. Paragraph 2(1) applied only where the tenancy was in the husband's name and he predeceased his wife. It did not apply in the converse, though much less common, case where the tenancy was in the wife's name and she predeceased her husband. Today, of course, section 3 of the Human Rights Act would permit this to be corrected. "Widow" cannot mean "widower" but it can mean "widow or widower". Reading in the words "or widower" would not contradict the express terms of the statute or create a nonsense. Parliament had failed to include the less common case (perhaps because it overlooked it or thought that it had provided for it), but it had not manifested an intention to exclude it.

87. Parliament responded promptly. In 1980 it amended the Rent Act by substituting "surviving spouse" for "widow", producing paragraph 2(1) in its present form. For the reasons I have mentioned, this did not prejudice the landlord. It merely meant that, like the widow, the widower could succeed by virtue of his status without having to prove that he was more deserving than (say) his stepson.

88. In 1988, however, Parliament made two changes of greater significance. The first was the consequence of a policy decision to introduce more flexibility into the housing market by phasing out statutory tenancies. No more statutory tenancies were to be created in future; they would be replaced by assured tenancies. Paragraph 3 was amended so that, on the death of a statutory tenant leaving a member of his or her family residing in the dwelling house, he or she would become an assured tenant but not a statutory tenant.

89. Parliament did not, however, alter the right of a surviving spouse to become a statutory tenant in the place of the deceased tenant. This must, I think, have been due to a reluctance to enact what might be seen as retrospective legislation. The wife or husband of a statutory tenant had a vested right to succeed to the tenancy on the tenant's death. He or she had more than a hope of succession, for there was nothing the tenant could do to prevent it. To the extent that this might be thought to run counter to the policy to phase out statutory tenancies, it should be recalled that the surviving spouse's claim arose only on the death of a statutory tenant. Eventually there would be no more statutory tenancies, and paragraph 2 would become a dead letter. The same aversion to retrospective legislation was not, however, seen as applying, or as applying with the same force, to the claims of other members of the tenant's family.

90. The present case is concerned with the second change: the introduction of paragraph 2(2). This was compelled by changes in society. Couples are increasingly living together openly as man and wife without actually marrying. It is possible that this will become the norm rather than the exception. To extend the privileges of marriage to those who choose not to marry was formerly highly controversial; it was thought by many to undermine the status of marriage. It is less controversial today. By 1988 Parliament considered that it was sufficiently acceptable to enact it in legislation.

91. By enacting paragraph 2(2), therefore, Parliament was responding to changes in society. The timing of such a response is, under our constitutional arrangements, peculiarly a matter for the legislature and not the judiciary. Parliament's policy,

however, had not changed. The survivor, whether a spouse or merely treated as a spouse, should still have the right to succeed to the statutory tenancy by virtue of his or her status. The difference was that he or she no longer had to prove that the relationship was recognised by law; it was sufficient that it existed in fact. The claimant no longer had to produce a marriage certificate; it was sufficient that he or she and the deceased tenant had lived openly together as husband and wife. This probably was seen as entrenching on the landlord's rights, for it must have been far from clear in 1988 that the "common law wife" or husband was a member of the other party's family. But landlords do not ask to see their tenants' marriage certificates; and the encroachment, if any, was easily justifiable.

92. The expression "living together as man and wife" or "as husband and wife "is in general use and well understood. It does not mean living together as lovers whether of the same or the opposite sex. It connotes persons who have openly set up home together as man and wife. While other factors may be significant where the question arises between the parties themselves, in a context such as the present it must depend largely if not exclusively on outward appearances. It cannot depend on the relationship being a happy, or long lasting, or stable one. This would be contrary to the Parliament's long-standing policy: the survivor must succeed by virtue of his or her status. He or she is to be treated as having been the spouse of the original tenant because that is what, to all intents and purposes and to all outward appearances, the claimant was. This is, of course, not to say that they must hold themselves out as husband and wife: couples who live together as husband and wife rarely do so. It means only that they must appear to the outside world as if they were husband and wife.

93. There is, indeed, a paradox at the heart of modern society. For centuries the civil and canon law, the common law of Europe as it has been called, did not require any form of religious or secular ceremony to constitute a marriage. Persons who openly set up home together and lived together as man and wife were presumed to be married; and if they had consummated the marriage they *were* married; marriage was by habit and repute. The combined effect of the Council of Trent and the Marriage Acts put an end to all that. But there is nothing new in treating men and women who live openly together as husband and wife as if they were married; it is a reversion to an older tradition.

94. By 1988 Parliament, therefore, had successively widened the scope of paragraph 2(1). First applying only to the tenant's widow, it was extended first to his or her surviving spouse and later to a person who had lived with the tenant as his or her spouse though without actually contracting a legally binding marriage. The common feature of all these relationships is that they are open relationships between persons of the opposite sex. Persons who set up home together may be husband and wife or live together as husband and wife; they may be lovers; or brother and sister; or friends; or fellow students; or share a common economic interest; or one may be economically dependent on the other. But Parliament did not extend the right to persons who set up home together; but only to those who did so *as husband and wife*.

95. Couples of the same sex can no more live together as husband and wife than they can live together as brother and sister. To extend the paragraph to persons who set up home as lovers would have been a major category extension. It would have

been highly controversial in 1988 and was not then required by the Convention. The practice of Contracting States was far from uniform; and Parliament was entitled to take the view that any further extension of paragraph (2) could wait for another day. One step at a time is a defensible legislative policy which the courts should respect. Housing Acts come before Parliament with some frequency; and Parliament was entitled to take the view that the question could be revisited without any great delay. It is just as important for legislatures not to proceed faster than society can accept as it is for judges; and under our constitutional arrangements the pace of change is for Parliament.

96. Parliament, as I have said, is now considering corrective legislation in the Civil Partnerships Bill currently before the House in its legislative capacity. The Bill creates a new legal relationship, called a civil partnership, which the persons of the same sex may enter into by registering themselves as civil partners. It inserts the words "or surviving civil partner" after the words "surviving spouse" in paragraph 2(1), and adds a new paragraph (2)(b):

    "(b) a person who was living with the original tenant as if they were civil partners shall be treated as the civil partner of the original tenant."

97. There will thus be four categories of relationship covered if the Bill becomes law: (i) spouses, ie married persons (necessarily being persons of the opposite sex); (ii) persons who live together as husband and wife who are to be treated as if they were married (and who must therefore also be of the opposite sex): (iii) civil partners (who must be of the same sex) who are given the same rights as but are not treated as if they were married persons; and (iv) persons who live together as if they were civil partners without having registered their relationship, who are treated as if they had done so. This is a rational and sensible scheme which does not involve pretending that couples of the same sex can marry or be treated as if they had done so.

98. Among the matters which Parliament will have had to consider in debating the Civil Partnerships Bill are: (i) which statutes to amend by extending their reach to civil partners and persons living together as civil partners: (ii) whether such statutes should extend to unregistered civil partnerships in every case or whether in some cases it would be appropriate to require the parties to register their relationship before taking the benefits of the statute: (iii) whether the Bill should be retrospective to any and what extent: and (iv) from what date should the new provisions come into force. Presumably some time must elapse before a system of registration can be established: should unregistered civil partners have to wait until it is? These, and no doubt other matters, are questions of policy for the legislature.

99. All this will be foreclosed by the majority. By what is claimed to be a process of interpretation of an existing statute framed in gender specific terms, and enacted at a time when homosexual relationships were not recognised by law, it is proposed to treat persons of the same sex living together as if they were living together as husband and wife and then to treat such persons as if they were lawfully married. It is to be left unclear as from what date this change in the law has taken place. If we were to decide this question we would be usurping the function of Parliament; and if we were to say that it was from the time when the European Court of Human Rights decided that such discrimination was unlawful we would be transferring the

legislative power from Parliament to that court. It is, in my view, consonant with the Convention for the Contracting States to take time to consider its implications and to bring their laws into conformity with it. They do not demand retrospective legislation.

100. Worse still, in support of their conclusion that the existing discrimination is incompatible with the Convention, there is a tendency in some of the speeches of the majority to refer to loving, stable and long-lasting homosexual relationships. It is left wholly unclear whether qualification for the successive tenancy is confined to couples enjoying such a relationship or, consistently with the legislative policy which Parliament has hitherto adopted, is dependent on status and not merit.

101. In my opinion all these questions are essentially questions of social policy which should be left to Parliament. For the reasons I have endeavoured to state it is in my view not open to the courts to foreclose them by adopting an interpretation of the existing legislation which it not only does not bear but which is manifestly inconsistent with it.

102. I would allow the appeal.

LORD RODGER OF EARLSFERRY

My Lords,

103. I have had the advantage of considering the speeches of my noble and learned friends, Lord Nicholls of Birkenhead, Lord Steyn and Baroness Hale of Richmond, in draft. I agree with them and would accordingly dismiss the appeal. In view of the importance of the issue, I add some observations on section 3 of the Human Rights Act 1998 ("the 1998 Act").

104. Section 3, which, as Lord Hoffmann remarked in *R v Secretary of State for the Home Department, Ex p Simms* [2000] 2 AC 115, 132A, enacts the principle of legality as a rule of construction, provides:

"3. (1) So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights.

(2) This section-

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

In *R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 373F Lord Cooke of Thorndon described section 3(1) as "a strong adjuration" by Parliament to read and give effect to legislation compatibly with Convention rights. Nevertheless,

the opening words of subsection (1) show that there are limits to the obligation. That is reflected in subsection (2)(b) and (c) as well as in the next section, section 4, which applies in those cases where a higher court is satisfied that, despite section 3(1), a provision is to be regarded as incompatible with a Convention right. In that event the court may make a declaration of incompatibility. While it is therefore clear that there are limits to the obligation in section 3(1), they are not spelled out. In a number of cases your Lordships' House has taken tentative steps towards identifying those limits. The matter calls for further consideration in this case.

105. In addressing the question, it is useful to bear in mind section 6(1) and (2):

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

(2) Subsection (1) does not apply to an act if -

(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or

(b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

Subsection (3) goes on to define "public authority" as including a court.

106. Inevitably, when section 3 comes to be considered by a court, the focus is on the approach which section 3(1) requires the court to adopt when reading a statutory provision that, on a conventional interpretation, would be incompatible with a Convention right. Nevertheless, the section is not aimed exclusively, or indeed mainly, at the courts. In contrast to section 4 - which applies in terms only to "a court" of the level of the High Court or above - and in contrast also to section 6 - which applies only to public authorities - section 3 is carefully drafted in the passive voice to avoid specifying, and so limiting, the class of persons who are to read and give effect to the legislation in accordance with it. Parliament thereby indicates that the section is of general application. It applies, of course, to the courts, but it applies also to everyone else who may have to interpret and give effect to legislation. The most obvious examples are public authorities such as organs of central and local government, but the section is not confined to them. The broad sweep of section 3(1) is indeed crucial to the working of the 1998 Act. It is the means by which Parliament intends that people should be afforded the benefit of their Convention rights - "so far as it is possible", without the need for any further intervention by Parliament. In *R v A (No 2)* [2002] 1 AC 45, 67 - 68, para 44, and in his speech today, Lord Steyn has referred to what ministers told Parliament about how, they anticipated, the obligation in section 3(1) would work in practice. However that may be, section 3(1) requires public authorities of all kinds to read their statutory powers and duties in the light of Convention rights and, so far as possible, to give effect to them in a way which is compatible with the Convention rights of the people concerned. In practice, even before the 1998 Act came into force, many public authorities had reviewed the legislation affecting them so as to be in a position to comply with this obligation from the date of commencement. This was a wise

precaution. Once the 1998 Act came into force, whenever, by virtue of section 3(1), a provision could be read in a way which was compatible with Convention rights, that was the meaning which Parliament intended that it should bear. For all purposes, that meaning, and no other, is the "true" meaning of the provision in our law.

107. The second point to notice is that, so far as possible, legislation must be "read and given effect" compatibly with Convention rights. The use of the two expressions, "read" and "given effect", is not to be glossed over as an example of the kind of cautious tautologous drafting that used to be typical of much of the statute book. That would be to ignore the lean elegance which characterises the style of the draftsman of the 1998 Act. Rather, section 3(1) contains not one, but two, obligations: legislation is to be read in a way which is compatible with Convention rights, but it is also to be given effect in a way which is compatible with those rights. Although the obligations are complementary, they are distinct. So there may be a breach of one but not of the other. For instance, suppose that legislation within the ambit of a particular Convention right requires a local authority to provide a service to residents in its area. The proper interpretation of the duty in the legislation may be straightforward. But, even if the local authority interprets the provision correctly and provides the appropriate service, if it provides the service only to those residents who support the governing political party, the local authority will be in breach of article 14 in relation to the other article concerned and, in terms of section 3(1), will have failed to give effect to the legislation in a way which is compatible with Convention rights. So, even though the heading of section 3 is "Interpretation of legislation", the content of the section actually goes beyond interpretation to cover the way that legislation is given effect.

108. Next, the Act discloses one clear limit to section 3(1). It is not concerned with provisions which, properly interpreted, impose an unavoidable obligation to act in a particular way. This can be seen from a comparison of paras (a) and (b) of section 6(2). According to para (a), section 6(1) does not apply, and a public authority therefore acts lawfully, if, as a result of primary legislation, "the authority could not have acted differently." An example might be a provision requiring a local authority to dismiss an application if the applicant failed to take a particular step within seven days. Even if this results in the violation of a Convention right, the local authority must dismiss the application and, in doing so, it acts lawfully: it cannot act differently in terms of the legislation. By para (b), on the other hand, the public authority also acts lawfully if, in the case of one or more provisions of primary or secondary legislation "which cannot be read or given effect in a way which is compatible with the Convention rights", the authority was acting so as to give effect to or enforce those provisions. Para (b) echoes the language of section 3(1) and therefore deals with the (different) situation where, in terms of section 3(1), it has not proved possible to read and give effect to a provision in a way which is compatible with Convention rights. In that situation, as section 3(2)(b) provides, the validity, continuing operation and enforcement of the legislation are not affected and so it is lawful for a public authority to act in terms of the legislation. In that case too, section 6(2) disapplies section 6(1).

109. If incompatible provisions that require a public authority to act in a particular way, and leave it with no option to act differently, do not fall within the scope of section 3(1), this can only be because, by definition, it is not possible to read them

or give effect to them in a way which is compatible with Convention rights. This makes sense. If a provision requires the public authority to take a particular step which is, of its very nature, incompatible with Convention rights, then no process of interpretation can remove the obligation or change the nature of the step that has to be taken. Nor can the public authority give effect to the obligation by doing anything other than taking the step which the Act requires of it. In such cases, only Parliament can remove the incompatibility if it decides to repeal or amend the provision. The most that a higher court can do is to make a declaration of incompatibility under section 4.

110. What excludes such provisions from the scope of section 3(1) is not any mere matter of the linguistic form in which Parliament has chosen to express the obligation. Rather, they are excluded because the entire substance of the provision, what it requires the public authority to do, is incompatible with the Convention. The only cure is to change the provision and that is a matter for Parliament and not for the courts: they, like everyone else, are bound by the provision. So from section 6(2)(a) and (b) one can tell that, however powerful the obligation in section 3(1), it does not allow the courts to change the substance of a provision completely, to change a provision from one where Parliament says that *x* is to happen into one saying that *x* is not to happen. And, of course, in considering what constitutes the substance of the provision or provisions under consideration, it is necessary to have regard to their place in the overall scheme of the legislation as enacted by Parliament. In *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, for instance, the Court of Appeal held that it was impossible for the court to use the interpretative obligation in section 3(1) in effect to recreate the fixed penalty scheme enacted by Parliament so as to turn it into a scheme that was compatible with article 6. As Simon Brown LJ observed, at p 758C - D, it would have involved turning the scheme inside out - something that the court could not do. Only Parliament, not the courts, could create a wholly different scheme so as to provide an acceptable alternative means of immigration control.

111. Another illustration of this limitation on the obligation under section 3(1) is to be found in the decision of your Lordships' House in *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837. Section 29 of the Crime (Sentences) Act 1997 provided that, "if recommended to do so by the Parole Board, the Secretary of State may … release on licence" certain life prisoners, viz convicted murderers. The House was satisfied that it was incompatible with the Convention rights of Mr Anderson, who had been convicted of murder, for the power to release him to lie with the Home Secretary rather than with a judicial body. Counsel for Anderson submitted accordingly that, under section 3(1) of the 1998 Act, section 29 of the Crime (Sentences) Act could be read and given effect in a manner which would be compatible with his Convention rights. In effect, this would have amounted to reading the section in such a way as to deprive the Home Secretary of the express power to release him. The House rejected this submission since it was clear that, under section 29, the power of release and the power to determine how long a convicted murderer should remain in prison for punitive purposes were to lie with the Home Secretary and with no-one else. In these circumstances, in the words of Lord Bingham of Cornhill [2003] 1 AC 837, 883C - D, para 30:

"To read section 29 as precluding participation by the Home Secretary, if it were possible to do so, would not be judicial interpretation but judicial vandalism: it would give the section an effect quite different from that which Parliament intended and would go well beyond any interpretative process sanctioned by section 3 of the 1998 Act …"

The "judicial vandalism" would lie not in any linguistic changes, whether great or small, which the court might make in interpreting section 29 but in the fact that any reading of section 29 which negatived the explicit power of the Secretary of State to decide on the release date for murderers would be as drastic as changing black into white. It would remove the very core and essence, the "pith and substance" of the measure that Parliament had enacted - to use the familiar phrase of Lord Watson (in a different context) in *Union Colliery Co of British Columbia Ltd v Bryden* [1899] AC 580, 587. Section 3(1) gives the courts no power to go that far. In these circumstances the House made a declaration of incompatibility, which left it to the minister and ultimately to Parliament to decide whether to remedy the incompatability by amending or repealing section 29 and, if so, how.

112. In reaching this conclusion Lord Bingham had regard to the well-known words of Lord Nicholls of Birkenhead in *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313, para 39, where the relevant distinction is drawn:

"The Human Rights Act reserves the amendment of primary legislation to Parliament. By this means the Act seeks to preserve parliamentary sovereignty. The Act maintains the constitutional boundary. Interpretation of statutes is a matter for the courts; the enactment of statutes, and the amendment of statutes, are matters for Parliament."

Whatever can be done by way of interpretation must be done by the courts and anyone else who is affected by the legislation in question. The rest is left to Parliament and amounts to amendment of the legislation. As Lord Nicholls pointed out, it is by no means easy to decide in the abstract where the boundary lies between robust interpretation and amendment, but, he added, at p 313, para 40:

"For present purposes it is sufficient to say that a meaning which departs substantially from a fundamental feature of an Act of Parliament is likely to have crossed the boundary between interpretation and amendment. This is especially so where the departure has important practical repercussions which the court is not equipped to evaluate. In such a case the overall contextual setting may leave no scope for rendering the statutory provision Convention compliant by legitimate use of the process of interpretation. The boundary line may be crossed even though a limitation on Convention rights is not stated in express terms."

113. The problem facing the House in *In re S* was, in some ways, the opposite of the problem that was to come before the House in *R (Anderson) v Secretary of State for the Home Department*. In the earlier case, the interpretation of the Children Act 1989 which the Court of Appeal had adopted in reliance on articles 6 and 8 of the Convention did not involve removing any power from a statutory body. Rather, in the view of the House, the starring system devised by the Court of Appeal involved conferring on the courts a power to supervise the way in which

local authorities discharged their parental responsibilities under final care orders. This was to depart substantially from "a cardinal principle" of the Children Act, that the courts are not empowered to intervene in the way local authorities discharge their responsibilities under such orders: [2002] 2 AC 291, 314, para 42. Lord Nicholls, with whom all the other members of the House agreed, went on to hold, in para 43, that the innovation made by the Court of Appeal "passes well beyond the boundary of interpretation". There was no provision in the Children Act that lent itself to the interpretation that Parliament was conferring this supervisory function on the court. On the contrary, conferring such a function was inconsistent in an important respect with the scheme of the Act. "It would constitute amendment of the Children Act, not its interpretation." In that situation it was not possible to "read in" to the Act or any of its provisions a power to set up such a system. That would be to produce a meaning that departed substantially from a fundamental feature of the Act and so crossed the boundary between interpretation and amendment.

114. Again, it is important to notice that the problem identified by the House did not derive from any perceived difficulty in finding language to frame a power to require a report on the progress of the local authority; rather, the problem was that, however the courts might frame the power, they would be introducing something which was not to be found in the Children Act - and, more particularly, something which was actually inconsistent with one of its cardinal principles. If such a change to the Act was to be made, Parliament would have to make it.

115. In the second passage from his speech in *In re S* which I have quoted in paragraph 112 above, Lord Nicholls made the further point that a departure from a fundamental feature of an Act of Parliament may be more readily treated as crossing the boundary into the realm of amendment where it has important practical repercussions which the court is not equipped to evaluate. It appears to me that difficult questions may also arise where, even if the proposed interpretation does not run counter to any underlying principle of the legislation, it would involve reading into the statute powers or duties with far-reaching practical repercussions of that kind. In effect these powers or duties, if sufficiently far-reaching, would be beyond the scope of the legislation enacted by Parliament. If that is right, the answer to such questions cannot be clear-cut and will involve matters of degree which cannot be determined in the abstract but only by considering the particular legislation in issue. In any given case, however, there may come a point where, standing back, the only proper conclusion is that the scale of what is proposed would go beyond any implication that could possibly be derived from reading the existing legislation in a way that was compatible with the Convention right in question. In that event, the boundary line will have been crossed and only Parliament can effect the necessary change.

116. Although he was disagreeing with the other members of the House on the interpretation point, the approach of Lord Hope of Craighead in *R v A (No 2)* [2002] 1 AC 45, 87, para 109, is similar to the reasoning of Lord Nicholls in *In re S*. In Lord Hope's view, "the entire structure of section 41" of the Youth Justice and Criminal Evidence Act 1999 contradicted the idea of reading into it a new provision entitling the court to give leave for evidence to be led of the complainant's previous sexual behaviour with the accused whenever this was required to ensure a fair trial. It seemed to him that "it would not be possible" to read in such a provision "without contradicting the plain intention of Parliament" in section 41(2) to forbid the exercise

of such a discretion unless the court is satisfied as to the matters identified by that subsection. In his view Parliament had taken a deliberate decision not to follow examples to be found elsewhere of provisions giving the court an overriding discretion to admit such evidence. In the phraseology of Lord Nicholls in *In re S*, for Lord Hope this was a "cardinal principle" of section 41 and it was not open to the courts to read the section in such a way as to depart substantially from it.

117. It was in this context that Lord Hope expressed the view, [2002] 1 AC 45, 87, para 108, that it will not be possible to achieve compatibility with Convention rights by using section 3(1) "if the legislation contains provisions which expressly contradict the meaning which the enactment would have to be given to make it compatible" or, indeed, if the legislation contains provisions which do so by necessary implication. Lord Hope repeated this observation in *R v Lambert* [2002] 2 AC 545, 585, para 79, and, for the reasons I have already given, I agree with it. But this is not to say that, where a provision can be read compatibly with the Convention without contradicting any principle that it enshrines or the principles of the legislation as a whole, such an interpretation is not possible simply because it may involve reading into the provision words which go further than the specific words used by the draftsman.

118. When Parliament provided that, "so far as it is possible to do so", legislation must be read and given effect compatibly with Convention rights, it was referring, at the least, to the broadest powers of interpreting legislation that the courts had exercised before 1998. In particular, Parliament will have been aware of what the courts had done in order to meet their obligation to interpret domestic legislation "*so far as possible*, in the light of the wording and the purpose of the [Community] directive in order to achieve the result pursued by the latter…": *Marleasing SA v La Comercial Internacional de Alimentación SA* (Case C-106/89) [1990] ECR I-4135, 4159, para 8 (emphasis added). Both *Pickstone v Freemans plc* [1989] AC 66 and *Litster v Forth Dry Dock & Engineering Co Ltd* [1990] 1AC 546 show how, long before 1998, this House had found it possible to read words into domestic regulations so as to give them a construction which accorded with the provisions of the underlying Community directive. As Lord Oliver of Aylmerton noted in *Litster*, at p 577A - B, *Pickstone* had established that

"the greater flexibility available to the court in applying a purposive construction to legislation designed to give effect to the United Kingdom's Treaty obligations to the Community enables the court, where necessary, to supply by implication words appropriate to comply with those obligations…."

Lord Oliver was satisfied that the implication which he judged appropriate in that case was entirely consistent with the general scheme of the domestic regulations and was necessary if they were effectively to fulfil their purpose of giving effect to the provisions of the directive.

119. Your Lordships are also familiar with the exercise which has to be carried out under some Caribbean constitutions to bring existing laws into conformity with the rights guaranteed by the constitution. In *R v Lambert* [2002] 2 AC 545, 587, paras 85 and 86, Lord Hope cites two examples, *Vasquez v The Queen* [1994] 1 WLR 1304 and *Yearwood v The Queen* [2001] UKPC 31; [2001] 5 LRC 247. Both of them show how far the Privy Council has been prepared to go in substituting very

different words for the words of the relevant provision in order to bring it into conformity with the relevant rights guaranteed by the constitution. Such cases are instructive in suggesting that, where the court finds it possible to read a provision in a way which is compatible with Convention rights, such a reading may involve a considerable departure from the actual words.

120. In other respects, however, the Privy Council decisions may not provide a sure guide to the approach to be adopted under section 3(1). They are all concerned with constitutions that are the supreme law, with which other laws must conform on pain of invalidity. Clearly, that applies irrespective of whether the effect of the constitution is to make the whole, or only part, of a law invalid and also irrespective of the legislature's intention in enacting the law. The typical constitution, or constitutional order-in-council, contains a provision to the effect that existing laws are to be "construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with" the constitution. I have taken these words from section 134(1) of the Constitution of Belize, which was under consideration in *Vasquez v The Queen*. The language of such provisions may be thought to go even further than the language of section 3(1) of the 1998 Act, especially in saying that existing laws are to be construed with such modifications etc "as may be *necessary*" to bring them into conformity with the constitution. In particular, since the constitution is supreme, the necessary modifications to a law may well involve making what, in the present context, would properly be regarded as amendments to the legislation. I refer in particular to the judgment of Lord Nicholls in *Rojas v Berllaque (Attorney General for Gibraltar intervening)* [2004] 1 WLR 201, 208-209, para 24 where, in relation to a similar "far-reaching obligation on courts" in Gibraltar, he said:

"The court is enjoined, without any qualification, to construe the offending legislation with whatever modifications are necessary to bring it into conformity with the Constitution."

He added:

"There may of course be cases where an offending law does not lend itself to a sensible interpretation which would conform to the relevant Constitution."

By contrast, the 1998 Act deliberately maintains the sovereignty of Parliament and section 3(1) is framed accordingly. For that reason, the Privy Council authorities should be treated with some caution since they are the product of constitutional systems which differ from that of the United Kingdom in this important respect.

121. For present purposes, it is sufficient to notice that cases such as *Pickstone v Freemans plc* and *Litster v Forth Dry Dock & Engineering Co Ltd* suggest that, in terms of section 3(1) of the 1998 Act, it is possible for the courts to supply by implication words that are appropriate to ensure that legislation is read in a way which is compatible with Convention rights. When the court spells out the words that are to be implied, it may look as if it is "amending" the legislation, but that is not the case. If the court implies words that are consistent with the scheme of the legislation but necessary to make it compatible with Convention rights, it is simply performing the duty which Parliament has imposed on it and on others. It is reading the legislation in a way that draws out the full implications of its terms and of the

Convention rights. And, by its very nature, an implication will go with the grain of the legislation. By contrast, using a Convention right to read in words that are inconsistent with the scheme of the legislation or with its essential principles as disclosed by its provisions does not involve any form of interpretation, by implication or otherwise. It falls on the wrong side of the boundary between interpretation and amendment of the statute.

122. When Housman addressed the meeting of the Classical Association in Cambridge in 1921, he reminded them that the key to the sound emendation of a corrupt text does not lie in altering the text by changing one letter rather than by supplying half a dozen words. The key is that the emendation must start from a careful consideration of the writer's thought. Similarly, the key to what it is possible for the courts to imply into legislation without crossing the border from interpretation to amendment does not lie in the number of words that have to be read in. The key lies in a careful consideration of the essential principles and scope of the legislation being interpreted. If the insertion of one word contradicts those principles or goes beyond the scope of the legislation, it amounts to impermissible amendment. On the other hand, if the implication of a dozen words leaves the essential principles and scope of the legislation intact but allows it to be read in a way which is compatible with Convention rights, the implication is a legitimate exercise of the powers conferred by section 3(1). Of course, the greater the extent of the proposed implication, the greater the need to make sure that the court is not going beyond the scheme of the legislation and embarking upon amendment. Nevertheless, what matters is not the number of words but their effect. For this reason, in the Community law context, judges have rightly been concerned with the effect of any proposed implication, but have been relaxed about its exact form. See, for example, Lord Keith of Kinkel and Lord Oliver in *Pickstone v Freemans plc* [1989] AC 66, 112D and 126A - B.

123. Attaching decisive importance to the precise adjustments required to the language of any particular provision would reduce the exercise envisaged by section 3(1) to a game where the outcome would depend in part on the particular turn of phrase chosen by the draftsman and in part on the skill of the court in devising brief formulae to make the provision compatible with Convention rights. The statute book is the work of many different hands in different parliaments over hundreds of years and, even today, two different draftsmen might choose different language to express the same proposition. In enacting section 3(1), it cannot have been the intention of Parliament to place those asserting their rights at the mercy of the linguistic choices of the individual who happened to draft the provision in question. What matters is not so much the particular phraseology chosen by the draftsman as the substance of the measure which Parliament has enacted in those words. Equally, it cannot have been the intention of Parliament to place a premium on the skill of those called on to think up a neat way round the draftsman's language. Parliament was not out to devise an entertaining parlour game for lawyers, but, so far as possible, to make legislation operate compatibly with Convention rights. This means concentrating on matters of substance, rather than on matters of mere language.

124. Sometimes it may be possible to isolate a particular phrase which causes the difficulty and to read in words that modify it so as to remove the incompatibility. Or else the court may read in words that qualify the provision as a whole. At other

times the appropriate solution may be to read down the provision so that it falls to be given effect in a way that is compatible with the Convention rights in question. In other cases the easiest solution may be to put the offending part of the provision into different words which convey the meaning that will be compatible with those rights. The preferred technique will depend on the particular provision and also, in reality, on the person doing the interpreting. This does not matter since they are simply different means of achieving the same substantive result. However, precisely because section 3(1) is to be operated by many others besides the courts, and because it is concerned with interpreting and not with amending the offending provision, it respectfully seems to me that it would be going too far to insist that those using the section to interpret legislation should match the standards to be expected of a parliamentary draftsman amending the provision: cf *R v Lambert* [2002] 2 AC 545, 585, para 80 per Lord Hope of Craighead. It is enough that the interpretation placed on the provision should be clear, however it may be expressed and whatever the precise means adopted to achieve it.

125. My Lords, in the light of that discussion, I can deal fairly briefly with the particular provisions with which the House is concerned in the present case, paragraphs 2 and 3 of Schedule 1 to the Rent Act 1977. The House considered them in detail in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 which concerned the claim by the survivor of a long-term homosexual relationship to be treated as "the surviving spouse" of the original tenant in terms of para 2. The House unanimously rejected that claim, but, by a majority, held that he fell to be considered as "a member of the original tenant's family" in terms of para 3. So he was entitled to an assured tenancy rather than a statutory tenancy.

126. In reaching the conclusion that the appellant should be regarded as a member of the original tenant's family, the majority identified the characteristics of such a person for the purposes of the Rent Act. Lord Nicholls put the matter in this way [2001] 1 AC 27, 44A - D:

"The question calling for decision in the present case is a question of statutory interpretation. It is whether a same sex partner is capable of being a member of the other partner's family for the purposes of the Rent Act legislation. I am in no doubt that this question should be answered affirmatively. A man and woman living together in a stable and permanent sexual relationship are capable of being members of a family for this purpose. Once this is accepted, there can be no rational or other basis on which the like conclusion can be withheld from a similarly stable and permanent sexual relationship between two men or between two women. Where a relationship of this character exists, it cannot make sense to say that, although a heterosexual partnership can give rise to membership of a family for Rent Act purposes, a homosexual partnership cannot. Where sexual partners are involved, whether heterosexual or homosexual, there is scope for the intimate mutual love and affection and long-term commitment that typically characterise the relationship of husband and wife. This love and affection and commitment can exist in same sex relationships as in heterosexual relationships. In sexual terms a homosexual relationship is different from a heterosexual relationship, but I am unable to see that the difference is material for present purposes. As already emphasised, the concept underlying membership of a family for present purposes is the sharing of lives together in a single family unit living in one house."

Lord Slynn of Hadley and Lord Clyde reasoned to similar effect: [2001] 1 AC 27, 38B - 39C and 51H - 52E respectively.

127. Of course, some homosexual relationships of the type described by Lord Nicholls will have lasted longer and will have been happier than others. The same goes for the equivalent long-term heterosexual relationships. What these passages make clear, however, is that a long-term homosexual relationship is to be treated as being the same as a long-term heterosexual relationship in all respects save in sexual terms. There is no material difference between them, so far as membership of the original tenant's family is concerned for the purposes of the Rent Act. As Lord Nicholls pointed out, [2001] 1 AC 27, 42A - B, the wife is a member of her husband's family and the husband is a member of his wife's family. Therefore, the only reason why the House held that a homosexual partner could not be regarded as "the surviving spouse" of the original tenant in terms of para 2(1) was that the extended definition of "spouse" in para 2(2) ("a person who was living with the original tenant as his or her wife or husband") was framed in a way that connoted a relationship between two persons of opposite sexes. That must be the starting point of any consideration of the matter in the present case.

128. For the reasons which Lord Nicholls has given in his speech, I am satisfied that treating the survivors of long-term homosexual partnerships less favourably than the survivors of long-term heterosexual partnerships for purposes of the Rent Act 1977 violates their right under article 14 in relation to article 8(1) of the Convention. Nor, in respectful disagreement with Lord Millett on this particular point, can I discern any principle underlying the Act as a whole, or Schedule 1 in particular, which requires that only the survivor of a long-term heterosexual relationship should be treated as a statutory tenant. All that seems to have happened is that, when Schedule 1 was amended in 1988, Parliament chose to extend the concept of "spouse" to someone who had lived with the original tenant in a long-term heterosexual relationship, but did not go any further. As was recognised in *Fitzpatrick v Sterling Housing Association Ltd*, society has moved on since 1988. In this particular context, even if there once was, there is no longer any reason in principle for not including within the concept of "spouse" someone who had lived with the original tenant in an equivalent long-term, but homosexual, relationship. To interpret para 2 so as to include such a person would, of course, involve extending the reach of para 2(2), but it would not contradict any cardinal principle of the Rent Act. On the contrary, it would simply be a modest development of the extension of the concept of "spouse" which Parliament itself made when it enacted para 2(2) in 1988. The position might well have been different if Parliament had not enacted para 2(2) and had continued to confine the right to succeed to the husband or wife of the original tenant. But that bridge was crossed in 1988. So the fact that the partners in a homosexual relationship are not, and indeed cannot be, married is not to be regarded as a critical factor limiting the way that para 2(2) may be interpreted under section 3(1) of the 1998 Act. Nor is there any reason to fear that the proposed interpretation would entail far-reaching practical repercussions which the House is not in a position to evaluate. Certainly, counsel for the Secretary of State, who made submissions in favour of interpreting para 2(2) in this way, did not foresee any such problems.

129. Accordingly, in reliance on section 3(1) of the 1998 Act I would interpret para 2(2) as providing that, for the purposes of para 2, a person, whether of the same or

of the opposite sex, who was living with the original tenant in a long-term relationship shall be treated as the spouse of the original tenant. By this means it is possible to read and give effect to para 2 in a way which is compatible with the respondent's article 8(1) and 14 Convention rights.

BARONESS HALE OF RICHMOND

My Lords,

130. It is not so very long ago in this country that people might be refused access to a so-called 'public' bar because of their sex or the colour of their skin; that a woman might automatically be paid three quarters of what a man was paid for doing exactly the same job; that a landlady offering rooms to let might lawfully put a 'no blacks' notice in her window. We now realise that this was wrong. It was wrong because the sex or colour of the person was simply irrelevant to the choice which was being made: to whether he or she would be a fit and proper person to have a drink with others in a bar, to how well she might do the job, to how good a tenant or lodger he might be. It was wrong because it depended on stereotypical assumptions about what a woman or a black person might be like, assumptions which had nothing to do with the qualities of the individual involved: even if there were any reason to believe that more women than men made bad customers this was no justification for discriminating against all women. It was wrong because it was based on an irrelevant characteristic which the woman or the black did not choose and could do nothing about.

131. When this country legislated to ban both race and sex discrimination, there were some who thought such matters trivial, but of course they were not trivial to the people concerned. Still less trivial are the rights and freedoms set out in the European Convention. The state's duty under article 14, to secure that those rights and freedoms are enjoyed without discrimination based on such suspect grounds, is fundamental to the scheme of the Convention as a whole. It would be a poor human rights instrument indeed if it obliged the state to respect the homes or private lives of one group of people but not the homes or private lives of another.

132. Such a guarantee of equal treatment is also essential to democracy. Democracy is founded on the principle that each individual has equal value. Treating some as automatically having less value than others not only causes pain and distress to that person but also violates his or her dignity as a human being. The essence of the Convention, as has often been said, is respect for human dignity and human freedom: see *Pretty v United Kingdom* (2002) 35 EHRR 1, 37, para 65. Second, such treatment is damaging to society as a whole. Wrongly to assume that some people have talent and others do not is a huge waste of human resources. It also damages social cohesion, creating not only an under-class, but an under-class with a rational grievance. Third, it is the reverse of the rational behaviour we now expect of government and the state. Power must not be exercised arbitrarily. If distinctions are to be drawn, particularly upon a group basis, it is an important discipline to look for a rational basis for those distinctions. Finally, it is a purpose of all human rights instruments to secure the protection of the essential rights of members of minority groups, even when they are unpopular with the majority. Democracy values everyone equally even if the majority does not.

133. It is common ground that five questions arise in an article 14 inquiry, based on the approach of Brooke LJ in *Wandsworth London Borough Council v Michalak* [2003] 1 WLR 617, 625, para 20, as amplified in *R (Carson) v Secretary of State for Work and Pensions* [2002] EWHC 978 (Admin), para 52 and [2003] EWCA Civ 797, [2003] 3 All ER 577. The original four questions were:

(i) Do the facts fall within the ambit of one or more of the Convention rights?

(ii) Was there a difference in treatment in respect of that right between the complainant and others put forward for comparison?

(iii) Were those others in an analogous situation?

(iv) Was the difference in treatment objectively justifiable? Ie, did it have a legitimate aim and bear a reasonable relationship of proportionality to that aim?

134. The additional question is whether the difference in treatment is based on one or more of the grounds proscribed - whether expressly or by inference - in article 14. The appellant argued that that question should be asked after question (iv), the respondent that it should be asked after question (ii). In my view, the *Michalak* questions are a useful tool of analysis but there is a considerable overlap between them: in particular between whether the situations to be compared were truly analogous, whether the difference in treatment was based on a proscribed ground and whether it had an objective justification. If the situations were not truly analogous it may be easier to conclude that the difference was based on something other than a proscribed ground. The reasons why their situations are analogous but their treatment different will be relevant to whether the treatment is objectively justified. A rigidly formulaic approach is to be avoided.

135. It is common ground that one of the Convention rights is engaged here. Everyone has the right to respect for their home. This does not mean that the state - or anyone else - has to supply everyone with a home. Nor does it mean that the state has to grant everyone a secure right to live in their home. But if it does grant that right to some, it must not withhold it from others in the same or an analogous situation. It must grant that right equally, unless the difference in treatment can be objectively justified. There is no need for us to express a view on the degree to which a Convention right must be engaged in order to bring article 14 into play. On any view, that threshold is crossed here.

136. It is also common ground that there is a difference in treatment in respect of that right between the respondent and the survivor of an opposite sex relationship. It is also common ground that sexual orientation is one of the grounds covered by article 14 on which, like race and sex, a difference in treatment is particularly suspect. For the reasons given earlier, the grounds put forward to justify it require careful scrutiny.

137. The parties differ on whether the survivors of unmarried heterosexual and homosexual couples are indeed in an analogous situation and therefore on whether the basis of the difference in treatment is sexual orientation or something else. But it is impossible to see what else the difference can be based on if not the difference in sexual orientation. Everything which has been suggested to make a difference

between the appellant and other surviving partners comes down to the fact that he was of the same sex as the deceased tenant. It is the decisive factor.

138. We are not here concerned with a difference in treatment between married and unmarried couples. The European Court of Human Rights accepts that the protection of the 'traditional family' is in principle a legitimate aim: see *Karner v Austria* (2003) 14 BHRC 674, para 40, The traditional family is constituted by marriage. The Convention itself, in article 12, singles out the married family for special protection by guaranteeing to everyone the right to marry and found a family. Had paragraph 2 of Schedule 1 to the Rent Act 1977 stopped at protecting the surviving spouse, it might have been easier to say that a homosexual couple were not in an analogous situation. But it did not. It extended the protection to survivors of a relationship which was not marriage but was sufficiently like marriage to qualify for the same protection. It has therefore to be asked whether opposite and same sex survivors are in an analogous situation for this purpose.

139. There are several modern statutes which extend a particular benefit or a particular burden, granted to or imposed upon the parties to a marriage, to people who are or were living together 'as husband and wife': see eg section 62(1) of the Family Law Act 1996 and section 137(1) of the Social Security Contributions and Benefits Act 1992. Working out whether a particular couple are or were in such a relationship is not always easy. It is a matter of judgement in which several factors are taken into account. Holding themselves out as married is one of these, and if a heterosexual couple do so, it is likely that they will be held to be living together as such. But it is not a pre-requisite in the other private and public law contexts and I see no reason why it should be in this one. What matters most is the essential quality of the relationship, its marriage-like intimacy, stability, and social and financial inter-dependence. Homosexual relationships can have exactly the same qualities of intimacy, stability and inter-dependence that heterosexual relationships do.

140. It has not been suggested to us that the nature of the sexual intimacies each enjoys is a relevant difference. Nor can the possibility of holding oneself out as a legally married couple be a relevant difference here. Homosexuals cannot hold themselves out as legally married, but they can if they wish present themselves to the world as if they were married. Many now go through ceremonies of commitment which have the same social and emotional purpose as wedding ceremonies - to declare the strength and permanence of their commitment to one another, their families and friends. If the Civil Partnership Bill now before Parliament becomes law, an equivalent status will be available to them.

141. The relevant difference which has been urged upon us is that a heterosexual couple may have children together whereas a homosexual couple cannot. But this too cannot be a relevant difference in determining whether a relationship can be considered marriage-like for the purpose of the Rent Act. First, the capacity to bear or beget children has never been a pre-requisite of a valid marriage in English law. Henry VIII would not otherwise have had the problems he did. Even the capacity to consummate the marriage only matters if one of the parties thinks it matters: if they are both content the marriage is valid. A marriage, let alone a relationship analogous to marriage, can exist without either the presence or the possibility of children from that relationship. Secondly, however, the presence of children is a

relevant factor in deciding whether a relationship is marriage-like but if the couple are bringing up children together, it is unlikely to matter whether or not they are the biological children of both parties. Both married and unmarried couples, both homosexual and heterosexual, may bring up children together. One or both may have children from another relationship: this is not at all uncommon in lesbian relationships and the court may grant them a shared residence order so that they may share parental responsibility. A lesbian couple may have children by donor insemination who are brought up as the children of them both: it is not uncommon for each of them to bear a child in this way. A gay or lesbian couple may foster other people's children. When the relevant sections of the Adoption and Children Act 2002 are brought into force, they will be able to adopt: this means that they will indeed have a child together in the eyes of the law. Thirdly, however, there is absolutely no reason to think that the protection given by the Rent Act to the surviving partner's home was given for the sake of the couple's children. Statutes usually make it plain if they wish to protect minor children. These days, the succession is likely to take place after any children have grown up and left home. Children, whether adult or minor, who are still living in the home may succeed as members of the family under paragraph 3 of the Schedule. It is the longstanding social and economic inter-dependence, which may or may not be the product of having brought up children together, that qualifies for the protection of the Act. In the days when the tenant was likely to be a man with a dependent wife, it was understandable that preference was given to the widow over anyone else in the family. But in 1980 that preference was extended to widowers, whether or not they were dependent upon the deceased wife. In 1988 it was extended to the survivor of unmarried marriage-like relationships, again irrespective of sex or financial dependence.

142. Homosexual couples can have exactly the same sort of inter-dependent couple relationship as heterosexuals can. Sexual 'orientation' defines the sort of person with whom one wishes to have sexual relations. It requires another person to express itself. Some people, whether heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the essence of being a couple. And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation.

143. It follows that a homosexual couple whose relationship is marriage-like in the same ways that an unmarried heterosexual couple's relationship is marriage-like are indeed in an analogous situation. Any difference in treatment is based upon their sexual orientation. It requires an objective justification if it is to comply with article 14. Whatever the scope for a 'discretionary area of judgment' in these cases may be, there has to be a legitimate aim before a difference in treatment can be justified. But what could be the legitimate aim of singling out hetero-sexual couples for more favourable treatment than homosexual couples? It cannot be the *protection* of the traditional family. The traditional family is not protected by granting it a benefit which is denied to people who cannot or will not become a traditional family. What is really meant by the 'protection' of the traditional family is the *encouragement* of people to form traditional families and the *discouragement* of

people from forming others. There are many reasons why it might be legitimate to encourage people to marry and to discourage them from living together without marrying. These reasons might have justified the Act in stopping short at marriage. Once it went beyond marriage to unmarried relationships, the aim would have to be encouraging one sort of unmarried relationship and discouraging another. The Act does distinguish between unmarried but marriage-like relationships and more transient liaisons. It is easy to see how that might pursue a legitimate aim and easier still to see how it might justify singling out the survivor for preferential succession rights. But, as Buxton LJ [2003] Ch 380, 391, para 21, pointed out, it is difficult to see how hetero-sexuals will be encouraged to form and maintain such marriage-like relationships by the knowledge that the equivalent benefit is being denied to homosexuals. The distinction between hetero-sexual and homosexual couples might be aimed at discouraging homosexual relationships generally. But that cannot now be regarded as a legitimate aim. It is inconsistent with the right to respect for private life accorded to 'everyone', including homosexuals, by article 8 since *Dudgeon v United Kingdom* (1981) 4 EHRR 149. If it is not legitimate to discourage homosexual relationships, it cannot be legitimate to discourage stable, committed, marriage-like homosexual relationships of the sort which qualify the survivor to succeed to the home. Society wants its intimate relationships, particularly but not only if there are children involved, to be stable, responsible and secure. It is the transient, irresponsible and insecure relationships which cause us so much concern.

144. I have used the term 'marriage-like' to describe the sort of relationship which meets the statutory test of living together 'as husband and wife'. Once upon a time it might have been difficult to apply those words to a same sex relationship because both in law and in reality the roles of the husband and wife were so different and those differences were defined by their genders. That is no longer the case. The law now differentiates between husband and wife in only a very few and unimportant respects. Husbands and wives decide for themselves who will go out to work and who will do the homework and child care. Mostly each does some of each. The roles are inter-changeable. There is thus no difficulty in applying the term 'marriage-like' to same sex relationships. With the greatest respect to my noble and learned friend, Lord Millett, I also see no difficulty in applying the term 'as husband and wife' to persons of the same sex living together in such a relationship. As Mr. Sales, for the Secretary of State, said in argument, this is not even a marginal case. It is well within the bounds of what is possible under section 3(1) of the Human Rights Act 1998. If it is possible so to interpret the term in order to make it compliant with Convention rights, it is our duty under section 3(1) so to do.

145. Hence I agree that this appeal should be dismissed for the reasons given by my noble and learned friend, Lord Nicholls of Birkenhead. I also agree with the opinions of my noble and learned friends, Lord Steyn and Lord Rodger of Earlsferry, on the scope and application of section 3 of the Human Rights Act 1998.