Susie Alegre, Barrister
Doughty Street Chambers
1 May 2018

Draft Submissions relating to the contravention of the European Convention on Human Rights (ECHR) by the Bermuda Domestic Partnership Act 2018 – The living instrument principle and the principle of non-regression in international human rights law.

Background

1. The enactment of the Domestic Partnership Act 2018 in Bermuda engages rights enshrined in the ECHR including, but not limited to the right to private and family life (article 8) alone and in conjunction with the prohibition on discrimination in the enjoyment of rights (article 14). While the ECHR does not explicitly provide for the right to same-sex marriage, the ECHR is a "living instrument" and must be "interpreted in light of present-day conditions" (see Tyrer v UK, 1978 para 31). In addition, the ECHR should be interpreted taking account of relevant principles of international law that emerge from the texts of other international instruments and other relevant jurisprudence (Demir and Bakara v Turkey, 2008 paras 65-68). This would include the principle of non-regression (otherwise known as non-retrogression) established in international human rights law instruments such as the International Covenant on Economic, Social and Cultural Rights (ICESCR).

2. Consideration of the applicability of ECHR provisions to same-sex marriage will take account of present-day conditions in Bermuda. This must include the fact that same-sex marriage has been allowed by law on the island and that individuals have relied on that law to marry. The right of same-sex couples to marry in Bermuda is therefore a fundamental human right recognized and existing in the jurisdiction in virtue of law which cannot be restricted or derogated from on the pretext that it is recognised to a lesser extent in international human rights instruments such as the ECHR. The reduction in status of individuals based on discriminatory grounds may, in itself, give rise to a violation of the ECHR.

"Living Instrument" Doctrine and the Margin of Appreciation

3. The rights contained in the ECHR are subject to an evolutive interpretation which recognises the ECHR as a "living instrument". The "living instrument doctrine" was set out by the European Court of Human Rights in the case of Tyrer v UK concerning the continued use of corporal punishment in the Isle of Man, a Crown Dependency of the UK. In its judgment, it states that:

   "*the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field. Indeed, the Attorney General for the Isle of Man mentioned that, for many years, the provisions of Manx legislation concerning judicial corporal punishment had been under review." (Tyrer v UK, para 31)*

   It is important to note, in this regard, that the fact that the legislation was under review in the Isle of Man was an important factor alongside the developments of standards across the Council of Europe in deciding that judicial corporal punishment was no longer acceptable under the Convention and amounted to inhuman and degrading punishment.

Representatives of the Isle of Man argued that the majority of the population supported the continued use of corporal punishment and that, therefore, the Court should have regard to local requirements in accordance with Article 56(3) ECHR which regulates the applicability of Convention rights to overseas territories. But the Court rejected these arguments.

4. The "living instrument doctrine" has been used in a range of cases where attitudes and standards have changed significantly in Council of Europe member states and beyond since the ECHR was drafted in the 1940s. In the case of Goodwin v UK, the Court recognised the need for protection for the legal rights for transsexuals under the ECHR given the evolving circumstances in 2002 despite earlier judgments which had not done so. It explained its position through changes in the conditions in the UK and other States:
74. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, Chapman v. the United Kingdom [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the Cossey judgment, p. 14, § 35, and Stafford v. the United Kingdom [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002-, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above cited Stafford v. the United Kingdom judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the Rees judgment, § 47; the Cossey judgment, § 42; the Sheffield and Horsham judgment, § 60).
75. The Court proposes therefore to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (see the Tyrer v. the United Kingdom judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law)."

5. It is submitted that, taking account of the present-day conditions within Bermuda, alongside the general trend to permit same-sex marriage in many other British and European jurisdictions, same-sex marriage should be considered as within the scope of the ECHR, in particular under Article 8 taken in conjunction with Article 14.

Principle of non-regression in international human rights law

6. Human rights law puts limitations on the ability of the State to interfere with individual rights. International human rights law is designed to make rights real and effective. It is clear that, if rights, once given, can be taken away by a change in the political climate or a change of government, those rights are illusory. This issue is of particular concern for groups who may suffer from discrimination because of their status. It is unthinkable, for example, that women could lose the right to vote simply because of a change of legislation. International human rights law ensures that rights protections may develop and evolve over time, but it cannot permit regressive steps in the protection of fundamental rights.

7. Article 53 of the ECHR provides a "Safeguard for existing human rights." It states that: *"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."*

8. As an international convention, the ECHR should be interpreted in accordance with the Vienna Convention Articles 31-33 – that is that the words of the provisions should be given their ordinary meaning in the context and in light of the object and purpose of the provision from which they are drawn. An ordinary reading of Article 53 would indicate that the provisions in the ECHR relating to the right to marry and found a family (Article 12) or previous case-law on same-sex marriage cannot be used as a justification for limiting rights that have already been granted under the law of Bermuda.

9. The European Court of Human Rights has explained that, in situations where the interpretation of a provision may be in doubt, other factors should be taken into account to reach an accurate interpretation:
   "66. Since the Convention is first and foremost a system for the protection of human rights, the Court must interpret and apply it in a manner which renders its rights practical and effective, not theoretical and illusory. The Convention must also be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see, among other authorities, Stec and Others v. the United Kingdom (dec.) [GC], nos. 65731/01 and 65900/01, §§ 4748, ECHR 2005-X).
   67. In addition, the Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see Saadi, cited above, § 62; Al-Adsani, cited above, § 55; Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, § 150, ECHR 2005-VI; and Article 31 § 3 (c) of the Vienna Convention).
   68. The Court further observes that it has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions, and that it has taken account of evolving norms of national and international law in its interpretation of Convention provisions (see Soering v. the United Kingdom, 7 July 1989, § 102, Series A no. 161; Vo v. France [GC], no. 53924/00, § 82, ECHR 2004-VIII; and Mamatkulov and Askarov v. Turkey [GC], nos. 46827/99 and 46951/99, § 121, ECHR 2005-I).
   ….
   85. The Court, in defining the meaning of terms and notions in the text of the Convention, can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases." (*Demir and Bakara, 2008).*

10. Conventions relating to economic, social and cultural rights such as the International Covenant on Economic, Social and Cultural Rights include provisions (see e.g. Article 2.1 ICESCR) that allow for the progressive realisation of some of the rights they contain where a

country's financial development may affect its ability to deliver on some rights such as the right to education. As well as the obligation to support the progressive realisation of Convention rights, the ICESCR also contains provisions that prevent a State from winding back rights that have already been given:
"5.1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights or freedoms recognized herein, or at their limitation to a greater extent than is provided for in the present Covenant.
2. No restriction upon or derogation from any of the fundamental human rights recognized or existing in any country in virtue of law, conventions, regulations or custom shall be admitted on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent."

11. Such explicit non-regression clauses were not included in instruments relating to civil and political rights because civil and political rights do not depend on the economic situation of the State for progressive realisation. Considering the broader context of international human rights law and the principle of non-regression, ECHR Article 53 must be interpreted in a way that does not allow for rights, once provided for in the law of a contracting party, to be limited or derogated from subsequently. To allow for a retrogressive step in fundamental rights protection domestically would be to undermine the real and effective nature of international human rights law.

Discrimination, dignity and the reduction of status

12. Legislation that removes legal rights from individuals based on a particular status such as sexual orientation cannot be compliant with the ECHR. In the East African Asians cases (*25 Cases of Citizens of the United Kingdom and Colonies v. United Kingdom*, Nos. 4478/70, 4486/70, 4423/70, 4423/70, 4416/70, 4417/70, 4418/70, Council of Europe: European Commission on Human Rights, 10 October 1970) the European Commission for Human Rights considered the effect of the UK Commonwealth Immigrants Bill 1968 resulting in the refusal of entry to individuals who were citizens of the UK and Colonies. In its reasoning, the Commission found that it did not need to consider the application of Article 14 ECHR (non-discrimination) because, in some cases, racial discrimination itself may be a violation of the prohibition on degrading treatment in Article 3.

13. The Commission found that Article 3 could include treatment that affect the dignity of an individual:
"189. As a general definition of the term "degrading treatment", the applicants submit that the treatment of a person is degrading "if it lowers him in rank, position, reputation or character, whether in his own eyes or in the eyes of other people" 1[10] The Commission finds this broad interpretation of the ordinary meaning useful when defining the term "degrading treatment" in Article 3 of the Convention. In view of the particular context in which the term is used in Article 3, the Commission considers, however, that the above interpretation must be narrowed. Article 3 states that no one shall be subjected to "torture or to inhuman or degrading treatment or punishment". The term "degrading treatment" in this context indicates that the general purpose of the provision is to prevent interferences with the dignity of man of a particularly serious nature. It follows that an action which lowers a person in rank, position, reputation or character can only be regarded as "degrading treatment" in the sense of Article 3 where it reaches a certain level of severity."

14. The Commission also considered whether or not the individuals had relied on a "pledge" from the UK that they had a continuing right to enter the UK but decided:
"204. The Commission does not find it necessary to determine whether the above circumstances can be considered as constituting an implied pledge of free entry to the United Kingdom. It believes, however, that they must be taken into account, as additional important elements, in the examination of the applicants' complaint under Article 3 of the Convention. 205. The Commission further considers it relevant that the persons concerned were not aliens, but were and remained citizens of the United Kingdom and Colonies. As such, they had the same rights as other citizens. They were thus, as submitted by the applicants, reduced to the status of second-class citizens.

15. The East African Asians cases addressed the particular severity of discrimination on racial grounds which could bring it within the definition of "degrading treatment." But it also raises relevant questions about the impact of reducing an individual's status based on discriminatory grounds. While the present case deals with discrimination based on sexual orientation and may therefore be distinguished from the East African Asians cases, an important similarity between the cases is the use of legislation to effectively reduce the status of individuals.

16. The Domestic Partnership Act 2018 effectively lowers the position of individuals who have relied on or intended to rely on the lawfulness of same-sex marriage in Bermuda. This shift in their position and lowering of their status will have an impact on their dignity and should be seen as a violation of their right to family life as protected by Article 8 ECHR in conjunction with the prohibition on discrimination in the enjoyment of rights contained in Article 14 ECHR.

Susie Alegre, Barrister
Doughty Street Chambers
1 May 2018