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Susan Wilkinson (Petitioner) V (1) Celia Kitzinger (2) Attorney-General (Resondents) & Lord Chancellor (Intervenor) (2006)

[2006] EWHC 835 (Fam); (2006) 2 FLR 397

12/04/2006

Barristers
Ruth Kirby KC

Court
Family Division

Summary
A petitioner who sought a declaration that her same sex marriage was a valid marriage in the United Kingdom was refused a protective costs order in respect of the costs of the Lord Chancellor as intervener, as the proceedings did not raise issues of general public importance and it was not unreasonable that the petitioner should be at risk of at least a contribution to the intervener's costs.

Facts
The petitioner female (W) applied for a protective costs order in respect of proceedings against the first respondent female (K). W and K, who had been domiciled in the United Kingdom, had married under the law of British Columbia, which recognised as valid marriages between persons of the same sex. W had sought a declaration under the Family Law Act 1986 s.55 that her marriage was a valid marriage at its inception, and a declaration that the terms of the Matrimonial Causes Act 1973 s.11(c) read literally and then taken alone or in combination with the effect of the Civil Partnership Act 2004 s.212 to s.218 were incompatible with the European Convention on Human Rights 1950 . W's case was that the failure to recognise her marriage as a lawful marriage constituted a breach of Art.8 , Art.12 and Art.14 of the Convention. The Lord Chancellor intervened in the proceedings pursuant to the Human Rights Act 1998 s.5 . W submitted that (1) her case had a real prospect of success; (2) the issue of non-recognition of same sex marriage was of significant and general public importance and that public interest required that the issue be resolved; (3) she had no private interest in the case of a kind that would set her or K apart from any applicant with locus standi in public law proceedings; (4) she and K had modest savings and, if a protective costs order was not granted, they would have to seriously consider whether to continue with the case.

Held
HELD: (1) The instant proceedings were essentially "quasi-public" in the sense that they went to matters of status, were essentially directed to the elucidation of public law and might appropriately have been brought in the Administrative Court but for s.55 of the 1986 Act. Accordingly the application should be

approached on the basis of the principles governing the making of protective costs orders in public law cases, R (on the application of Corner House Research) v Secretary of State for Trade and Industry (2005) EWCA Civ 192 , (2005) ACD 100 applied. W's case was not misconceived. There was sufficient material available for an argument that the requirement of the 2004 Act that a marriage between same-sex partners abroad must, on registration, be treated as a civil partnership and not a marriage was on the face of it discriminatory under Art.14 of the Convention on the grounds of sexual orientation. However, the hurdle to be overcome was the requirement to tie such discrimination to Art.8 and Art.12. (2) The issues raised by W did not require resolution as a matter of general public importance. There was scant evidence that a substantial number of same-sex couples were in the same position as W and K, or considered that the status, rights, and responsibilities accorded to them under the 2004 Act disadvantaged or demeaned them in any way in comparison to married couples. No clarification of the law was necessary. W was seeking a change in the law. It was difficult to see that the public interest required change so soon after the passage of the relevant legislation. Further, the issues raised related to a measure carefully considered by Parliament with a view to producing equivalence, in a context in which the European Court of Human Rights clearly recognised the wide margin of appreciation enjoyed by the states, Secretary of State for Work and Pensions v M (2006) UKHL 11 , (2006) 2 WLR 637 considered. (3) Where the applicant in private or public law proceedings was pursuing a personal remedy, albeit her purpose was essentially representative of a number of persons, it was difficult to see why, if a protective costs order was otherwise appropriate, the existence of an applicant's private interest should disqualify her from the benefit of such an order. The nature and extent of the "private interest" and its weight in the overall context should be treated as a flexible element in the court's consideration of whether it was fair and just to make the order. (4) It was not unreasonable, unfair or unjust, in the absence of evidence of real hardship, that W should be at risk of at least a contribution to the costs of an intervener who had a proper interest in opposing the claim, and it was unlikely that W would discontinue with the proceedings if she was refused the protective costs order provided that the costs were quantified on a reasonable basis. A cap of £25,000 was imposed.