

Jonathan Cooper LGBTQ+ Mooting Competition 2023

Problem Question

The Cashman Island¹ is a British Overseas Territory which is a party to the European Convention on Human Rights. It has its own constitution. The relevant terms are as follows:

1. Human dignity is inviolable. It must be respected and protected
3. The Cashman Island respects and upholds the sanctity of marriage.
4. The Cashman Island respects and upholds the importance of family life.
9. The courts of the Cashman Island will take into account relevant international law and the court decisions of other jurisdictions in determining the rights of the citizens. These sources are, however, not binding on the Cashman Island.
10. In so far as is reasonable, all legislation, and this Constitution, will be read in a way which is compatible with the European Convention on Human Rights.

In 2015, the Government of the Cashman Island introduced equal marriage, allowing two people of the same sex to marry. Previously, only partners of the opposite sex had been permitted to marry. A new Government came to power in 2021 and it introduced legislation (The Sanctity of Marriage Act 2021) which was passed and rendered all same-sex marriages void and prohibited future same-sex marriages.

Thomas Philips and Paul Hartman, two men who had married in 2016, commenced litigation against the Cashman Island Government, claiming that the 2021 Act was contrary to the Constitution of the Cashman Island and incompatible with the European Convention on Human Rights. At first instance, the claimants succeeded. Cameron J held, on the basis of the requirements of the Constitution of the Cashman Island and taking into account decisions from other jurisdictions, that removing the marital status and option to marry from the applicants failed to respect the sanctity of marriage or respect for family life. The Act was also said to breach the applicants' rights contained in Articles 8, 12, and 14 ECHR.

The Court of Appeal allowed an appeal. It held that, at the time of drafting the Constitution, the word sanctity would have been understood in religious terms. When the Constitution was passed, the majority of the Islanders belonged to religious groups which opposed same sex marriage. While it was true that now only a minority of Islanders are practicing members of a religion, it was important to recognise the religious heritage and foundation of the Islands. Additionally, public opinion is still divided on the issue of same-sex marriage, with 40% of the population still being strongly against it.

¹ An imaginary jurisdiction created for the purpose of this moot.

Further, it was held that neither the Constitution nor the ECHR provides a positive right to marry someone of the same sex. As such, the Government was found to be permitted to revoke the applicants' marital status, and option to marry in the future. The Court of Appeal found that existing legal protections for same-sex couples, such as the possibility to enter into civil partnerships, were ample to ensure their family life was respected, as required by the Constitution and the Convention. In any event, given the controversy surrounding same-sex marriage, it was appropriate in a democracy for the courts to respect the decision of an elected Government.

Thomas and Paul now appeal to the Privy Council with two grounds for appeal:

1. The removal of marital status and the option to marry from same-sex couples breached Articles 8, 12, and 14 ECHR. The Court of Appeal erred in finding that, because the ECHR did not recognise a right to same-sex marriage, it followed that marital status or the option to marry once granted could be removed.
2. The removal of marital status and the option to marry from same-sex couples breached the Cashman Constitution and failed to take into account international law and decisions from other jurisdictions. The Court of Appeal erred in relying on the "democracy" argument and failed to perform its proper constitutional functions, thus failing to properly apply the Constitution.

Recommended Reading:

1. [*Day and another v The Government of the Cayman Islands and another* \[2022\] UKPC 6](#)
2. [*Attorney General for Bermuda v Ferguson and others* \[2022\] UKPC 5](#)
3. [*Schalk and Kopf v Austria* \(Application no. 30141/04\)](#)
4. [*Tang Seng Kee v. Attorney-General* \[2022\] SGCA 16](#)
5. [State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples \(Interpretation and Scope of Articles 1\(1\), 3, 7, 11\(2\), 13, 17, 18 and 24, in relation to Article 1, of the American Convention on Human Rights\), Advisory Opinion OC-24/17, Inter-American Court on Human Rights \(Nov. 24, 2017\).](#)
6. [Leonardo Raznovich, "The Caribbean deserves better than the unpersuasive arguments of the Privy Council", E.H.R.L.R. 2022, 5, 482-500.](#)
7. [International Commission of Jurists, "SOGI Casebook: Chapter fourteen: Marriage".](#)

Further Reading:

1. [*Dudgeon v the United Kingdom* \(Application no. 7525/76\)](#)
2. [*Karner v Austria* \(Application no. 40016/98\)](#)

3. [Oskar Sherry, "LGBTQ+ Rights as Administrative Law? Tang Seng Kee v. Attorney-General", Oxford Human Rights Hub Blog.](#)
4. [Minister of Home Affairs and Another v Fourie and Another \(CCT 60/04\) \[2005\] ZACC 19](#)
5. [Elena Abruci, "The IACtHR Advisory Opinion: one step forward or two steps back for LGBTI rights in Costa Rica?", EJIL Blog.](#)
6. [The Yogyakarta Principles](#)
7. [Peter Laverack, The indignity of exclusion: LGBT rights, human dignity and the living tree of human rights, E.H.R.L.R. 2019, 2, 172-184](#)
8. [Conor O'Mahony, "There is no such thing as a right to dignity", ICON \(2012\), Vol.10 No.2, 551-574.](#)
9. [Carmelo Danisi, "How far can the European Court of Human Rights go in the fight against discrimination? Defining new standards in its nondiscrimination jurisprudence", I•CON \(2011\), Vol. 9 No. 3-4, 793-807.](#)
10. [Paul Johnson, Silvia Facetta, Same-Sex Marriage and Article 12 of the European Convention on Human Rights, in Research Handbook on Gender, Sexuality and the Law \(Edward Elgar Publishing, Forthcoming\).](#)
11. [International Commission of Jurists, "Singapore: Long overdue decriminalization of consensual same-sex relations between men overshadowed by discriminatory constitutional amendment purporting to "protect" definition of marriage".](#)