Court rejects '*de facto* families' in lesbian couple case

The Supreme Court used surprisingly trenchant language recently when overturning a High Court decision in a case involving a lesbian couple and a sperm donor, writes Michael Farrell

The Supreme Court's judgments in *McD v L & Another* ([2009] IESC 81, 10 December 2009) have important implications for the position of unmarried couples, whether same sex or opposite sex, and for the role of the *European Convention on Human Rights* in Irish law. The sperm donor (McD), who had helped one of the women to conceive, had originally agreed not to get involved in the child's upbringing, but later applied to be made a guardian and to have regular access to the child. The couple, who had been together for 12 years and had entered into a civil partnership in Britain, objected. Mr Justice Hedigan rejected McD's claims in the High Court. He relied partly on a finding that the couple and the child constituted a '*de facto* family' that had rights as a 'family unit' under article 8 of the ECHR.

These rights, in his view, helped to outweigh the claims of the biological father McD. Judge Hedigan acknowledged that the Constitution only recognised the family based on marriage, but he noted that the Irish courts had begun to recognise the existence of '*de facto* families' made up of unmarried heterosexual couples in stable relationships and had accorded them certain rights. Looking to the ECHR, Judge Hedigan – who is a former judge of the European Court of Human Rights – said that he could see no reason why same sex couples should not qualify as '*de facto* families' as well. Judge Hedigan based his decision in the case on the best interests of the child, but he afforded some weight to the position of the '*de facto* family' consisting of the couple and the child.

In its decision, the Supreme Court agreed that, based on the best interests of the child, McD should not be appointed a guardian, but held that the High Court had not given sufficient weight to his position as the biological father of the child and that he should be given access rights, the details to be decided by the High Court. The Supreme Court reserved its strongest criticism for Judge Hedigan's views on the question of '*de facto* families' and his use of the ECHR.

Three of the four Supreme Court judgments – by the Chief Justice, Mr Justice Fennelly and Ms Justice Denham – strongly rejected the idea that '*de facto* families' had any legal status or any rights in Irish law, referring to the well-known statement of Henchy J in *State (Nicolau) v An Bord Uchtala* ([1966] IR 567): "For the state to award equal constitutional protection to the family founded on marriage and the 'family' founded on an extramarital union would in effect be a disregard of the pledge … in article 41.3.1 to guard with special care the institution of marriage."

On the role of the ECHR, the Chief Justice said that it was not directly applicable in Irish law and had no direct effect other than through the *ECHR Act 2003*, which was quite limited. He said: "The learned trial judge had no jurisdiction to consider the claims [of the parties] under article 8 of the convention." Judge Fennelly argued that the European Court of Human Rights had not so far accepted that same-sex couples were protected by article 8 of the convention. He said the High Court judge had been interpreting the convention directly, and he warned against the domestic courts 'outpacing' the Strasbourg court.

Judge Hedigan had acknowledged that the Strasbourg court had not yet recognised that a lesbian couple could constitute a family unit for the purposes of article 8. However, he said that national courts were entitled to interpret and apply convention principles, and he believed that recognition of such couples was a natural development of those principles. This raises a bigger issue. Is it the role of national courts under the ECHR to wait until the Strasbourg court has ruled on an issue and then apply that ruling? Or can

a national court be more proactive and seek to interpret and apply the Strasbourg jurisprudence directly to the issues it is dealing with, thus engaging in a sort of dialogue with the Strasbourg court and playing a part in the development of ECHR law?

There is a lively debate about this issue going on in Britain at the moment, but that is against the background that the British courts have embraced the convention since it was incorporated through the *Human Rights Act 1998* and have been very active in applying and even developing convention law. It seems unnecessarily defensive for the Supreme Court here to come down so heavily against what they seem to see as an over-enthusiastic approach to the convention at a time when there has been so little case law under the *ECHR Act* in our courts. And it seems unfortunate that they were so dismissive of the concept of '*de facto* families' at a time when the number of people in such relationships has increased so substantially.

At the end of his judgment in the High Court, Judge Hedigan made a plea for urgent consideration by the Oireachtas of the position of same-sex couples, especially where they wish to have children, so as to avoid the sort of emotional trauma suffered by the parties in this case. It is perhaps a pity that the Supreme Court did not at least endorse the urgency of that plea, without expressing any views on particular proposals before the Oireachtas.

Michael Farrell is the senior solicitor with Free Legal Advice Centres.