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*Judgment: approved by the Court for handing down*
*(subject to editorial corrections)*

**IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND**

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**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**IN NORTHERN IRELAND**

**QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)**

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**Northern Ireland Commissioner for Children and Young peoples' Application [2009] NICA 10**

**AN APPLICATION FOR JUDICIAL REVIEW**
**BY THE NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE**

**Kerr LCJ, Higgins LJ and Girvan LJ**

**GIRVAN LJ**

**Introduction**

[1] The appellant is the Northern Ireland Commissioner for Children and Young People ("the Commissioner") who derives her powers from the Children and Young People (Northern Ireland) Order 2003. Amongst her powers is the power to bring proceedings other than criminal proceedings involving law and practice concerning the rights and welfare of children and young people. Before bringing proceedings she must be satisfied that the case raises a question of principle or that there are special circumstances which make it appropriate for her to do so. She has brought the present proceedings to challenge the lawfulness of the defence of what is variously described as the right of parental correction, punishment or chastisement ("parental punishment").

[2] Miss Higgins QC who appeared on behalf of the Commissioner challenged the lawfulness of the defence on the grounds that it is incompatible with the rights of children under articles 3, 8 and/or 14 of The European Convention on Human Rights and Fundamental Freedoms ("the Convention"). In support of her argument she persuasively called in aid a considerable body of material emanating from distinguished sources. She strongly contended that parental corporal punishment is incompatible with the dignity and well-being of children; that it is ineffective and counterproductive as a means of discipline; that it sends out the wrong messages to parents; and that is imprecise and so lacks the clarity and transparency that Convention compatible law should have. Persuasive though her arguments were, the Commissioner's application cannot succeed because she is not a victim for the purposes of section 7 of the Human Rights Act 1998 ("HRA").

**Article 2 of the 2006 Order**

[3] Miss Higgins's starting point was her attack on the provisions of article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006 which provides:

> "(1) In relation to any offence specified in paragraph (2), battery of a child cannot be justified on the ground that it constituted reasonable punishment.
>
> (2) The offences referred to in paragraph (1) are –
>
> (a) an offence under section 18 of the Offences against the Person Act 1861 (c.100) (wounding, or causing grievous bodily harm, with intent)
>
> (b) an offence under section 20 of that Act (malicious wounding or grievous bodily harm)
>
> (c) an offence under section 43 of that Act (aggravated assault)
>
> (d) an offence under section 47 of that Act (assault occasioning actual bodily harm and common assault)
>
> (e) an offence under section 20(1) of the Children and Young Persons Act (Northern Ireland) 1968 (c.34) (cruelty to persons under 16)
>
> (3) Battery of a child causing actual bodily harm to the child cannot be justified in any civil proceedings

> on the ground that it constituted reasonable punishment.
>
> (4) For the purposes of paragraph (3) 'actual bodily harm' has the same meaning as it has for the purposes of section 47 of the Offences Against the Person Act 1861.
>
> (5) In section 20 of the Children and Young Persons Act (Northern Ireland) 1968 subsection (6) is hereby repealed."

**The relief sought by the Commissioner**

[4] The Commissioner claimed in her Order 53 statement the following relief:

(i) Declarations that –

(a) the Secretary of State had no power to decide to introduce and the Minister had no power to make, confirm, approve or do any other act to introduce into law article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006;

(b) as he had no power to decide to introduce, make, confirm or approve or do any act to introduce into law article 2, that provision had no legal effect;

(c) the said decisions were otherwise unlawful; or

(d) article 2 is invalid or unlawful.

(ii) An order of certiorari quashing the said decisions and/or the said provision.

(iii) Further or in the alternative a declaration (pursuant to section 4(2) of the Human Rights Act 1998) that the provision is incompatible with articles 3 and/or 8 and/or 14 of the European Convention on Human Rights.

(iv) Further and in the alternative an order under section 81(2) of the Northern Ireland Act 1998 suspending the effect of article 2 of the 2006 Order for a stated period and directing that the Secretary of State repeal article 2 within that period.

**The incompatibility challenge**

[5] The application for the declarations set out in paragraph (i) (a) to (d) cannot succeed because the 2006 Order was enacted in accordance with the statutory procedures established by the Northern Ireland Act 2000 (which include submitting the draft Order to parliamentary scrutiny). It came into operation by virtue of article 1(3) two months later. Any prior decision-making on the part of the Secretary of State was duly overtaken by the legislation itself which was sanctioned in accordance with the statutory procedures. The application for an order under section 81(2) of the Northern Ireland Act 1998 must also fail because the statutory preconditions for the exercise of such power are not satisfied.

[6] The Commissioner's real challenge relates to the provisions of article 2 of the 2006 Order and as noted the declaratory relief which is sought challenges the compatibility of article 2 of the 2006 Order with articles 3, 8 and/or 14 of the Convention. A declaration of incompatibility is sought under section 4(2) of the HRA. Since the 2006 Order is not primary legislation as defined in section 21 of the 1998 Act, the court cannot grant a declaration of incompatibility under section 4(2). Nor could the court grant a declaration of incompatibility under section 4(4) for, although the 2006 Order is subordinate legislation as defined in section 21, a declaration of incompatibility under section 4(4) can only be granted if the provision in question is incompatible *and* (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility. Section 4(4) cannot be called in aid in relation to the 2006 Order.

[7] Even if the appellant could overcome the statutory limitations on the incompatibility procedure, it is clear that the applicant's real focus lies not in relation to what article 2 provides but in relation to what it does *not* provide. Article 2 removes the defence of reasonable parental punishment from a tortious battery which causes actual bodily harm (article 2(3) and article 2(2)). In the context of the criminal law it removes any defence to any of the offences set out in article 2(2)(a) to (e). It leaves intact (in the context of both the civil and the criminal law) the common law defence of reasonable parental punishment. A declaration that article 2 is incompatible with the Convention rights would impact on the beneficial restrictions on the defence. This is not the focus of the Commissioner's challenge.

[8] While it might be argued that the statutory provision impliedly gives a form of statutory underpinning to the common law defence by recognising its continued existence, the statute does not re-enact the common law defence. It qualifies it but leaves intact a defence to what would otherwise be an assault. Even if it expressly provided that the common law defence remained available except to the extent that it is modified by article 2, the common law defence would remain. For reasons set out below, even if the continuation of the common law defence is to be regarded as authorised by the provisions of the 2003 Order, it would not affect the outcome to this appeal.

**The amendment to the claim**

[9] Faced with this difficulty Miss Higgins amended her Order 53 statement to claim a declaration that all physical punishment of children is contrary to articles 3 and/or 8 and/or 14 of the Convention and that the common law defence of reasonable parental punishment breaches articles 3 and/or 8 and/or 14 of the Convention and is therefore unlawful. The Commissioner has thus extended her argument to claim that the continued existence of the defence at common law to every form of parental physical punishment including even minor smacks is contrary to the Convention rights of the child.

**The key questions**

[10] The Commissioner's challenge raises a number of different jurisdictional questions:

(A) Is it open to the Commissioner to bring such a challenge and obtain the relief which she is seeking? Is she a victim for the purposes of section 7(1) of the 1998 Act;

(B) If she is not a victim, is she nonetheless entitled to pursue such a claim having regard to her statutory powers? Is she entitled to pursue a freestanding claim for declaratory relief to establish a legal right for others where she cannot herself in the circumstances be the victim of an illegal act by a public authority?

(C) Is she effectively seeking to rely on the HRA and the Convention rights to require the criminalisation of actions which are currently not criminal? Would the provisions of section 7(8) of the 1998 Act and Article 7 of the Convention be thereby infringed?

(D) If so, is the challenge to the continued existence of the defence in effect a challenge to a failure by Parliament to legislate for the abolition of every form of physical punishment by a person in loco parentis? If so, does such a claim fall foul of section 6(6) of the 1998 Act which provides that a failure to introduce a proposal for legislation cannot constitute an actionable unlawful act?

**Questions A and B**

[11] Section 6 of the Human Rights Act makes it unlawful for a public authority to act in a way which is incompatible with the Convention rights. Section 7(1) provides that a person who claims that a public authority has acted or proposes to act in a way which is unlawful under section 6(1) may

bring proceedings in the appropriate court or tribunal and may rely on Convention rights concerned in any legal proceedings. He may do so only if he is a victim of the unlawful act. Under section 7(3) a person is a victim only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of the relevant Act. Article 34 of the Convention states:-

> "The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation of one of the rights set forth in the Convention or the protocols thereto."

[12] In Klass v Germany [1978] 2 EHRR 214 the victim requirement was extensively discussed. The court stated:-

> "Article 34 requires that an individual applicant should claim to have been actually affected by the violation he alleges. Article 34 does not institute for individuals a kind of actio popularis for the interpretation of the Convention; it does not permit individuals to complain against a law in abstracto simply because they feel that it contravenes the Convention. In principle it does not suffice an individual applicant to claim that the mere existence of a law violates his rights under the Convention: it is necessary to show that the law should have been applied to his detriment. Nevertheless as both the Government and the Commission pointed out, a law may by itself violate the rights of an individual if the individual is directly affected by the law in the absence of specific measures of implementation."

This last sentence introduces a degree of flexibility into the concept of victimhood but it still requires that a claimant must show at least the potential for *his* rights to be affected by the impugned law. A relevant example can be found in Campbell and Cosans v UK [1982] 4 EHRR 293 in which a pupil was able to show that he was a victim when he complained that corporal punishment was inhuman treatment simply because his attendance at the school put him at risk of being exposed to inhuman treatment. What emerges from the Strasbourg case law is that the test of standing under the Convention does not permit a public interest challenge or *actio popularis* nor does the making of a complaint entitle the Court to review the law in the abstract. It has consistently emphasised in its decisions that it will confine itself to the particular facts of concrete cases.

[13] If the appellant's claim is in reality a claim brought under section 7 in respect of an unlawful act or threatened unlawful act of a public authority under section 6, the applicant cannot satisfy the requirement of showing that she is a victim. Gillen J in his judgment carefully considered the authorities including the decision in Re Application by the Committee for the Administration of Justice and Martin O'Brien for Judicial Review [2005] NIQB 25 and he correctly concluded that the applicant did not satisfy the victim test for the purposes of section 7.

**Can the Commissioner escape the victim test?**

[14] On 27 May 2008 this court, through the Lord Chief Justice in the course of the hearing of this appeal, gave a ruling to the effect that the court was impelled to the conclusion that the arguments of the respondent on the issue of victimhood were correct and that the trial judge had correctly concluded that the applicant did not satisfy the test of victimhood prescribed by section 7. The question was left open as to whether the Commissioner could assert that she was entitled to seek a declaration of incompatibility without satisfying the victimhood requirement of section 7. The court thus left open the question whether, independently of section 7 of the 1998 Act, the applicant could rely on the wider principles of standing in judicial review proceedings and bring her incompatibility challenge to the provisions of the 2006 Order outwith a section 7 claim. It was clear from the ruling that the Court had not reached a final view on that question. When the case was resumed the parties failed to address this jurisdictional question in their arguments. The question left open by the ruling became more complicated when the Commissioner amended her Order 53 statement to challenge the common law defence but again the question was not addressed in argument.

[15] Section 3 of the 1998 Act requires primary and subordinate legislation to be read compatibly with Convention rights. Section 4 enables applications to be made for declarations of incompatibility. Both sections may come into play in a situation where a party is not suing in respect of an act alleged to be unlawful under section 6. Indeed in the case of primary legislation and of subordinate legislation falling within section 4(3) and (4) the legislation continues to remain valid and enforceable even after the granting of a declaration of incompatibility. There is, thus, an argument that an incompatibility challenge does not arise out of a claim in respect of an unlawful act and thus proceedings for a declaration of incompatibility can arise independently of section 7 which requires victimhood in the case of a section 6/7 claim. However, some commentators suggest that the victimhood requirement must still be satisfied where a declaration of incompatibility is sought (see for example "Remedies for Violations of Convention Rights Under the Human Rights Act 1998" by D Feldman (1999) EHRLR 691).

[16] Clayton and Tomlinson in the Law of Human Rights at para 22.44 suggest that it is arguable that a challenge that delegated legislation is ultra vires primary legislation is a conventional application of administrative law principles and so there is no justification for construing section 7(3) so as to preclude a public interest group from pursuing this sort of conventional administrative law claim. They further suggest that it may be open to public law claimants to seek an advisory declaration that primary and secondary legislation must be read and given effect to in a way which is compatible with Convention rights. They submit that there is no reason in principle why proceedings based on section 3 should be defeated by the statutory provision which prescribes a procedure for making section 6 claims. Local authorities and other public bodies would benefit if they could obtain a declaration that a particular statutory provision or Government circular requires them to act incompatibly with Convention rights.

[17] Whatever the correct legal view on that question, it does not arise in this case and it is thus unnecessary to resolve it. The appellant's challenge in the present case does not fall under section 3 or 4. It is impossible to construe article 2 of the 2006 Order as doing anything other than preserving the common law defence of parental punishment, albeit subject to the limitations introduced by the article 2. The applicant cannot and does not rely on section 3. For the reasons discussed above this is not a case which falls within section 4(3) or (4). The impugned legislation is subordinate legislation unaffected by section 4(3) or (4). Where subordinate legislation enacted under the Northern Ireland Act infringes Convention rights, the simple consequence is that the courts must disregard the subordinate legislation if to enforce it would infringe a Convention right. Baroness Hale put the position thus in Re P [2008] UKHL 38:-

> "Section 6(1) of the HRA 1998 provides that it is unlawful for a public authority to act in a way which is incompatible with a Convention right, unless required to do so by a provision in primary legislation: section 6(2). A court is a public authority for this purpose: section 6(3). If this were a provision of primary legislation which the court considered incompatible with a Convention right, the court would be bound to consider whether it was possible to interpret it so as to remove the incompatibility: see section 3(1). If this is not possible, the court will have the power, but not the duty to make a declaration of incompatibility, see section 4(2). So far as I am aware in all the cases in which either the interpretative duty in section 3 has been used or a declaration of incompatibility made under section

> 4 it has been reasonably clear that the Strasbourg court would hold that United Kingdom law was incompatible with the Convention … Where a provision of subordinate legislation is incompatible with the Convention rights, the remedies are different: section 3 applies but section 4 does not. *The courts are free simply to disregard subordinate legislation which cannot be interpreted or given effect in a way which is compatible with the Convention rights. Indeed, in my view this cannot be a matter of discretion. Section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so."* (italics added)

[18] If, as it might be argued, a party challenging the compatibility of legislation under section 4 does not have to be a victim provided he satisfies the judicial review requirements for standing, the question arises as to why a different rule should apply where the applicant seeks to challenge the validity of subordinate legislation which is incompatible with Convention rights. The answer to this can be found in the last three sentences italicised in the quotation from Baroness Hale's speech. The obligation to disregard the subordinate legislation arises in situations where section 6(1) requires the court to act compatibly with the Convention rights if it is free to do so. The question of whether the subordinate legislation is to be disregarded can only arise in a case where it is asserted that a Convention right has been infringed. The same piece of subordinate legislation may be perfectly valid and lawful in a situation where a Convention right is not infringed. It is only when a Convention right has been infringed that the court must disregard the subordinate legislation. Where a party alleges that the subordinate legislation is invalid if applied in a case where a Convention right is infringed, he is asking the court to disapply the subordinate legislation because to apply it would be unlawful in his circumstances under section 6. Such a claim falls squarely within section 7 and, accordingly, the party must satisfy the victimhood test.

[19] Does the situation differ where the appellant is challenging not the subordinate legislation but the continued existence of a common law rule which is alleged to be no longer Convention compliant? The answer must be the same, for what is being alleged is that the application of the common law rule would infringe the relevant Convention rights of the aggrieved party concerned and constitute an unlawful act in relation to him. What is being alleged is an unlawful or threatened unlawful act under section 6(1) (namely the application of the impugned common law rule). This falls within section 7 of the 1998 Act and hence the victimhood requirement applies.

**Question C and D**

[20] Since the Commissioner's application must fail because she is not a victim it is not necessary to proceed further. However, since the issues raised in the application may fall to be considered in differently constituted proceedings or if the conclusion that the Commissioner must establish victim status is shown to be wrong, it may be appropriate to raise, if not answer, two additional jurisdictional questions which will have to be addressed in any proceedings brought by a party having standing. These are the questions raised in para [10](C) and (D) above. If a party who has standing (which would include the Commissioner if she is entitled to bring the application even though she is not a victim within section 7(3)) both questions would fall for determination for they go to the jurisdiction of the court to grant the relief sought. These questions were not identified or addressed in the course of the argument and hence it would be inappropriate to come to a conclusion on them though it is appropriate to indicate their potential importance.

[21] For the purposes of the criminal law an assault or battery involves the use or threat of unlawful force. The use or threat of force is not always unlawful. In particular it may be justified on the basis of actual or implied consent, self-defence, crime prevention or crowd control and on the basis that it involves the lawful punishment of a child. It is for the prosecution to prove that a parent was not lawfully correcting his child when the issue arises. If the court were to rule that the common law defence contravenes the application of the Convention rights pursuant to the 1998 Order and that it cannot be called in aid by a parent prosecuted for an assault on a child when he alleges that he is exercising a parental right to punish, this would appear to have the effect of turning an act which is presently unlawful into an offence. To accede to the applicant's application would very arguably run counter to the provisions of section 7(8) which provides that nothing in the HRA creates a criminal offence. It would appear that this provision is intended to prevent the 1998 Act creating new offences where none existed before the Act.

[22] In this context article 7 of the Convention is also clearly relevant. It provides:-

> "No one shall be guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

It would appear highly arguable that a ruling by a trial court that the common law defence is no longer available would turn a potentially lawful act into an illegal act and do so retrospectively. If, in any substantive prosecution brought against an individual parent, the trial court were to remove the

defence, the defendant would face conviction in relation to an act which at the time it was committed was potentially not unlawful. For a court to act in this way would thus very arguably breach article 7. A defendant must be entitled to be tried on the law which applied at the date when the impugned act was carried out. If, without reference to any concrete case, a court were to declare that the defence is no longer available, the court would be purporting to declare criminal actions which at the time they were done were lawful. The court could not restrict the effect of its judgment to future cases or suspend the operation of the judgment in the absence of some statutory mechanism to do so. None of the protections inherent in the section 4 incompatibility procedure would apply. These considerations in fact give added weight to the view that it is wise to restrict challenges such as this to true victims with real and concrete cases. Furthermore, having regard to the binding nature of precedent a trial court could not simply disregard the binding authority of appellate decisions which have upheld the lawfulness of the defence (see the decision of the Court of Appeal in R v H (25 April 2001)).

[23] If these considerations preclude the removal by the courts of the common law defence, a victim's challenge may well be restricted to the argument that the state is in breach of its Convention obligation to abrogate the common law defence by legislation for it may well be that the defence could only be abrogated by clear non-retrospective legislation. Such a challenge, however, would face the apparently formidable difficulty presented by section 6(6) which provides that a failure to introduce legislation is not an unlawful act in breach of section 6.

**Disposal of the appeal**

[21] We conclude that Gillen J was correct to conclude that the Commissioner is not a victim and hence is not entitled to the relief which she seeks in these proceedings and we dismiss the appeal.