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*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION (JUDICIAL REVIEW)

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IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW BY THE NORTHERN IRELAND COMMISSIONER FOR CHILDREN AND YOUNG PEOPLE OF DECISIONS MADE BY PETER HAIN THE SECRETARY OF STATE AND DAVID HANSON THE MINISTER OF STATE

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GILLEN J

The application

[1] Leave to bring this Judicial Review was granted on 12 September 2006. In this matter the Northern Ireland Commissioner for Children and Young People ("the applicant") seeks to challenge the legality of and quash the decisions of Peter Hain the Secretary of State and David Hanson the Minister of State ("the respondents") to introduce into law, to lay before Parliament and to enact Article 2 of the Law Reform (Miscellaneous Provisions) (Northern Ireland) Order 2006 ("Article 2 of the2006 Order " or "the impugned article "). In short this impugned article provides for a defence of reasonable chastisement of a child to a charge of assault. In addition the applicant challenges the legality of Article 2 of the 2006 Order seeking a declaration of incompatibility of the legislation with the European Convention on Human Rights and Fundamental Freedoms ("the Convention"). In the applicant's amended Order 53 statement the relief sought is set out at paragraph 3 and the grounds on which such relief is sought are set out at paragraph 4. In the course of a wide-ranging skeleton argument, Ms Higgins QC, who appeared on behalf of the applicant with Ms McMahon, refined the grounds under five general headings :

(i) Illegality (or lack of vires) on the basis that Article 2 breaches Convention rights namely Articles 3, 8 and 14 of the Convention and the provisions of the United Nations Convention on the Rights of the Child 1989 ("UNCRC") and is therefore unlawful or of no legal effect pursuant to s. 6 of the Human Rights Act 1998 ("HRA 98") or s. 24 and s.26 of the Northern Ireland Act 1998 ("NIA 98");

(ii) An unfair and unreasonable denial of a legitimate expectation that the applicant would be consulted with before a policy decision was taken by the respondents on the question of the physical punishment of children;

(iii) An unfair and unreasonable denial of legitimate expectation that the respondents would not depart from the principles and policies stipulated in the Office of Law Reform(" OLR") consultation document and the Children's Strategy in the absence of any cogent explanation for doing so;

(iv) Breaches of the principles of fairness and unreasonableness in failing to take account of various relevant and important matters; and

(v) Irrationality on the grounds of perversity and of mistaken understanding of the facts.

[2] The applicant

The applicant is the Northern Ireland Commissioner for Children and Young People ("the Commissioner") and derives her power from the Children and Young People (NI)Order 2003("the 2003 Order").Articles 6,7and 14 of the 2003 Order are as follows :

> "6. Principal aim of the Commissioner
>
> (1) The principal aim of the Commissioner in exercising his functions under this Order is to safeguard and promote the rights and best interests of children and young persons. ….
>
> (3) In determining whether and, if so, how to exercise his functions under this Order, the Commissioner shall have regard to –
>
> (a) the importance of the role of parents in the upbringing and development of their children; and
>
> (b) any relevant provisions of the United Nations Convention on the Rights of the Child.
>
> Functions of the Commissioner
>
> **Duties of the Commissioner**

7.-(1) The Commissioner shall promote –

(a) an understanding of the rights of children and young persons;

(b) an awareness of the importance of those rights and a respect among children and young persons for the rights of others; and

(c) an awareness of matters relating to the best interests of children and young persons.

(2) The Commissioner shall keep under review the adequacy and effectiveness of law and practice relating to the rights and welfare of children and young persons.

(3) The Commissioner shall keep under review the adequacy and effectiveness of services provided for children and young persons by relevant authorities.

(4) The Commissioner shall advise the Secretary of State, the Executive Committee of the Assembly and a relevant authority on matters concerning the rights or best interests of children and young persons –

(a) as soon as reasonably practicable after receipt of a request for advice; and

(b) on such other occasions as the Commissioner thinks appropriate.

…….

Power to bring, intervene in or assist in legal proceedings

14.-(1) Subject to the following provisions of this Article, the Commissioner may in any court or tribunal –

(a) bring proceedings (other than criminal proceedings) involving law or practice concerning the rights or welfare of children or young persons;

(b) intervene in any proceedings involving law or practice concerning the rights or welfare of children or young persons;

(c) act as amicus curiae in any such proceedings.

(2) An intervention under paragraph (1)(b) shall not be made except –

(a) with the leave of the court or tribunal; and

(b) in accordance with any such provision as may be made by the rules regulating the practice and procedure of the court or tribunal.

(3) The Commissioner shall not bring or apply to intervene in proceedings unless he is satisfied that –

(a) the case raises a question of principle; or

(b) there are other special circumstances which make it appropriate for the Commissioner to do so

[3] Article 2 of the 2006 Order

This Order came into law in September 2006. Entitled "Physical Punishment of children " it 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."

[4] The background to the legislation

The law concerning the extent to which a parent may administer corporal punishment was enacted in England in section 58 of the Children Act 2004 ("s58") and in N. Ireland in article 2 of the 2006 Order in direct response to a case before the European Court of Human Rights("ECrtHR"), A v UK (1998) 27 EHRR 611("A v UK"). In that case a child was physically punished with a garden cane by his step-father which caused considerable bruising. The applicant's step-father was found not guilty of occasioning actual bodily harm contrary s. 47 of the Offences Against the Person Act 1861 because the jury found the punishment handed out by the step-father was in the circumstances moderate and reasonable. The ECrtHR concluded that such treatment reached the level of severity prohibited by Art. 3 of the Convention and that the State had failed in its positive obligation to provide adequate protection against such harm because the defence of "reasonable chastisement" did not provide adequate protection. Section 58 was in direct response to this case with s. 58(3) concluding that "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". It is my interpretation of this case that the court gave primary consideration to the harm inflicted by rather than the motivation for inflicting such acts.

[5] Following A v UK, the Court of Appeal in R v H (Assault of a Child: Reasonable Chastisement) (2001) 2 FLR 431("R V H") has interpreted the

reasonable chastisement defence so as to exclude punishment which would contravene the ban on inhuman and degrading treatment or punishment in Article 3 of the Convention. In that case the defendant had beaten his son with a leather belt, was charged with an offence of assault occasioning actual bodily harm, contrary to Section 47 of the Offences Against the Person Act 1861, and had alleged he was exercising his right as a parent to chastise his son. At paragraph 31 the court adopted the suggestion of counsel that "the judge should direct the jury that, when they are considering the reasonableness or otherwise of the chastisement, they must consider the nature and context of the defendant's behaviour, its duration, its physical and mental consequences in relation to the child, the age and personal characteristics of the child and the reasons given by the defendant for administering punishment."

The status of the applicant

[6] The first matter to be determined in this case is the status of the applicant to bring a challenge to the impugned legislation under the Convention. This point has no relevance to the issues of legitimate expectation and Wednesbury unreasonableness where the applicant clearly has sufficient interest to bring Judicial Review proceedings. Section 7 of HRA 98 (which provides for remedies in relation to an unlawful act by a public authority under Section 6 of the Act) sub-section (3) states:

> "If the proceedings (under Section 7(1)) are brought on an application for judicial review, the applicant is to be taken to have a sufficient interest in relation to the unlawful act only if he is, or would be, a victim of that act."

[7] This is known as the "victim test". It reflects article 34 (formerly article 25) of the Convention, governing the admissibility of applications to the Strasbourg Court, which states:

> "The court may receive applications from any person, non-governmental organisation or group of individuals claiming to be victim of a violation…."

The victim test is designed to avoid abstract, theoretical "victimless" human rights cases and those brought by unrelated third parties.

[8] In Klass v Germany (1978) 2 EHRR 214 the ECtHR dealt with the question of victim status in paragraph 33 as follows:

> "33. While Article 24 allows each Contracting State to refer to the Commission 'any alleged breach' of the

> Convention by another Contracting State, a person, non-governmental organisation or group of individuals must, in order to be able to lodge a petition in pursuance of Article 25 (now Article 34) claim 'to be the victim of a violation of ….. of the rights set forth in (the) Convention'. Thus, in contrast to the position under Article 24 – where, subject to the other conditions laid down, the general interests attaching to the observance of Convention, renders admissible an inter-State application – Article 25 requires that an individual applicant should claim to have been actually affected by the violation he alleges …. Article 25 does not institute for individuals a kind of actio popularis for the interpretation of 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 for an individual applicant to claim that the mere existence of a law violates his rights under the Convention; it is necessary 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 any specific measure of implementation."

[9] Applying that test the Court of Appeal in Northern Ireland In the Matter of an Application by the Committee on the Administration of Justice and Martin O'Brien for Judicial Review (2005) NIQB 25("the CAJ case") concluded that the Committee on the Administration of Justice, an independent non-governmental organisation whose purpose was to secure the highest standards in the administration of justice in Northern Ireland and to work with domestic and international human rights groups, did not have victim status in judicially reviewing the decision of the Police Ombudsman and the Chief Constable to refuse disclosure of certain material concerning the investigation of a solicitor's murder.

[10] In the instant case, Ms Higgins argued that the applicant is a "children's champion" and Parliament intended that she should be able to rely upon the HRA 98 to hold Government to account in order that it should comply with Convention rights in the interest of children. Counsel contended that the content of Articles 6 and 7 of the 2003 Order provided ample justification for her to treated as a victim in this case.

[11] Ms Higgins advanced the argument that Article 2 of the 2006 Order interfered with the Commissioner's work to advance the interests of children and she was thereby at least as an indirect victim. Counsel went on to assert that it was inconceivable that the Parliamentary draftsman intended that the Commissioner, whilst having a principal aim of safeguarding and promoting the rights and bests interests of children and young people, should not be entitled to enforce the Convention rights of children in a judicial review. She rejected the assertion of Mr O'Hara QC, who appeared on behalf of the respondents with Mr McMillen, that she could only become involved if a child who was a victim brought a claim. Ms Higgins submitted that it would be almost unseemly for the Commissioner to be searching around for a specimen case in circumstances where the research information provides evidence that children are regularly being beaten.

[12] My initial reaction to this point was to invoke the canon of statutory construction that an Act of Parliament should be read so as to promote, not so as to defeat or impair, the central purpose aim or aim of that legislation. The principal aim of the 2003 Act is that the Commissioner should exercise his functions to safeguard and promote the rights and bests interests of children and young persons and that to prevent her taking proceedings such as this would be to frustrate that aim..

[13] Moreover I recognise the broad approach which the ECrtHR adopts to the concept of the victim (see Lord Steyn at paragraph 21 in Rushbridger and Toyn v Attorney General 2003 UK HL 38 at paragraph 21). An illustration of this is in Norris v Ireland (1989) 13 EHRR 186 ("Norris's case") where a homosexual man complained that the criminalisation of homosexual conduct in Ireland violated his Article 8 right to respect for his private life, although he accepted that the risk of being prosecuted was remote. The court accepted that he was a victim. Even an administration policy of not prosecuting the offence in question would not have made a difference. Similarly in Open Door Counselling and Dublin Well Woman v Ireland (1992)15 EHHR 244 at 258 ("the Open Door case") the ECrtHR accepted that all women of childbearing age were victims of an injunction granted by the domestic court concerning the provision of information about abortion facilities abroad

[14] However having reflected upon this matter at length I have reluctantly been drawn to the conclusion that the applicant is not a victim within the terms of Section 7(1) of HRA 1998 for the following reasons:

[15] Claims under the HRA 1998 must satisfy a stricter test of standing than claimants for judicial review. The victim standing test has been adopted from the Strasbourg institutions by Parliament. Mr O'Hara QC correctly drew my attention to the attempts that were made during the Committee stage of the Bill in the House of Commons as outlined in "Human Rights Law and

Practice" 2nd edition by Lester and Pannick at para. 2.7.3 footnote 3 where the authors record:

> "It is understandable that the 'victim' test should be applied under the Act where Convention rights are relevant to private law proceedings where a plaintiff needs to have a personal interest. But the test is unsuitable for public law proceedings raising issues of general importance where reliance on Convention rights may form only part of the case being presented by an applicant who is not a victim but has a sufficient interest to bring judicial review proceedings on other grounds. Unless flexibly applied, the 'victim' test will have the unfortunate consequence that an applicant will be able to raise some grounds of challenge, but not others, and the court will be prevented from considering whether Convention rights are being denied. The dangers were explained by Lord Lester of Herne Hill, QC during the Committee stage of the Bill in the House of Lords on 24 November 1977 … and by Lord Slynn of Hadley and Lord Lester of Herne Hill QC during the third reading debate in the House of Lords on 5 February 1998 …. where the House of Lords rejected a proposed amendment to substitute a 'sufficient interest' test for raising Convention issues in judicial review proceedings. In a letter to the Lord Chancellor dated 17 February 1998, Lord Woolf MR expressed his concern, and that of other members of the judiciary, about the adoption of a 'victim' test."

I am confined by the considered wording of an Act of Parliament to an examination of a concrete case and I cannot review any system of domestic law in abstracto no matter how flexibly I strive to apply the victim test. There is no specific case before me where a child is a victim and I cannot permit a complaint against this law in abstracto simply because the Commissioner feels, however sincerely , it contravenes the Convention unless she is a victim.

[16] In addition to the CAJ case that I have referred to in paragraph 9 of this judgment there are a number of decisions that a trade union or other organisation cannot itself claim to be a victim on the ground that it represents the interests of members (see Ahmed v United Kingdom (1995) 20 EHRR CD). A trade union may only be a victim if its own rights under the Convention have been breached. Equally it may provide assistance to individual applicants who are complaining about breaches of their rights. I consider that the role of the Commissioner is to be seen in a similar light. The 2003

legislation clearly empowers the Commissioner to protect children's rights in a number of disparate ways. This includes assisting members of the public understand what the rights of children are, setting out methods of vindicating those rights, advising Government about some of the powers open to the office and of course bringing proceedings in her own right. How the Office of the Commissioner discharges its duties and resources its functions are all matters for the Commissioner to decide. However I find nothing in the 2003 legislation which suggests that the applicant should become a major litigant in the human rights field. While recourse to the courts for vindication and redress is a fundamental necessity to protect human rights, there is nothing in the 2003 legislation, made five years after the HRA 1998, which suggests that the Commissioner becomes a victim within the Strasbourg jurisdiction simply because rights of children may be infringed. In my view to provide the Commission with a power, notwithstanding the provisions of s 7 of the HRA 98, to seek judicial review of the policies or actions or omissions of a Government body or public authority where it has reason to believe that such policies or actions or omissions have resulted, or are likely to result, in a violation of Convention rights, would require an amendment to s 7 of the HRA98 itself in circumstances where that power has not been conferred on the Commissioner in the 2003 legislation. To accede to Ms Higgins submissions, would require the Human Rights Act to be read alongside later legislation which impliedly amended it. I consider this would be inconsistent with its status as a constitutional statute setting out in one place the legal regime for the vindication of fundamental rights. This can only be achieved through a provision or amendment in the Commissioner's founding legislation. The notion of flexibly applying the "victim test "does not translate onto express defiance of the express wording of s7 of the HRA98.

[17] I consider Mr O'Hara was correct in his contention that the instant case is distinguishable from the Norris and Open Door cases. The difficulty that the applicant faces is that in each of these cases the applicants were in a very different position from this applicant in that their activities were plainly potentially affected. The ECrtHR has emphasised that the Convention requires that an individual applicant should be able to claim to be actually affected by the measure of which he complains. I do not consider that it can be plausibly argued that the applicant in this case has been "affected" simply because the legislation offends against her concept of what is appropriate for children's rights notwithstanding the aims and terms of her empowering legislation .

[18] This view does not dilute the effect of Article 14 of the 2003 Order which permits the applicant to initiate cases in her own name whether as representative cases or not provided she can demonstrate a "sufficient interest" in the cause of action. Other existing commissions have successfully sought judicial review on a number of occasions. For example the Equal

Opportunities Commissioner in R v S of S for Employment, ex p. EOC (1995) 1 AC 1 where the court said:

> "It would be a very retrograde step now to hold that the EOC (should not be allowed) to agitate in JR proceedings questions relating to sex discrimination which are of public importance and affect a very large section of the population."

It is still open to the applicant to provide assistance to individuals to take cases relating to HRA 1998 who are victims, as well as seeking judicial review in her own name outside the remit of the Convention . In addition to that the applicant still retains the right to intervene by way of third party intervention and as an amicus curiae. If these powers prove inadequate, further litigation functions can still be added by way of Parliamentary amendment at a later stage.
Consequently in this case the applicant can proceed in these proceedings on the conventional judicial review grounds of Wednesbury unreasonableness and legitimate expectation but not as a victim under the Convention .

[19] In passing I observe that Girvan J reached a similar conclusion In the Matter of an Application by the NICCYP 2004 NIQB 40 at paragraph 14 although he did not have the benefit of the detailed and lengthy submissions that I had at my disposal .

[20] Lest I am wrong in the conclusion I have reached that the applicant is not a victim within the meaning of Section 7 of the HRA1998-which therefore means that I must dismiss this application in so far as it seeks to impugn Art.2 on Convention grounds and reject the case made that it is incompatible with the suggested articles of the Convention — I shall proceed to consider the position as if the applicant had established victim status.

Interveners

[21] There were three interveners in this case. First, the Children's Law Centre(CLC) which is an independent non-governmental charity set up in September 1977 to promote, protect and realise children's rights. The work of the CLC is grounded on the UNCRC and it focuses on the recommendations of the United Nations Committee and the Rights of the Child for strategic planning purposes. Secondly, Save the Children (UK) and through the International Save the Children Alliance("the Alliance"). The Alliance is the world's large independent organisation working for children and has 20 Save the Children member organisations working in 100 countries around the world. Save the Children UK is one such member organisation. Thirdly, the Parents Advice Centre (PAC) is a leading family support organisation in Northern Ireland established in 1979. The organisation operates a number of

services providing support and guidance to parents across all communities in Northern Ireland.

[22] At the leave hearing of this judicial review application on 12 September 2006 all three were granted leave to intervene in this matter. Written submissions were furnished to me on behalf of all three interveners and were declared to be "intended to supplement arguments, evidence and submissions advanced by the applicant and to provide further materials to assist the court in its deliberations". Ms McGrenara QC held what amounted to a watching brief on their behalf at this hearing .

[23] I have read the thorough and extensive written submissions and exhibits provided. In particular I have keenly observed the views expressed by children and young people on the issue of corporal punishment. As ever, taking the trouble to listen to the voice of children is always a productive exercise and I am grateful for the opportunity to do so which has been afforded by the input of the interveners. Moreover the extensive analysis of the UNCRC has also served to add a perspective to my understanding of its role. Those submissions also drew my attention to the equality provisions in Section 75 of the Northern Ireland Act 1998 and the submission made that if the defence of reasonable chastisement is left on the statute books children's rights to equality of protection from assault are thereby breached. Those submissions also served to underline the applicant's submissions concerning the vulnerability of children to lifelong consequences of violence and the need to explain to parents and communities everywhere that recognising the human rights of children does not amount to denying rights to parents.

[24] I noted the international input which the research from these interveners afforded me and in particular the contributions worldwide. The detailed statements emanating from the General Assembly of the United Nations provided a very helpful backdrop to the submissions made by the applicant. The helpful listing of those States which have achieved full prohibition laws prohibiting corporal punishment in the home complemented research which I had commissioned on my own behalf and furnished to counsel on this issue.

[25] The propositions put forward by the interveners can be summarised as follows:

(i) Article 2 of the 2006 Order was incompatible with Articles 3,8 and 14 of the Convention and was ultra vires the enabling statute.

(ii) Art.2 was incompatible with the UNCRC.

(iii) The Secretary of State in so enacting Article 2 of the 2006 Order acted ultra vires and contrary to Section 24(1)(a) of the Northern Ireland Act 1998.

(iv) The Secretary of State acted in breach of express legitimate expectations to consult on the legislation and or alternatively to conscientiously undertake the duty to consult.

[26] The Alliance submitted that all physical punishment is violence against children and a serious breach of children's fundamental human rights. My attention was drawn to the 2006 report of Paulo Sergio Pinheiro on the Promotion and Protection of the rights of children as submitted to the United Nations General Assembly. Similarly I read the report of the Third Committee of the United Nations General Assembly on 30 November 2006 welcoming the Secretary General study on violence against children.

[27] Save the Children in Northern Ireland and Parents Advice Centre had conducted an audit of support programmes and materials for parents in Northern Ireland providing some base line information.

[28] On the issue of consultation, my attention was drawn to Re Christian Institute's Application (2007) NIQB 66 (paragraphs 28-34)where a consequence of a failure to properly engage in consultation was the quashing of Regulation 3(3) of the Employment Equality (Sexual Orientation) Regulations (Northern Ireland) 2003.

[29] The interveners submitted that Articles 3, 8 and 14 of the Convention must now be interpreted by the court, inter alia, in light of Articles 3, 19 and 37 of the UNCRC, the concluding observations of the United Nations Committee on the Rights of the Child in 1995 and 2002 and the United Nations General Comment No. 8 2006. My attention was similarly drawn, inter alia, to Article 17 of the revised European Social Charter, Recommendation 166 (2004) of the Parliamentary Assembly of the Council of Europe calling for co-ordinated campaign for the total abolition of corporal punishment and a three year programme of action on children and violence set out in a handbook produced by the Committee of Ministers of the Council of Europe in November 2005, Recommendation 2006, 19 of the Committee of Ministers of the Council of Europe to Member States and Policy to Support Positive Parenting, Issue Paper 2006/1 published by the Council of Europe's Commissioner for Human Rights in June 2006 and the Report of the Third Committee of the United Nations General Assembly on 30 November 2006.

[30] Although some of the exhibits to the submissions were already well known to me as a judge in the Family Division, I have read with interest all the documents appended by the interveners and taken these matters into account in considering the general thrust of the submissions made by Ms Higgins on behalf of the applicants.

Article 8 of the Convention("Art.8")

[31] In asserting the incompatibility of the impugned legislation with the Convention the applicant relied on Article 8 of the Convention ("Right to Respect for Private and Family Life") which provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[32] The first matter that I have to determine in this context is whether the issue of physical punishment of children engages art 8. I am satisfied that it does. The concepts contained in art 8 are broad in nature and at least cover the physical and psychological integrity of children. Children are a vulnerable group in our society. Smacking children to whatever degree is likely to involve their human dignity, their personal development and their own sense of self and autonomy. Children are real persons not abstractions. As Baroness Elizabeth Butler-Sloss described it in a phrase well known to family law practitioners, the child is a person not an object of concern. The principal international instrument defining children's rights, the UNCRC, has been ratified by the United Kingdom and all but two of the Member States of the United Nations. In this context the interveners helpfully reminded me of an address by Baroness Hale in Belfast in 2006 "Making Children's Rights Real" in which she cited the 42 rights outlined in the UNCRC which serve to make it clear that children are not just passive recipients of other people's concern for their best interest, but they are moral actors in their own right with points of view of their own which are entitled to respect.

[33] I find authority for these conclusions in a number of authorities. In R (Countryside Alliance and Others) v Attorney General and Another, Regina (Derwin and Others) v Same 2007 UKHL 52 ("the Countryside Alliance case"), which involved a challenge to the compatibility with the European Convention of the Hunting Act 2004, Lord Bingham said of Article 8 at paragraph 2:

> "The content of this right has been described as 'elusive' and does not lend itself to exhaustive

> definition. This may help to explain why the right is expressed as one to respect, as contrasted with the more categorical language used in other articles. But the purpose of the Article is in my view clear. It is to protect the individual against intrusion by agents of the State, unless for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose."

See also Lord Rodger of Earlsferry at paragraph 105 and Baroness Hale at paragraph 116.

[34] Similarly in Pretty v United Kingdom (2002) 35 EHRR 1 at paragraph 61 the court recognised the breadth of the concept:

> "(61) …. the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person. It sometimes embrace aspects of an individual's physical and social identity … Article 8 also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world. Though no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle underlying the interpretation of its guarantees."

At paragraph 65 the court stated:

> "The very essence of the Convention is respect for human dignity and human freedom."

[35] I find further approval for this approach adopted in R (Razgar) v Secretary of State for the Home Department (2004) 2 AC 368, 383, para. 9, and Hanover v German (2004)40 EHRR 1

[36] Accordingly I consider that Ms Higgins is correct to start from the premise that children have the same rights as adults not to suffer the assault of others and if there are reasons to make exceptions, it is these that require justification not their basic right.

[37] What otherwise might be an impermissible interference with a child's right not to be assaulted in the context of art 8 , may be justified if three conditions are met.

[38] The first of these is that the interference should be "in accordance with the law" or "prescribed by law". The meaning of this requirement has been considered by the ECrtHR on a number of occasions e.g. Silver v United Kingdom (1983)5 E.H.R.R.347 and Sunday Times and Malone v United Kingdom (1985)7 E.H.R.R.14. It has been interpreted as requiring that laws which authorise the state to interfere with rights such as article 8 must be accessible ,must be drawn with sufficient precision to enable citizens to foresee the extent of the interference with their Convention rights and must contain a measure of protection to ensure that the powers which the law confers cannot be used arbitrarily. Not a single authority ,domestic or European. was put before the court which suggested that all physical punishment of children ,no matter how trivial ,is unlawful. Indeed the impugned legislation was introduced expressly to meet the criticisms raised by the ECrtHR in A v UK that the stance of the UK on the issue of physical punishment to children was unlawful and to meet the United Kingdom's undertakings to the court in Strasbourg so as to render its approach lawful and in compliance with the Convention.

[39] Ms Higgins advanced the argument that the words "reasonable chastisement " are so vague and unclear that the law is now unintelligible, imprecise and unpredictable . She drew on the well publicised tenets of the rule of law set out by Lord Bingham of Cornhill in a lecture now published in the Cambridge Law Journal. (2007) CLJ 67 and in particular the first sub-rule concerning the accessibility of the law:

> "First, the law must be accessible and so far as possible intelligible, clear and predictable. This seems obvious: if everyone is bound by the law they must be able without undue difficulty to find out what it is, even if that means taking advice (as it usually will) and the answer when given should be sufficiently clear that a course of action can be based on it."

[40] I find nothing vague, imprecise or unlawful about the use of the phrase "reasonable chastisement" in Article 2 of the 2006 legislation. Ad hoc discretionary decision must be distinguished from appropriate judicial interpretation. Judicial decisions may properly add precision to a statute. The legislature can never foresee all the situations that may arise, and if it did, could not practically set them all out. It is thus in the nature of our legal system that areas of uncertainty exist and that judges clarify and augment the law on a case by case basis. See the comments of the Supreme court of Canada in Canadian Foundation for Children Youth and the Law v Canada

(Attorney General) 2004 1 S.C.R 76 ("the Canadian foundation case") at paragraph 17. The law has long used reasonableness to delineate areas of risk without incurring the dangers of vagueness or lack of precision . The law of negligence is seared with the concept of reasonableness and the criminal law is punctuated with similar concepts. It is expected that police officers and prosecutors alike will be au fait with what constitutes reasonable grounds in a number of instances. The fact of the matter is that whilst on their face the words are broad, a number of implicit limitations will add precision arising out of well trammelled legal principles augmented on a case by case basis emanating from court decisions. Our law, and in particular our criminal law, often uses the concept of reasonableness to accommodate evolving mores and avoid successive "fine tuning" amendments. Article 2 manifestly does not protect degrading, inhuman or harmful conduct. Reasonable chastisement necessarily rules out conduct stemming from the care givers frustration, loss of temper or abusive personality. The interpretation in each case must be considered in context and in light of all the circumstances of the particular instance. I have no reason to believe that any difficulty will arise as time unfolds and cases are determined by the courts. Ms Higgins referred to concerns arising out of the review by the Government of s. 58 of the English legislation which purported to highlight commonplace misunderstandings about the current legal position . Insofar as I see no difference between the conceptual approach in this instance and the use of similar phraseology in other aspects of law, I have no doubt that the early misgivings will soon be resolved as case law unfolds and the analogies with existing law are drawn to public attention. I therefore find nothing about the impugned article that renders it inaccessible ,imprecise or lacking in protection for children or incompatible with the rule of law.

[41] The second condition is that the interference for which the law provides should be directed towards one or more of the objects or aims specified in the second paragraph of article 8. Article 2 of the 2006 legislation expressly protects children from any physical violence outside reasonable chastisement and even then this is confined to the offence of assault. The legislation was aimed at meeting concerns raised in Strasbourg in A v UK. The fact that this case was confined in its outcome by agreement to issues surrounding article 2 of the Convention does not render the legislation superfluous to the notion of a legitimate aim under article 8(2) of the Convention. I consider therefore that the impugned article does provide for the protection of children .

[42] The third condition is that the interference in question is necessary in a democratic society, raising the familiar questions whether there is a pressing social need for it and whether it is proportionate to the legitimate aim pursued. I consider that this is an area where Parliament has a broad discretion representing as it does an area of social policy. Courts should be cautious to interfere with the democratic expression on such issues. On such

matters the legislature is entitled to weigh up and balance all the disparate views and factors about what works best in bringing up children in a safe family setting and take a lead without interference from the courts. As Baroness Hale recognised at paragraph 84 of her judgment in the Williamson case to which I shall refer in the next paragraph of this judgment, physical punishment within the family raises more complex questions than does corporal punishment in institutional settings.

[43] I find authority for such a restrained approach in R (On the Application of Williamson and Others) v Secretary of State for Education and Employment (2005) 2 AER 1 ("Williamson's case") where parents and teachers at a number of independent Christian schools had challenged the law (now contained in Section 548 of the Education Act 1996) prohibiting corporal punishment in all schools whether run by the State or independently. Whilst the decision in this case was to justify a prohibition of corporal punishment in schools the principle of leaving such maters to be determined by Parliament applies equally to the instant case where it is to be permitted in the home setting in certain circumstances. Lord Bingham said at paragraph 47:

> "It is well known that different views are held on the desirability of the corporal punishment of children. Evidence by parents, experts and others that in their opinion corporal punishment has an overall beneficial effect or that it may do so in certain circumstances, would be no more than evidence in support of one view on a much discussed social issue affecting every family."

Further relevant extracts from Lord Bingham at paragraphs 50 and 51 are as follows:

> "[50]……the means chosen to achieve this aim (*the protection of children)* are appropriate and not disproportionate in their adverse impact on parents who believe that carefully controlled administration of corporal punishment to a mild degree can be beneficial for this reason: the legislature was entitled to take the view that, overall on balancing the conflicting considerations, all corporal punishment of children at school is undesirable and unnecessary and that other, non-violent means of discipline are available and preferable. On this Parliament was entitled, if it saw fit, to lead and guide public opinion. Parliament is further entitled to take the view that a universal ban was the appropriate way to achieve the

> desired end. Parliament was entitled to decide that, contrary to the complainants' submissions, a universal ban is preferable to a selective ban which exempts schools where the parents or teachers have an ideological belief in the efficacy and desirability of a mild degree of carefully controlled corporal punishment.
>
> 51. Parliament was entitled to take this course because this issue is one of broad social policy. As such it is pre-eminently well suited for decision by Parliament. The legislature is to be accorded a considerable degree of latitude in deciding which course should be selected as the best course in the interest of children as a whole. ….."

[44] I was not persuaded by Ms Higgins' assertion that this legislation does not come within the ambit of social policy approved by Parliament because , being legislation exercisable by Order in Council and following the affirmative Resolution Procedure, Parliament did not debate the matter. This ignores the fact that not only is this a democratically established procedure during the period of suspension of the Northern Ireland Assembly but it was the subject of a lengthy and comprehensive consultation process prior to the laying of the draft 2006 Order before Parliament on 12 June 2006. At paragraph 10 of the affidavit of Laura McPolin the Assistant Director in the Office of Law Reform sworn on 15 January 2007 Ms McPolin avers:

> "In Northern Ireland, the consultation exercise commenced on 11 September 2001, with the launch of OLR's consultation paper: 'Physical Punishment in the Home: Thinking About the Issues, Looking at the Evidence'. The paper posed a series of questions and sought comment on key issues. Responses were requested by 31 January 2002 and, at the final round up, just over 1700 responses were received.
>
> 11. The paper was underpinned by face to face discussion groups in Londonderry and Belfast and a package of consultation methods (including face to face discussions and activity sheets) that were specifically aimed at children and young people.
>
> 12. This is most comprehensive consultation exercise that OLR has ever conducted and it is often referred to as a best practice model for consulting with children. The Northern Ireland Equality

> Commission's Guide to Statutory Duties lists it as an example of 'good consultation' particularly having regard to the 'web consultation' with young people and the use of focus groups with narrative stories for children as young as 4-6 years old.
>
> 13. The analysis of the responses, which was published in June 2004, reveal that –
>
> ….
>
> On the question of whether the defence of reasonable chastisement should be limited or removed, 90% of the people who responded said it should be retained."

[45] This is an issue of broad social policy which is pre-eminently well suited for decision by the Order in Council procedure when taken with the consultation procedures and provides the imprimatur of democratic approval. It strikes the right balance between the interests of the individual and those of the community in a considered democratic compromise. That the impugned legislation was not the produce of active debate in Parliament, albeit the comparable Section 58 legislation in England clearly was, does not deflect from the importance of the democratic process invoked in order to lay this matter before Parliament.

[46] The final matter to be addressed in this context is whether the interference alleged is proportionate to the legitimate end sought to be achieved. In deciding whether a measure is proportionate in Huang v Secretary of State for the Home Department (2007) 4 AER 15("Huang's case") case, Lord Bingham adopted the widely cited and applied formula which poses the following questions:

(i) Is the legislative objective sufficiently important to justify limiting a fundamental right?

(ii) Are the measures designed to meet the legislative objective rationally connected to it?

(iii) Are the means used to impair the right or freedom no more than is necessary to accomplish the objective?

Additionally there is an overriding requirement that any judgment on proportionality must always involve the striking of a fair balance between the rights of the individual and the interests of the community which is inherent

in the whole of the Convention. The severity and consequences of the interference will call for a careful assessment at this stage.

[47] Applying these tests to Article 2, I am satisfied that the legislative objective in the first instance was to comply with United Kingdom's undertaking to the court in A v UK to review the operation of the defence of reasonable chastisement (and this would involve a consideration of all relevant rights under the Convention) and introduce measures which would prevent a repeat of the violation found by the court ie. the Article 2 violation. The objective was also self evidently to protect children from physical violence outside reasonable chastisement and even then only in relation to assault whist preserving the right of parents to bring up their children, guiding and disciplining them appropriately within a safe and loving family setting without invoking the criminal law. I consider that that objective is sufficiently important to justify limiting the right of children to be protected from assault in the narrow confines of the reasonable chastisement defence on a charge of assault. Secondly I am satisfied that the measures taken ie. the implementation of the reasonable chastisement defence was designed to meet the legislative objective and was rationally connected to it. Thirdly I am persuaded that the means used to impair the right were no more than was necessary to accomplish the objective. Confining the matter to assault effectively ensured that only a modest and measured degree of physical chastisement could ever be deployed to come within the defence of reasonable chastisement. Not only has the chastisement to be reasonable, but it has to be actual chastisement and not merely loss of temper, acts of frustration or irrational outbursts by a parent unconnected with reasonable punishment within the confines of the offence of assault. Obviously anything beyond common assault cannot invoke the defence. I am satisfied that such an approach does strike a fair balance between the rights of the individual children and interests of the community.

[48] In my view the Secretary of State is entitled, in the interests of the community as a whole, to take into account the factors outlined by Ms McPolin in her first affidavit at paragraph 17 where she said, inter alia:

> "17. Several factors influenced the policy decision. In particular, it was considered that –
>
> - Such a ban could result in the criminalisation of parents. This would not be conducive to the parent/child relationship or in the best interests of either party and it was felt that more could be achieved through encouraging parents than by holding the possibility of prosecution over their heads."

[49] I pause to observe that this was an argument employed by McLachlin CJ in the Canadian Foundation case. This case dealt with the constitutionality of Section 43 of the Criminal Code in Canada which justified the reasonable use of force by way of correction by parents and teachers against children in their care. At paragraphs 58 and 59 McLachlin CJ said:

> "58. Children need to be protected from abusive treatment. They are vulnerable members of Canadian society and Parliament and the Executive act admirably when they shield children from psychological and physical harm. In so acting, the Government responds to the critical need of all children for a safe environment. Yet this is not the only need of children. Children also depend on parents and teachers for guidance and discipline, to protect them from harm and to promote their healthy developments within society. A stable and secure family in a school setting is essential to this growth process.
>
> 59. Section 43 is Parliament's attempt to accommodate both of these needs. It provides parents and teachers with the ability to carry out the reasonable education of the child without the threat of sanction by the criminal law. The criminal law will decisively condemn and punish force that harms children, is part of a pattern of abuse, or is simply the angry or frustrated imposition of violence against children; in this way by decriminalising only minimal force of transient or trivial impact, s. 43 is sensitive to the children's need for a safe environment. But s. 43 also ensures that the criminal law will not be used where the force is part of a genuine effort to educate the child, poses no reasonable risk of harm that is more than transitory and trifling, and is reasonable under the circumstances. Introducing the criminal law into children's families and educational environments in such circumstances would harm children more than help them. So Parliament has decided not to do so, preferring the approach of educating parents against physical discipline.
>
> 60. This decision, far from ignoring the reality of children's lives, is grounded in their lived experience. The criminal law is the most powerful tool at Parliament's disposal. Yet it is a blunt instrument

whose power can also be destructive of family and educational relationships."

[50] Whilst this may be a view that many do not share — including, dare I say, many experienced family judges – nonetheless I consider that it does represent a proportionate response by the Secretary of State to the debate on this issue particularly when, as in N. Ireland, the legislation is to be accompanied by education of parents to discover alternative methods of punishment . Conclusions that the family should not be subjected to the incursion of criminal law enforcement for every trivial slap and that extending the law to all disciplinary force would potentially have a negative impact upon families and hinder parental efforts to nurture children are perfectly plausible and proportionate views to hold. McLachlin CJ summarised the argument tellingly in paragraph 62:

> "The decision not to criminalise such conduct is not grounded in devaluation of the child, but in a concern that to do so risks ruining lives and breaking up families – a burden that in large part would be borne by children and outweigh any benefit derived from applying the criminal process."

[51] Ms McPolin went on to dilate upon further factors that had influenced the policy in paragraph 17 of her first affidavit as follows:

> "
>
> - Real change on the ground would be achieved via the promotion of positive parenting, which, as stated previously, supports parents and allows them to develop a constructive and effective parent/child relationship and alternative ways of dealing with inappropriate behaviour. It would recognise that the successful promotion of positive parenting was linked to a parent's willingness to engage and it was felt that a complete ban would be counter productive, in that parents would be less willing to seek advice and assistance, for fear that they would face prosecution for having resorted to physical punishment however mild;
>
> - Comparisons with bans in other spheres were unrealistic. For example, those who support a complete ban often refer to the success of the seat belt campaign. However, that campaign

proceeded on the basis of a strong penalty system and non-compliance is easily verifiable;

- The restriction of the defence of reasonable chastisement was a more honest approach. By that I mean that it is generally accepted that, in many of the countries which have introduced a ban, lesser breaches of the prohibition are not pursued ….. Article 2 of the Law Reform (Miscellaneous) Provisions (Northern Ireland) Order 2006 is therefore merely stating this 'up front'.

- The Scottish model was unattractive because by outlawing certain types of physical punishments, the legislature could appear to be endorsing others."

Mr McNeany on behalf of the applicant carried out a detailed critique of Ms McPolin's assertions which I have read in full and he found her views illogical and disjunctive in their reasoning .His views found expression in the submissions of counsel that the removal of Article 2 would not tend to criminalise parents . The common law defence of necessity and the principle of de minimis, coupled with a measure of discretion given to prosecuting authorities, would adequately protect parents from excusable and/or trivial conduct. See also the argument of Arbour J in a dissenting judgment in the Canadian Foundation case.

[52] I intend no discourtesy to the industry exhibited by Ms Higgins and the interveners if I do not refer in detail in this judgment to the very extensive research into the effects of physical punishment on children to which she drew my attention during this hearing. There were many references to the deleterious effects on children of corporal punishment. The weight of this research in her submission established that the evidence that the impugned legislation was a proportional response to a breach of Article 8 of the Convention would have to be extremely compelling. She acknowledged however that there is at least a minority of opinion to the contrary asserting that minor physical discipline does not harm children albeit it may not benefit them . Mr O'Hara countered by asserting that the research does not focus very much on the nature of the very mild punishment permitted by the impugned article but refers largely to severe punishment, an observation with which I am bound to say I find myself in agreement . For example the UNICEF Innocenti Report of 5 September 2003 argued that physical punishment, far from being a socialising discipline, is a very effective way of teaching bad behaviour and that legalised violence towards children is a breach of a human rights even when takes place within

the home. Nonetheless Mr O'Hara drew attention to the fact that even that report refers to "a divide between the families where children were hit with implements or often hit to a level which caused lasting pain, bruising or other injury, and those where occasional slaps occurred which rarely or never had lasting effects. There was no substantial bridging group in which smacking group was regular but not severe, which we would have expected to find if escalation were a common phenomenon. In general it seems that parents either hit children rarely and lightly or they do it to cause serious hurt." Ms Higgins rejoinder to this, inter alia, was to refer to the Northern Ireland Section of the draft copy of "Physical Discipline use in Families" by Lisa Bunting (NSPPC), Mary Webb (NIYYC) and Julie Healy (Barnardo's) which drew attention to the Northern Ireland prevalence study. This indicated that extrapolation of results to the overall Northern Ireland population based on figures provided by the Department of Social Development suggested approximately close to 3,000 households in Northern Ireland have used some severe physical discipline and over 72,000 have used some form of minor discipline.

[53] The ebb and flow of this factual argument on the research not only illustrated the inherent unsuitability of the Judicial Review process to determine such factual disputes without the benefit of cross-examination or witnesses but also served to persuade me that the research is not clear cut and is often contextual in its assertions. More importantly, this is precisely the kind of area where in a changing society such matters should be subject to the democratic process and decisions should be taken by Parliamentary representatives weighing up policy decisions predicated on the sort of factors outlined by Ms McPolin in paragraph 17 of her affidavit. In my view the approach adopted in this case by the respondents is a proportionate response and strikes a fair balance between the rights of the individual child and the interests of the community.

[54] I have therefore concluded that had it been necessary for me to so determine(see paragraph 20 of this judgment) ,I would not have found the impugned legislation unlawful, ultra vires or in breach of or incompatible with article 8 of the Convention.

Article 3 of the ECHR

[55] Ms Higgins asserted that in so far as Article 2 of the 2006 legislation permitted any form of physical violence against children, it offended against Article 3 of the Convention ("Article 3") and was incompatible with it. She argued that the gathering momentum of recent research that pointed to the danger to children of physical punishment and the advent of the international instruments such as the UNCRC had all served to redefine the meaning of article 3 in the context of children to the extent that any violence to children breached its terms. Alternatively the reasonable chastisement

defence was so vague , imprecise and lacking in protection for children as to constitute a breach of article 3.as an alternative she urged that at least the legislation ought to have specified that certain physical punishment of children such as that involving blows to the head, shaking and use of an implement should be prohibited coupled with an absolute prohibition on punishment of those under two years of age in a manner similar to legislation enacted in Scotland.

[56] Article 3 of the Convention prohibits "torture or … inhuman or degrading treatment or punishment". It is a fundamental right of the Convention and non-derogable.

[57] I am satisfied that the conventional approach to the test for Art. 3 is that the treatment must reach "a minimum level of severity", the minimum being:

> "Relative … (*depending*) on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim." See Ireland v UK (1979) 2 EHRR 25 at paragraph 106.

[58] References to a minimum level of severity to reach article 3 abound in Strasbourg jurisprudence. eg Keenan v United Kingdom (2001) 33 EHRR 913, Tekin v Turkey Judgment of 9 June 1998, Reports 1998 – IV , DP and JC v United Kingdom (2003) 36 EHRR 14 and Tyrer v United Kingdom (1978) 2 EHRR 1.. More recently the House of Lords has revisited the issue in R (Limbuela v Secretary of State for the Home Department) (2007) 1 AER 951("Limbuela") at paragraph 7 where Lord Bingham said:

> "Treatment is inhuman or degrading if, to a seriously detrimental extent, it denies the most basic needs of any human being. As in all art. 3 cases, the treatment, to be proscribed, must achieve a minimum standard of severity, …"

At paragraph 46 Lord Hope said:

> "As the court put it in Pretty v UK …, art. 3 may be described in general terms as imposing a primarily negative obligation on states to refrain from inflicting serious (*my emphasis*) harm on persons within their jurisdiction."

[59] It is plausible to argue the courts have left open the possibility that particular forms of inhuman and degrading treatment may be pertinent only to children and situations need to be judged with reference to their impact

on children *as children*. Children do represent a vulnerable class of individuals and so in my opinion should be accorded particular protection. The nature of that protection must move with the grain of our times and accord with contemporary notions of social justice. Although spoken in the context of a case involving two adult females with profound learning and physical disabilities, I consider that the comments of Munby J in A and Others v East Sussex County Council and Another (2003) EWHC 167 (Admin) at paragraph 94 et seq. bear repetition when considering the rights of children:

> "94. So the demands of human dignity fall to be evaluated in the particular context – not merely of place but also of time. And in the context one needs to bear in mind the point made by Lord Hoffmann in Birmingham City Council v Oakley (2001) 1 AC 617 at 631G:
>
> > 'The concept of cruelty is the same today as it was when the Bill of Rights 1688 … forbade the infliction of "cruel and unusual punishments" (Section 10). But changes in social standards mean that punishments which would not have been regarded as cruel in 1688 will be so regarded today'."

[60] Selmouni v France (2000) 29 EHRR 403 is another example of where the Strasbourg court at p442 para 101 has made the point that increasingly high standards are required. The concept of human dignity may be the same as ever, but the practical standards which require to be met are not. Changes in social standards demand better provision for the vulnerable if their human dignity is not to be impaired.

[61] Moreover I am also satisfied that international instruments defining children's rights, principally the UNCRC although also many of those mentioned by the interveners and referred to in paragraph 29 of this judgment , are taken into account by and should inform the deliberations of the ECrtHR in considering art 3 criteria . See R (P&Q) v Secretary of State for the Home Department (2001) EWHC Admin. 357 and SR v Nottingham Magistrates' Court (2001) EWHC Admin. 802. The UNCRC has been ratified by the United Kingdom and all but two of the Member States of the United Nations. Articles 6-40 spell out a great many rights. Article 3 of the UNCRC requires that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Article 19 enjoins States Parties to take all "appropriate" legislative, administrative, social and educational measures to

protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child. The UN Committee on the Rights of the Child (in its Concluding Observations on the United Kingdom's First Report on its compliance with the Convention, 1995, para. 16) had been critical of the UK for not banning corporal punishment in private schools. But it also criticised the continued existence of the parental right of chastisement, and recommended the abolition of both (paras 31 and 32). In its second review, in October 2002, the Committee welcomed the ban in all schools, but maintained its recommendation that all corporal punishment in the family also be prohibited (paras. 35 and 36).

[62] I am therefore of the view that Article 3 criteria can take into account the characteristics of vulnerable groups eg children in the context of their particular needs. Thus there may well be a sliding scale in the nature of Article 3 which means that the difficulties of particularly vulnerable groups can be taken into account when determining whether suffering has reached the necessary minimum. Special considerations are likely to apply when ascertaining whether or not there has been a breach of Article 3 in dealing with children.

[63] Nonetheless I consider that a "minimum level of severity" would still have to be reached even in those cases .No authority was produced before this court to the effect that any court ,domestically or in Strasbourg, has ever challenged the proposition so often stated that there must be a minimum standard in every case in order to trigger article 3 . I believe there is much to be said for the comments of Baroness Hale of Richmond in R (In the Application of Al-Skeini and Others v Secretary of State for Defence at para. 90 where she said:

> "While it is our task to interpret the 1998 Act, it is Strasbourg's task to interpret the Convention. It has often been said that our role in interpreting the Convention is to keep in step with Strasbourg, neither lagging behind nor leaping ahead: no more, as Lord Bingham said in R (On the Application of Ullah) v Special Adjudicator, DO v Secretary of State for the Home Department (2004) 3 AER 785 but certainly no less: no less, Lord Brown (at 106), below, but certainly no more. If Parliament wishes to go further, or if the courts find it appropriate to develop the common law further, or if the courts find it appropriate to develop the common law further, of course they may. But that is because they chose to do so, not because the Convention requires it of them."

[64] I observe also that whilst international instruments such as the UNCRC may well be taken into account in interpretation of the Convention, I find no warrant for Ms Higgins' submission or that of the interveners that the ECrtHR is bound to or indeed is even likely to act in strict compliance with the terms of the UNCRC or the other international instruments to which I have made reference . That assertion confuses obligation with aspiration. The UNCRC is relevant and may inform the court's decision on any interpretation of Article 3 with reference to children but it need not be determinative. I consider that the Secretary of State in this instance is still entitled to follow the principles set out in R v Secretary of State for the Home Department, ex parte Brind (1991) 1 AC 696 where at p. 762C Lord Ackner adopted views expressed by Lord Oliver in Rayner (Mincing Lane) Ltd v Department of Trade and Industry (1990) 2 AC 418 at 500 as follows:

> "Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is res inter alios acta from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant."

[65] Accordingly I consider that Mr O'Hara was entitled to argue that it would be incorrect to say that the Executive could alter the meaning or understanding of legislation passed by Parliament by adopting a treaty. Thus it is unsurprising that in the Williamson case which dealt with the challenge by parents and teachers at a number of independent Christian schools to the law (now contained in Section 548 of the Education Act 1996) prohibiting corporal punishment in all schools, whether run by the State or independently, the court did not rely upon the UNCRC in arriving at its conclusions.

[66] The fact of the matter is that the law, perhaps to some extent under the spur of the convention and international instruments , has gradually restricted the intensity and occasions when corporal punishment may be administered to children. This gradual development has taken two directions distinguishing, on the one hand, between lawful chastisement administered by the parents in the home and, on the other, corporal punishment administered in school. The law regarding corporal punishment in schools has gradually restricted the ability of teachers to punish pupils physically. From initially prohibiting teachers in maintained and non-maintained school

from administering Corporal Punishment (Education No. 2 Act 1986 s. 47) , the law widened its scope with an outright ban on the use of corporal punishment to all pupils attending all types of school (Education Act 1996, s. 548). Similarly the law regarding parents inflicting corporal punishment has also evolved over this period. Punishment of a child which caused "actual bodily harm" cannot be justified, either in civil proceedings or in respect of certain criminal offences, on the ground that it constituted reasonable punishment. Section 58 of the Children Act 2004 and the impugned Article 2 of the 2006 Order in this jurisdiction have arrived at this position in the wake of A v UK. Thus to be lawful, corporal punishment administered by a parent must stop short of causing actual bodily harm. Even then it must be reasonable chastisement to be considered ,per R v H, in the context of the defendant's behaviour, its duration, its physical and mental consequences in relation to the child, the age and personal characteristics of the child and the reasons given by the defendant for administering punishment.

[67] I have come to the conclusion that the current state of the law and the impugned Article 2 are not incompatible with Article 3 of the Convention. Standards of reasonableness will change over the years and the courts will interpret this according to the standards current at the time of trial. As I have already determined in paragraph 39 of this judgment I find nothing imprecise or vague about the use of the standard of reasonableness. For punishment of children to be in breach of Article 3, in my opinion it must attain a particular or minimum level of severity. Art 3 does not require the total abolition of corporal punishment even in the case of children. To suggest that compatibility with Article 3 in the case of children can only be attained by a complete ban would be to so diminish the impact of Article 3 that all previous jurisprudential references to a minimum level of severity would be rendered meaningless and contrary to all the authorities to which I have earlier referred. The degree of severity which will permit the invitation of reasonable chastisement in compliance with Article 3 will be judged according to the facts of each case and the nature and context of the punishment meted out. Not every case of corporal punishment will necessarily involve a breach of Article 3.

[68] Dealing with Ms Higgins' alternative submission I consider it to be an entirely plausible argument to make that attempts to define precise acts that come within Article 3 are both unnecessary and liable to mislead. Inclusion of specific instances could suggest, by virtue of their omission , exclusion of equally unacceptable punishment. I consider that the wording of the impugned Article 2 is therefore fully compatible with State obligations under Article 3 of the Convention. Courts will find the minimum level of severity in individual instances. The unfolding case law, domestically and in the ECrtHR, will serve to fortify the rights of children consistent with Article 3 of the Convention.

[69] Finally in this context I reject Ms Higgins' suggestion that Article 2 of the 2006 Order brings about discriminatory treatment of children and young people amounting to a breach of Article 3 of the Convention. Counsel drew an analogy with discrimination based on race (eg. East African Asians v UK (1981) 3 EHRR 76).That is an inapposite analogy. Children are justifiably treated differently from adults in a number of legal areas for their welfare and protection. Such justification can never arise in the case of racial discrimination. I see nothing in the different treatment of children and adults in this instance which would amount per se to a breach of Article 3.

[70] I have therefore concluded that had it been necessary for me to so determine(see paragraph 20 of this judgment) ,I would not have found the impugned legislation unlawful, ultra vires or in breach of or incompatible with article 3 of the Convention.

Discrimination and Article 14 of the Convention

[71] The equality provisions of the Convention are currently limited to Article 14. Both direct and indirect discrimination under the Convention occurs when persons are treated differently with "no objective and reasonable justification" if the difference in treatment does not "pursue a legitimate aim" and is not proportionate to that aim. A failure to treat differently people whose situations are substantially different also violates the Convention.

[72] Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no other independent existence. It has effect only in relation to the enjoyment of the rights and freedoms guaranteed by those provisions. It does not necessarily presuppose the violation to the substantive rights guaranteed by the Convention and it is sufficient for the facts of the case to fall within what has been described as "the ambit" of one or more of the Convention Articles. In R v(Clift) v Secretary of State for the Home Department (2007) 1 AC 484 at paragraph 13 Lord Bingham commended on expressions such as "ambit":

> "They denote a situation in which a substantive Convention right is not violated but in which a personal interest close to the core of such a right is infringed".

[73] Article 14 therefore does not forbid all forms of discrimination nor does it require there to be strict equality of treatment between all individuals, whatever their circumstances. Article 14 records that "the enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political, or other opinion, national or social origin, association with a national minority, property, birth or other status". There is thus a restricted

list of the matters in respect of which discrimination is forbidden and there is a restricted list of the grounds upon which discrimination is forbidden. See R (Carson) v Work and Pensions Secretary (2005) 2 WLR 1369 at paragraph 10.

[74] In the Matter of P (a child) (2007) NICA 20 (" Re P") Kerr LCJ, in the context of a case of alleged discrimination under Article 14 when an unmarried couple were unable to adopt, said at paragraph 31:

> "There is a further requirement of – or, perhaps, dimension to – discrimination in the Article 14 context. That is that it must amount to a failure to treat like cases alike. … Lord Hoffman in Carson captures this concept neatly where he said at paragraph 14:
>
> > 'Discrimination means a failure to treat like cases alike. There is obviously no discrimination when the cases are relatively different. Indeed, it may be a breach of Article 14 not to recognise the difference: see Thlimmenos v Greece (2001) 31 EHRR 411. There is discrimination only if the cases are not sufficiently different to justify the difference in treatment. The Strasbourg Court sometimes expresses this by saying that the two cases must be in an 'analogous situation'."

[75] Ms Higgins argued that the failure to extend to children and young people the full protection of the criminal law against assault in the same way as it is extended to adults unlawfully discriminates against them in the enjoyment of their rights and freedoms under Article 3, Article 6 and Article 8 and thus breaches Article 14. It was her submission that age qualifies under "any other status" as being "a personal characteristic .. by which a group or groups of persons are distinguishable from each other" (see Re P supra at paragraph 34).

[76] I was unattracted by this argument. There clearly are objective and reasonable justifications in many instances for treating children differently from adults. Thus we legislate to prevent them smoking, voting , attending certain films, having sexual relations, marrying etc when no such restrictions are placed on adults . Children and young people are treated differently under the law inter alia to protect them and to ensure their education and welfare. I do not believe therefore that Article 14 forbids such discrimination. The Convention does not require that there be strict equality of treatment

between children and adults. This is not an instance of a failure to treat like cases alike.

[77] If I am wrong in that conclusion, the question then arises as to whether the differentiation has a legitimate aim and whether the means chosen to achieve the aim are appropriate and not disproportionate to the adverse impact.

[78] I have already indicated that I consider that Article 2 of the 2006 Order does pursue a legitimate aim.

[79] In considering whether Article 2 in this context is proportionate if it does interfere with a Convention right, it is well settled that the court should recognise that a discretionary area of judgment must be accorded the decision of the legislature as to what societal conditions demand. In re P Kerr LCJ said at paragraph 40:

> "The more purely political the issue is, the less likely it is to be appropriate for a judicial resolution. In A v Secretary of State for the Home Department (2005) 2 AC 68 at para. 38 Lord Bingham of Cornhill suggested that legislative choices, especially those involving balancing the rights of groups or individuals, or the public interest, were more likely to fall appropriately to those conducting the business of democratic Government. Questions of contentious, social or moral policy (especially where the Convention right in question itself allows the balance to be struck) are also more likely to fall within the democratic authorities' discretionary area, as are questions of economic policy, whereas there will be other areas including those of high constitutional importance where the courts are better placed to assess the need for protection."

[80] Relevant considerations in this context are s follows . First Article 2 obviously a matter of legislation. Secondly the right invoked by the applicant is one of qualified Convention rights .Thirdly the subject matter of the Article 2,as I have earlier indicated in this judgment ,is one of social policy and lies peculiarly within the constitutional responsibility and the expertise of the legislature rather than the courts especially where a full consultation exercise, as in this instance, has been carried out.

[81] I have therefore concluded that had it been necessary for me to so determine(see paragraph 20 of this judgment), I would not have found the

impugned legislation unlawful, ultra vires or in breach of or incompatible with article 14 of the Convention.

Legitimate expectation

[82] It was the applicant's assertion that the then Commissioner was denied his legitimate expectation that either the Minister or his Department would consult with him at an early stage about draft legislation concerning children and in particular about the proposal to introduce Article 2 of the 2006 Order thus affording the Commissioner an opportunity to make representations on the proposal.

[83] Given the terms of Article 6 of the Commissioner for Children and Young People (NI) Order 2003 and the duties of the Commissioner as set out in Article 7(see paragraph 2 of this judgment), it came as no surprise to the court that Mr O'Hara on behalf of the respondent accepted that this was a legitimate expectation. It is therefore unnecessary for me to visit the authorities helpfully introduced by Ms Higgins to satisfy me on this point of principle. The real issue I had to determine was whether or not that legitimate expectation had been fulfilled in the circumstances in this instance.

[84] I commence my conclusions on this aspect of the case by recognising the established principle that where the parties respective affidavit evidence discloses contentious issues of fact which it is appropriate for the court to resolve, the court should take the evidence where it stands against the applicant. In Regina (Laporte) v Chief Constable of Glocestershire (2004) 2 All ER 874 at paragraph 3 May LJ said:

> "Since the claimant has chosen judicial review proceedings, the defendant's evidence is to be taken as it stands."

[85] It is an equally well established principle that the onus of proof lies on the applicant, a principle reflected in for example Re SOS Application (2002) NIJB 252 at paragraphs 18 and 19 per Carswell LCJ.

[86] The courts in judicial review are loathe to become embroiled in fact finding and resolution of factual disputes between the parties. Lord Lowry said in Regina v Inland Revenue Commissioners, ex parte Coombs (1991) 2 AC 283 at 302A:

> "Proceedings in which affidavit evidence is the general rule are not well suited to resolving factual questions."

[87] More recently the English Court of Appeal in Anufrijeva v London Borough of Southwark (2004) 2 WLR 603 at paragraph 53 said:

> "The administrative court … does not normally concern itself with issues of disputed facts."

[88] A great deal of the court's time in this instance was taken up by the competing factual accounts on the issue of whether or not there had been a breach of the duty to consult. The applicant's case was that the respondent had been so unacceptably casual in the fulfilment of this duty that in the event there was no consultation at all. The respondent's case was that for whatever reason the applicant either personally or through his office failed to avail of requests by the respondent to consult and that efforts to engage the applicant in the consultation process had simply not been taken up.

[89] Ms Higgins submitted that there was a defined form of consultation which ought to have taken place. She relied on General Consumer Council's Application (2006)NIQB 86 ("the General Consumer case") at paragraph 21 et seq where Weatherup J said:

> "First the document which the Department agreed was the governing guidance document, namely the Affirmative Resolution Procedure of May 2006. It is guidance for departments during the current period of suspension of the Northern Ireland Assembly. The introduction states that during the suspension of the Northern Ireland Assembly the Northern Ireland Act 2000 provides for the legislative power of the Assembly to make legislation to be exercisable by Order in Council. At paragraph 8 it refers to the character of the process, with many of the pre-legislative stages of policy development and implementation being the same during suspension as during devolution, for example, public consultation on policy proposals, the preparation and consideration of impact assessment, Ministerial clearance etc. However suspension does not provide for the contribution that the Departmental Committee would make to the policy development process during devolution. Neither is there an Executive input and once a Draft Order is laid before Parliament there is no facility to have it amended, unlike a Bill during the passage through the Assembly. At paragraph 9 it is stated that the inability of Parliament to amend draft Orders once they were laid makes the prior consultation process even more important than

> the stages prior to the introduction of a Bill to the Assembly. *Normally (my italics*) departments will carry out a 12 week consultation on proposals for a draft Order, that is public consultation on the draft legislation in addition to or along with any consultation on the policy proposals. Strong commitment to this effect have been given by Ministers to Parliament to help address criticisms of the Order in Council process generally. There follows two sentences of some note 'Ministers also have indicated that they will be receptive to requests to have proposals for draft Orders debated by the Northern Ireland Grand Committee in the House of Commons so as to give MPs an opportunity to suggest amendments before the draft Orders are laid. Departments should work on the basis that this additional scrutiny stage is likely to be required for high profile legislation.' The present draft Order is high profile legislation. Initially there was a proposal that this matter would be debated by the Northern Ireland Grand Committee in the House of Commons as appears in the earlier frameworks, but for various reasons the Grand Committee was not engaged in relation to this legislation."

[90] I do not believe that there is any general principle to be extracted from the case law as to what kind or amount of consultation is required in each case. The general point was made in relation to delegated legislation in R v Secretary of State for Social Services ex parte AMA (1986) 1 WLR 1 at 4(f)-(g) that inevitably practice on consultation will vary from case to case. Mr O'Hara properly drew my attention to paragraph 39 of the General Consumer case to distinguish the present instance from that under consideration by Weatherup J. At paragraph 39 the judge had said:

> "I do not accept that there has been a clear cut division between the different phases. During the present legislative consultation process some policy considerations were still in play in relation to the draft Order. There were policy issues being debated, there were technical issues being debated, there were drafting issues being debated. Of course in an ideal world the policy would have been set in stone at a fixed date and the legislative phase would merely be a drafting exercise which carried into legislative effect the fixed policy position."

[91] In this case of course there were no drafting or technical issues. Reliance was clearly being placed on the English legislation namely Section 58 of the Children Act 2004 and I find as a matter of fact that this had been known to the applicant from as early as 2004 when a press release on behalf of the respondents had been made indicating that the English Bill was to be followed. I do not consider therefore that the respondents in this instance were committed to any particular form of consultation so long as a proper opportunity for adequate consultation in all the circumstances was afforded .

[92] Amid the welter of accusation and counter-accusation that surfaced in this court about the respective failures of the applicant to engage in or the respondents to fulfil the obligation of consultation, I came to the conclusion that the applicant had failed to satisfy me to the requisite level that an opportunity for appropriate consultation had not been afforded to the applicant. Some examples of the conflict will suffice . There had been a meeting arranged in the applicant's office on 5 April 2004. In attendance were Ms McPolin the Assistant Director in the Office of Law Reform, Ethne Harkness, Director of Law Reform, Claire Irvine, the Legal Assistant in the Office of Law Reform, Teresa Devlin, Head of Research, Policy and Services Review in the applicant's office and Marlene Kinham, Head of Communications and Participation in the applicant's office. It was the respondents' case that the discussions there focused on the Office of Law Reform's consultation exercise on physical punishment and the timescale for publication of the analysis of responses. Two days later on 7 April 2004 the Permanent Secretary of the Department of Health and Social Services and Public Safety had communicated with Nigel Williams the Northern Ireland Commissioner for Children and Young People outlining the Government views about physical punishment of children. I am satisfied that this meeting and correspondence clearly illustrate that nothing was being done to conceal this exercise from the applicant and that the respondents were more than willing to engage the Commissioner and his office in the process .

[93] Ms Higgins did not deny, and no affidavit suggested the contrary, that following the publication of the analysis of the responses to the Office of Law Reform's consultation exercise, the Office of Law Reform did endeavour to arrange a meeting with the Commissioner's Office for the purpose of consultation on the issue of the government proposals. Ms McPolin's affidavit records:

> "However, it emerged that the applicant was conducting interviews and it was, therefore, agreed that, when he was free he could contact OLR to arrange a meeting. No such contact was ever made."

No explanation was given to me as to why the applicant did not make such an arrangement. I recognise of course that at this time Mr Williams was

suffering from ill-health but there were many others in his office carrying on the work of the Commission. I cannot ignore that this constituted what I believe to be an invitation to consult and in terms amounted to an invitation which was not taken up. Moreover it appears that there was no response to the research analysis of the OLR emanating from the applicant notwithstanding that responses did come from for example the Human Rights Commission and other bodies. Why did no one from the applicant's office avail of the request to consult then or thereafter ? Why was there no written response to the research analysis as other similar bodies had done ?

[94] Ms Higgins relied on the four requirements of consultation set out in R (Coughlan) v North and East Devon Health Authority (2001) QB2 13("Coughlan's case") at para. 108 which stated:

> "To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken."

[95] I regard this period of response to the research analysis as amounting to the formative stage and that a positive attempt was made by the respondent to engage the applicant in consultation. In correspondence of 26 February 2004 (which evoked the response of 7 April 2004 mentioned in paragraph 90 above), Mr Williams had specifically stated that the applicant was waiting for the outcome of the Office of Law Reform's consultation on "Physical Punishment in the Home" on the issue of reform of the law in this jurisdiction on "Reasonable Chastisement". Why then was no response forthcoming once this analysis was published? There was sufficient information in the public domain with ample time for the applicant to have given intelligent consideration and an intelligent response .His views could not be taken into account by the respondents in the absence of such a response.

[96] Ms McPolin's affidavit indicates thereafter "in August 2004, I contacted Mrs Devlin about another matter and she suggested that, as Mr Williams will be returning to work in mid-September 2004, it would be good to catch up on the smacking debate. I e-mailed Mrs Devlin on 1 September 2004 and, having noted that Mr Williams would face a backlog of work, I suggested that it would be best if he contacted OLR when he was free to arrange a meeting. No such contact was ever made." It is perhaps significant that Ms McPolin's e-mail of 1 September 2004 to the applicant records:

> "Moving on to more important things, we are really glad to hear of Nigel's return and look forward to 'catching up'. Barnie (*I assume this to be Mr McNeany*) had also asked for a meeting, but he is up to his eyes with interviews and we had agreed that he would give us a call when he was free. Perhaps its best to adopt the same approach with Nigel, as we expect there is lots waiting for him. Let us know what you think."

[97] Significantly the reply from Ms Devlin states:

> "I have sent this out to my colleagues but they are all up to their eyes and I haven't received a response. Nigel will be back in mid-September so it might be good to arrange a meeting with him to discuss this. It would also be good to catch up on the smacking debate after out last meeting. Can you let me know if this okay."

Once again, sadly, it appears that the applicant did not follow up the invitation and so no further step to arrange consultation was taken by the applicant. I was unable to discern the reason for this .

[98] It is clear from the papers before me that the respondents had been prepared to consult widely. For example the Human Rights Commission, Children's Law Centre, Barnardos and Children are Unbeatable had all been the subject of consultation. I can think of no plausible reason why the respondents would have wished to have excluded such a distinguished person as the Northern Ireland Children's Commissioner. Requests for meetings were received from all of the other bodies that I have mentioned and consultation occurred. It is also clear that the respondents and the office of the applicant were meeting from time to time for other reasons for example in May 2005 and November 2005 and yet no request was made even in the margins to request a consultation given the earlier requests that had been made as listed previously. This is all the more curious because at or about this time Government Ministers were issuing press statements about this very matter eg. October 2004 a press statement was issued recording that if Parliament accepted Clause 49 of the Children Bill (now Section 58 of the 2004 Bill) the Minister would be minded to introduce a similar provision in Northern Ireland. Notwithstanding this it is common case that no request was made by the applicant at any time during the course of the numerous meetings which took place on other topics to arrange a consultation with the respondent on the issue of physical punishment of children. I find this

particularly difficult to understand given the powers that the Commissioner has under Article 7 of the Children and Young People (NI) Order 2003 .

[99] On 24 November 2005 the respondents issued a further press release that the Secretary of State had decided that Section 58 of the Children Act 2004 should apply in Northern Ireland. Once again I find it surprising that no reaction appeared to come from the applicant to pick up the request for consultation. It was Ms Higgins submission that the onus was on the Government to arrange consultation and that the applicant had been waiting for such contact to occur. I find that implausible. There must be a limit to how often the respondents are obliged to request consultation when earlier requests have not have been taken up and I consider that the absence of any response eg. to the press release of 22 November 2005 can only have served to reinforce the respondents' conclusion that consultation was not being sought.

[100] I have read with interest the stout rebuttal affidavit from Mr McNeany on behalf of the applicant. However I find it difficult to explain that the strong assertions of complaint that the applicant had not been properly consulted with which are now made did not find voice during the course of January 2006 when Mr Williams called for renewed debate to end the physical punishment of children at a time when all four UK Children's Commissioners had issued a joint statement calling on Government to remove completely any defence of reasonable punishment throughout the United Kingdom. At that time on 19 January 2006 Mr Williams had written to Lord Rooker Minister of State asking him to review his decision that the Children Act provisions would be extended in Northern Ireland .However yet again there was no request for , reference to or complaint of a lack of consultation. If the alleged failure on the part of the Government to fulfil the legitimate expectation of consultation was a live issue, I have grave difficulty understanding why that very matter did not surface at this time. The Minister replied on 30 January 2006 to Nigel Williams indicating, inter alia, that he was determined to move ahead with the decision to replicate the position in Northern Ireland. Once again this did not elicit the chorus of protest from the office of the applicant that the Coughlan principles had not been adhered to and that consultation had been denied.

[101] Mr McNeany was appointed as acting Children's Commissioner in or about May 2006. In Mr McNeany's affidavit of 4 September 2006 he indicates that on 30 June 2006 Ethney Ryan had written to Eithne Harkness the Director of the Office of Law Reform highlighting, inter alia, "the failure to consult with groups and individuals as early as possible and emphasising that no reference was made to the ongoing NICCY research on the issue". Why did this complaint take so long in coming ? It must be borne in mind that failure to consult must have been an issue fairly close to the mind of the applicant since the Commissioner had been involved in litigation involving ASBOs where a challenge to the Government's failure to consult had been the essence

of the judicial review sought a very considerable time before . I have to ask why it is that it took until 30 June 2006 for the applicant to raise the question of failure to consult when the position of the Government had certainly been tolerably clear at least in outline from as early as October 2004 and was restated in November 2005? I consider that there is some justification in Mr O'Hara's submission that the complaint was only raised once the legislation was under way .

[102] In this context Ms Higgins and the interveners relied on Section 75 of the Northern Ireland Act 1998 which bound the respondent to comply with the Department of Finance and Personnel's approved Equality Scheme. Paragraph 3.5 of the equality scheme states that consultation with groups and individuals will begin as early as possible. She argued that the respondents were committed to carrying out consultations in accordance with Equality Commission Guiding Principles. I do not believe this adds anything to the case now made insofar as the fundamental factual issue arises as to whether or not an opportunity for consultation was afforded by the respondents to the applicant which was ignored .

[103] I reiterate that I do not consider that the factual dispute which has arisen in this matter as to whether or not consultation opportunities were afforded to the applicant is an appropriate topic to be determined in this forum. However I am driven to conclude that in any event, such evidence as there is tends to point towards the applicant having failed to avail of opportunities to consult and that in those circumstances I am unpersuaded that the respondent has failed to fulfil the legitimate expectation to consult with the applicant.

[104] In passing I pause to note that an independent observer might have commented that the approach of both the applicant and the respondent to the consultation process in this case could have benefited from a rather more structured and formal approach on both their parts. Whilst I have found that the legitimate expectation that the respondents would consult with the applicant has not been breached because of the failure of the applicant to avail of opportunities afforded, nonetheless future exchanges between both parties on such a fundamentally important issue as children's rights might benefit from an immediate joint review to produce a more structured approach to the subject of consultation in the future.

Legitimate expectation that stated policy would be applied

[105] It was the applicant's case that the Office of Law Reform consultation document and the draft Children Strategy that had been consulted upon and developed with key stakeholders together with ministerial statements made it clear that it was Government policy in Northern Ireland to ensure compliance with international rights and standards and, in particular, the

UNCRC. Ms Higgins urged that this amounted to representations about Government policy which ought not to have been departed from in the absence of some good reason. In introducing Article 2 of the 2006 Order , the respondents had failed to ensure compliance with the UNCRC which lay at the heart of the Children's strategy and had breached the applicant's legitimate expectation that the policy would be adhered to in the absence of good reason before departing from it. Counsel further argued that this expectation was founded on Sections 24 and 26 of the NIA 1998 claiming that there was a duty on public bodies recognised by the administrative court "to have regard to the principles embodied in the UNCRC and the European Charter of Fundamental Rights" as stated in R (Kenny) v Leeds Magistrates' Court (2004) 1 AER 133 at (41)-(42). This requirement was underlined by virtue of the research into the effects of physical punishment of children including the review of the effects of Section 58 of the English legislation.

[106] In this context it is important to appreciate some basic concepts about the doctrine of legitimate expectation. First, it may arise where the decision-maker has made a promise or representation about treatment. Thus a policy statement as to the procedures that will be invoked before the power is exercised, or the manner in which the power will be exercised are examples (see Att-Gen (Hong Kong) v Ng Yuen Shiu (1983) 2 AC 629 and R v Secretary of State for the Home Department ex p. Khan (1984) 1 WLR 1337). The legitimate expectation can include the procedure which the decision-maker will adopt before the decision is taken as to the manner in which he will exercise his discretionary power.

[107] However the expectation must be a reasonable one in order to be termed legitimate. The purpose of the doctrine is to ensure the existence of a balance between the public and private interests at stake. It therefore does not operate as a legal entitlement in the sense of a non-defeasible legal right defined by statute or the common law to require a public authority to confer some benefit or advantage. Rather it is an expectation which is in some sense protected by the law as to how the public authority will carry out its discretionary functions when deciding whether to confer a benefit or advantage upon a person in respect of which that person does not have such a right. (See "Legitimate Expectations in English Public Law": An Analysis by Philip Sales and Karen Steyn Public Law Autumn 2004 at p. 567).

[108] By its very nature therefore it can create a tension between the rule against fettering of discretion and the doctrine of legitimate expectation. Thus where legitimate expectation arises the decision-maker will be taken to have acted to some degree with binding effect at the time the policy or assurance was given. What then of the situation where more information about the consequences of the decision or a better understanding of the views and interests of those who were consulted arises? For my own part I consider that the courts have tended to the view that decision- makers continue to

have a discretion which permits them to revise policy statements and assurances subject to the rider that the court will take steps to ensure that individuals are protected from unwarranted harm arising from such revisions. In R v North and East Devon HA, ex p. Coughlan (2000) 3 AER 850 Lord Woolf MR dealt with this matter at paragraphs 64 and 82 as follows:

> "It is axiomatic that a public authority which derives its existence and its powers from statute cannot validly act outside those powers. This is the familiar ultra vires doctrine adopted by public law from company law … Since such powers will ordinarily include anything fairly incidental to the express remit, a statutory body may lawfully adopt and follow policies … and enter into formal undertakings. But since it cannot abdicate its general remit, not only must it remain free to change policies; its undertakings are correspondingly open to modification or abandonment. The recurrent question is when and where and how the courts are to intervene to protect the public from unwarranted harm in this process. The problem can readily be seen to go wider than the exercise of statutory powers. It may equally arise in relation to the exercise of the prerogative power … and in relation to private monopoly powers…
>
> 82. The fact that the court will only give effect to a legitimate expectation within the statutory context in which it has arisen should avoid jeopardising the important principle that the Executive's policy making powers should not be trammelled by the courts…. Policy being (within the law) for the public authority alone, both it and the reasons for adopting or changing it will be accepted by the courts as part of the factual data – in other words, as not ordinarily open to judicial review. The court's task – and this is not always understood – is then limited to asking whether the application of the policy to an individual who has been led to expect something different is a just exercise of power. In many cases the authority will have already considered this and made appropriate exceptions …. or resolved to pay compensation where money alone would suffice. But where no such accommodation is made, it is for the court to say whether the subsequent frustration of the

individuals expectation is so unfair as to be a misuse of the authorities power."

[109] I have already determined that the ECrtHR does look to other international human rights instruments when interpreting its own Convention(see paragraphs 60 and 63 of this judgment). I consider the UNCRC to be an important consideration in this context. Even if an international treaty such as this has not been incorporated into domestic law, our domestic legislation should be construed so far as possible so as to comply with the international obligations which we have undertaken when two interpretations are possible. Where children are involved I consider the interpretation chosen should be that which better complies with the commitment to the welfare of children which this country has made by ratifying the United Nations Conventions on the Rights of the Child .See Smith v Secretary of State for Work and Pensions & Another (2006) UKL 35 Baroness Hale of Richmond at para. 78 and Uner v Netherlands (2006) 3 FCR 340 at para. 9.

[110] However it remains the fact that that internationally agreed statements of good practice such as the UNCRC are not contained within our domestic law and whilst it "should colour the courts' approach" (see Procurator Fiscal v Watson; K v Lord Advocate (2002) 4 AER at para. 23) they can do no more than that. To take such matters into account does not mean that they become binding. The fundamental principle still remains that treaties do not affect domestic law unless incorporated into it by some legislative act. I am satisfied therefore that the respondents are not bound to follow a policy to implement the UNCRC although it should be taken account of as an important international instrument.

[111] I find no factual basis to sustain Ms Higgins' argument that the OLR consultation document or the draft Children's Strategy or any ministerial statement did define a policy to which the Government was committed. By its very nature a consultation paper cannot define policy. The purpose is to invite response without a predetermined outcome. Similarly the analysis of the responses to the consultation paper do not in view amount to any commitment on the part of the Government that the UNCRC will be implemented. The consultation paper itself, published in September 2001, is punctuated with phrases such as "choices for reform of family law" and "options." Its specifically requests consultees, inter alia, to comment on which option for reform of the defence of reasonable chastisement (removing or limiting the defence) is thought to represent the best way forward. The analysis of responses to the consultation paper amounted to simply that – an analysis of the responses. I fail to see how it committed the Government to any policy including the UNCRC .Similarly no minister could irrevocably commit a government to any policy in advance of this consultation process without rendering it a farce. Policy is self evidently subject to change,

alteration or even abandonment in light of further information, consideration or advice .

[112] Careful perusal of the UNCRC itself has to be made to ensure that the instrument itself amounts to the prohibition against corporal punishment that Ms Higgins asserted. I consider that a plausible argument can be made out to sustain the words of McLachlin CJ in the Canadian Supreme Court in the Canadian Foundation case at paragraph 33 where she said:

> "Neither the Convention of the Rights of the Child nor the international covenant on civil and political rights explicitly require State parties to ban all corporal punishment of children. In the process of monitoring compliance with the international covenant on civil and political rights, however, the Human Rights Committee of the United Nations has expressed the view that corporal punishment of children in schools engages Article 7's prohibition of degrading treatment or punishment. … The Committee has not expressed a similar opinion regarding parental use of mild corporal punishment."

[113] That case of course was reported in 2004 and since then the UN Committee on the Rights of the Child has criticised the continued existence of the parental right of chastisement and recommended its abolition . The fact of the matter is that Article 19(1) of the UNCRC required States parties to "take all *appropriate* legislative measures to protect the child from all forms of physical or mental violence". The use of the adjective "appropriate" in my view does provide plausible justification McLachlin CJ's interpretation. It is the Committee on the Rights of the Child which has arguably taken the matter a stage further in recent times by recommending the abolition of all corporal punishment for children. Even had the Government committed itself to fully implementing the UNCRC, which I do not believe it has done, it has not committed itself to accepting the interpretation on Article 19(1) placed on it by that Committee.

[114] Finally, I consider that there is some measure of strength in Mr O'Hara's submission that if the applicant had embraced a genuine legitimate expectation that Government policy was committed to full implementation of the UNCRC as interpreted by the UN Committee on the Rights of the Child, this would have surfaced in the exchanges with the Office of Law Reform. Hence for example it is a curious omission that in the letter of 30 June 2006 addressed by Ms Ryan the legal advisor of the applicant to the OLR, setting out the objections of NICCY to the proposals to "imminently introduce Article 2 of the draft Law Reform (Miscellaneous) Provisions (Northern Ireland) Order 2006", there is no mention of legitimate expectation based on

the assertions now put forward by Ms Higgins on the applicant's behalf. Had the applicant laboured under the belief that the government was committed to such a policy, one might have expected a chorus of protest throughout 2006 from the applicant along these lines. I therefore am not persuaded that the applicant held what amounted in law to a genuine expectation that the respondents were committed to such a policy .

[115] I have come to the conclusion therefore that there is no basis to the assertion that the applicant had a legitimate expectation that there was any Government policy in Northern Ireland to ensure compliance with the UNCRC.

Failing to take proper account of relevant factors and Wednesbury unreasonableness.

[116] Relying on the principle that decision makers must take proper account of all relevant factors to avoid a Wednesbury finding of unreasonableness as set out in Re Brenda Downes' (2006) NICA 24 and Re Friends of the Earth's Application NI (2006) 48, Ms Higgins submitted that the respondents had failed to give any or appropriate weight or consideration to a number of factors which, had they been properly taken into account, would have resulted in Article 2 not being introduced. Under a separate heading, but which can be conveniently dealt with by me in this aspect of a consideration of the "Wednesbury" principle, Ms Higgins urged that the court should conclude that the decisions to replicate S. 58 of the English legislation in Northern Ireland were irrational and unreasonable.

[117] Counsel had set out the various factors referred to above at paragraph 4(6) of her Order 53 Rule3(2) statement. I have already made reference to a number of these in the course of the other headings but they included:

The best interests of the child pursuant to Article 3 of the 1995 Order, the research available on the impact of physical punishment on children, the State's human rights obligations under e.g. the Convention, the UNCRC and Article 17 of the European Social Charter together with the International, Parliamentary and Children's Commissioners recommendations that corporal punishment of children by parents should be prohibited. I also considered under this heading the material drawn to my attention by the interveners . In Ms Higgins' submission, the Secretary of State and/or the Minister had acted unreasonably by denying children and young people equal protection from assault under the criminal law, failing to limit circumstances of reasonable punishment, failing to consider the research available and to delay introduction of the legislation until the relevant statistical data contained in the applicant's 2006 research had been completed and misunderstanding of the decisions of the ECtHR in A v UK and Others.

[118] Whilst I have considered each of these various matters in detail , I can set out my conclusions in short compass as follows:

[119] I am satisfied that that respondents carried out an extensive consultation process which I have outlined in extenso in paragraph 43 of this judgment and which evidenced awareness of the material mentioned in paragraph 117 . This was followed by an analysis of the responses in June 2004 as outlined earlier in this judgment where 90% of the people who responded said that the defence of reasonable chastisement should be limited. Whilst Ms Higgins attacked this response on the basis that it was flawed as a result of prepared responses by interested parties, it is a factor which the respondents are entitled to take into account. The Government was also well aware of the joint statement of the four Commissioners opposing this implementation. Informed responses had been obtained from meetings with groups such as the Human Rights Commission, Children are Unbeatable and other groups who were clearly opposed to the legislation.

[120] Despite the number of international treaties upon which the applicant relies the fact of the matter is that there has never been a judgment in the ECrtHR which challenged legislation similar to that which in now impugned or which has found that such legislation is contrary to the Convention. I do not accept that there is evidence that the respondents have been dismissive of the UNCRC or the views of the Committee commenting thereon or any of the other instrumental instruments drawn to my attention. Informed departure is not the same as crude dismissal. The fact of the matter is that the respondents are entitled to argue that the preferred approach leading to implementation of Article 2 of the 2006 legislation was not inconsistent with the general approach in some other countries in Europe. A common stance has not been adopted or implemented in Europe outlawing all corporal punishment of children despite all the international instruments upon which Ms Higgins relies . They necessarily carry weight but they do not have legal standing within domestic law. The consultation paper published by the OLR clearly indicates that the UNCRC and other international obligations were known, considered and taken into account but they cannot dictate the eventual outcome of the process. Otherwise the consultation process would be redundant. I do not consider it Wednesbury unreasonable for the respondents to have adopted the approach that Article 2 reflects.

[121] There is evidence of the respondents' commitment to positive parenting for example in the DHSS PS's family and parenting strategy which illustrates the commitment to ongoing work with parents to equip them with the skills needed to discipline children without smacking and to change attitudes in society generally. Far from being inconsistent with the contents of Article 2 this chimes with the careful balancing process which has produced the compromise of the impugned article and on which I am satisfied the respondents have embarked in this complex area .

[122] The OLR consultation paper illustrates that the respondents were aware of developing research. However at some stage the respondents must take a decision on the legislation proposed and they cannot be expected to wait indefinitely for further and better research such as that carried out by the applicant (which I understand has not yet been completed).The weight of the research does not render it Wednesbury unreasonable to hold the view that the danger of criminalising parents and the unsuitability of creating a tendency to resort to the criminal justice system for minor physical reprimands is potentially detrimental to parent child relationships.

[123] Ms Higgins drew upon the contents of Article 3 of the Children Order (Northern Ireland) 1995 to found her argument that laws affecting children should be based on the fundamental principle that the interests of the child are paramount and that this principle had been ignored in introducing Art 2 of the 2006 legislation. The "best interests of the child" is an established legal principle in international and domestic law. The United Kingdom is a party to international conventions that treat "the best interests of the child" as a legal principle including the United Convention on the Rights of the Child. I am not persuaded that the paramount interest of children has been ignored in this process either unreasonably or otherwise. The obligation under the Children Order to ensure the paramountcy of the interests of children prevails in courts dealing with the upbringing of children. The current legislation deals with legislation about the criminal law and in any event strictly confines the severity of corporal punishment which a parent may lawfully give to a child. Punishment of a child which causes actual bodily harm no longer can be justified and any punishment falling short of that will amount to a criminal offence without a defence unless it amounts to reasonable chastisement. Such an approach cannot be said to ignore the paramount interests of children and does not amount to Wednesbury unreasonableness.

[124] I am mindful that Ms Higgins' argument was not merely that corporal punishment should be banned completely. She did advance an alternative case that certain physical punishment of children such as that involving blows to the head, shaking of children, use of an implement, restriction to those over two years of age should have been introduced into the legislation in a manner similar to that enacted in Scotland. I am similarly unpersuaded that it was Wednesbury unreasonable to have adopted the reasonable chastisement approach .It is plausible to argue that in outlawing certain specified acts, by implication other equally unacceptable practices might be deemed to be included within the defence. I consider therefore that it is not unreasonable to conclude that the preferable way to approach the matter is by use of a general phrase such as "reasonable chastisement" as the only basis for a defence to assault in the wake of the decision in A v UK. I do not consider this betrays a misunderstanding of this decision but rather is one

rational way of addressing the concerns arising therefrom and furthering the protection of children by materially confining the circumstances in which physical punishment may occur.

[125] I have concluded therefore that there is no basis for the proposition that the respondents have failed to take into account relevant matters or have acted in a Wednesday unreasonable or irrational manner in this instance.

Devolution

[126] In light of the findings that I have made in this matter, the devolution issue under Schedule 10 of the Northern Ireland Act 1998 does not arise. For the reasons that will be clear from my earlier determinations, I am satisfied that the Secretary of State and the Minister have not acted illegally or without power to introduce, make confirm , approve or do any other act to introduce into law Article 2 of the 2006 Order. I have found that Article 2 of the 2006 Order is not incompatible with Articles 3,8 and 14 of the European Convention and accordingly I find no breach of Sections 6 or 24 of the Northern Ireland Act 1998 whereby a Minister or Northern Ireland Department has no power to make, confirm or approve any subordinate legislation or to do any act so far as the legislation or act is incompatible with any of the Convention rights.

[127] Accordingly I dismiss the applicants case. I shall invite counsel to address me on the issue of costs.