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IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

FAMILY DIVISION

OFFICE OF CARE AND PROTECTION

IN THE MATTER OF THE CHILDREN (NORTHERN IRELAND) ORDER 1995

_____

Between:

SV (A MINOR)
FV (A MINOR)
GV (A MINOR)

Applicants

and

PV

First Respondent

and

A HEALTH AND SOCIAL CARE TRUST

Second Respondent

and

THE DEPARTMENT OF FINANCE

Notice Party

And Between:

A HEALTH AND SOCIAL CARE TRUST

Applicant

and

PV

First Respondent

and

SV, FV & GV (MINORS) ACTING BY THE OFFICIAL SOLICITOR AS GUARDIAN AD LITEM

Second Respondents

_____

Fiona Doherty QC and Niamh McCartney (instructed by McCoubrey Hinds)
for the Applicants
Noelle McGrenera QC and Kathy Downey (instructed by McIvor Farrell)
for the first Respondent
Claire McKenzie (instructed by the Directorate of Legal Services)
for the second Respondent
Neasa Murnaghan QC and Nessa Fee (instructed by the Departmental Solicitor's Office)
for the Notice Party

HUMPHREYS J

This judgment has been anonymised to protect the identity of the applicants. I have used the ciphers SV, FV and GV for the names of the applicants. These are not their initials. Nothing can be published that will identify the applicants.

Introduction

[1] There are three separate applications before the court, one on behalf of each minor applicant, to have their father's parental responsibility terminated. These applications have been brought by the minors in their own names which is permissible under rule 6.3(1)(b) of the Family Proceedings Rules (Northern Ireland) 1996 where a solicitor considers that the minor is competent to give instructions.

[2] The second respondent Trust has also applied for declaratory relief, seeking an order that it is not obliged to provide the first respondent with any information or documentation in respect of the applicants and/or to involve him in any decision making process with regard to the children.

[3] There are, in broad terms, three questions for the court's determination:

(i) Are the existing statutory provisions in relation to the termination of parental responsibility compatible with the ECHR?

(ii) If not, should the court make an order terminating the father's parental responsibility?

(iii) In either event, should the court grant relief to the Trust under its inherent jurisdiction?

[4] Resolution of these issues has required navigation through an evolving area of law and its application to the difficult circumstances in which this family finds itself. I have derived very considerable assistance from the submissions of counsel, both oral and in writing, and am grateful to all the legal teams for the careful and sensitive manner in which this case has been handled.

Background

[5] In February 2014 proceedings were issued under Article 50 of the Children (Northern Ireland) Order 1995 ('the 1995 Order') seeking a care order in respect of the three applicant children and their half siblings. Tragically, the applicants' mother passed away in March 2014 and in September of that year full care orders were made.

[6] In October 2015 the first respondent, the applicants' father, was convicted of the rape and indecent assault of his stepdaughters (the applicants' half sisters) and was sentenced to a period of 14 years' imprisonment. Leave to appeal these convictions to the Court of Appeal was refused. He was released from custody in June 2021 subject to licence and to a lifelong Sexual Offences Prevention Order.

[7] In January 2021 the Trust made an application for a secure accommodation order in respect of the first applicant. This caused him a great deal of distress since his father was made a party to this application by virtue of his parental responsibility.

[8] Each of the applicants has made it clear, in unequivocal terms, that they want nothing to do with their father. There are allegations of physical, emotional and sexual abuse against him. In the course of these proceedings, I have been referred to a number of reports prepared by social workers and by the guardian ad litem which detail the significant harm these applicants have sustained as a result of the actions of their father. The details of these matters do not need to be set out for the purposes of this judgment nor do the allegations require to be adjudicated upon.

[9] The removal of their father's parental responsibility would be of significant import to the applicants as they seek to move on from the trauma of their childhood. The applicants are competent to bring these applications and they express their views in an articulate and thoughtful fashion.

Parental Responsibility

[10] John Eekelaar described parental responsibility as "*the pivotal conception of the Act*"[1], referring to the Children Act 1989 ("the 1989 Act") upon which the 1995 Order is closely modelled. He noted that the preceding decade had seen a shift from discussion of parental rights to responsibilities to be exercised for the benefit of the child. The other aspect of responsibility entails a move towards parental autonomy and away from state control.

[11] In enacting the 1989 Act (and the 1995 Order), the legislature chose to allocate parental responsibility to mothers and married fathers, and to define circumstances in which it may be acquired by unmarried fathers.

[1] Journal of Social Welfare and Family Law (1991) Vol 13 issue 1

[12] Article 5 of the 1995 Order provides:

> "(1) Where a child's father and mother were married to, or civil partners of, each other at the time of his birth, they shall each have parental responsibility for the child.
>
> (1A) Where a child—
>
> (a) has a parent by virtue of section 42 of the Human Fertilisation and Embryology Act 2008; or
>
> (b) has a parent by virtue of section 43 of that Act and is a person to whom Article 155(3) applies,
>
> the child's mother and the other parent shall each have parental responsibility for the child.
>
> (2) Where a child's father and mother were not married to, or civil partners of, each other at the time of his birth—
>
> (a) the mother shall have parental responsibility for the child;
>
> (b) the father shall have parental responsibility for the child if he has acquired it (and has not ceased to have it) in accordance with the provisions of this Order.
>
> (2A) Where a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 and is not a person to whom Article 155(3) applies—
>
> (a) the mother shall have parental responsibility for the child;
>
> (b) the other parent shall have parental responsibility for the child if she has acquired it (and has not ceased to have it) in accordance with the provisions of this Order.
>
> (3) The rule of law that a father is the natural guardian of his legitimate child is abolished.

(4) More than one person may have parental responsibility for the same child at the same time.

(5) A person who has parental responsibility for a child at any time shall not cease to have that responsibility solely because some other person subsequently acquires parental responsibility for the child.

(6) Where more than one person has parental responsibility for a child, each of them may act alone and without the other (or others) in meeting that responsibility; but nothing in this Part shall be taken to affect the operation of any statutory provision which requires the consent of more than one person in a matter affecting the child.

(7) The fact that a person has parental responsibility for a child shall not entitle him to act in any way which would be incompatible with any order made with respect to the child under this Order.

(8) A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another but may arrange for some or all of it to be met by one or more persons acting on his behalf.

(9) The person with whom any such arrangement is made may himself be a person who already has parental responsibility for the child concerned.

(10) The making of any such arrangement shall not affect any liability of the person making it which may arise from any failure to meet any part of his parental responsibility for the child concerned."

[13] Article 6 of the 1995 Order defines 'parental responsibility' as meaning:

> "All the rights, duties, powers and responsibilities and authority which by law a parent of a child has in relation to the child and his property."

[14] The circumstances in which parental responsibility can be acquired are set out in Article 7:

"(1) Where a child's father and mother were not married to, or civil partners of, each other at the time of his birth, the father shall acquire parental responsibility for the child if—

(a) he becomes registered as the child's father;

(b) he and the child's mother make an agreement providing for him to have parental responsibility for the child; or

(c) the court, on his application, orders that he shall have parental responsibility for the child.

(1ZA) Where a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 and is not a person to whom Article 155(3) applies, that parent shall acquire parental responsibility for the child if—

(a) she becomes registered as a parent of the child;

(b) she and the child's mother make an agreement providing for her to have parental responsibility for the child; or

(c) the court, on her application, orders that she shall have parental responsibility for the child.

(1ZB) An agreement under paragraph (1)(b), (1ZA)(b) or (1A)(b) is known as a `parental responsibility agreement.'

(3A) A person who has acquired parental responsibility under paragraph (1), (1ZA) or (1A) shall cease to have that responsibility if the court so orders.

(4) The court may make an order under paragraph (3A) on the application—

(a) of any person who has parental responsibility for the child;

or

(b) with leave of the court, of the child himself,

> subject, in the case of parental responsibility acquired by a parent of the child under paragraph (1)(c) or (1ZA)(c), to Article 12(4) (residence orders and parental responsibility).
>
> (5) The court may only grant leave under paragraph (4)(b) if it is satisfied that the child has sufficient understanding to make the proposed application."

[15] Parental responsibility is therefore automatically conferred upon mothers, and on fathers in circumstances where they were married to, or in a civil partnership with, the mother at the time of the birth.

[16] Parental responsibility may be acquired by a father who was not married to or in a civil partnership with the mother at the time of the birth when:

(i) He becomes registered as the child's father; or

(ii) He enters into a parental responsibility agreement with the mother; or

(iii) A court orders that he has parental responsibility.

[17] A court can bring parental responsibility to an end if, and only if, it has been acquired pursuant to Article 7. No such order can be made in relation to a parent upon whom parental responsibility has been automatically conferred, including a mother and a father married to, or in a civil partnership with, the mother at the time of the birth. Such persons cannot lose parental responsibility, even voluntarily, except where an order is made pursuant to the Adoption (Northern Ireland) Order 1987.

[18] These provisions are themselves subject to the important and long-standing laws in relation to legitimacy. Article 155(2)(a) of the 1995 Order provides that:

> "References to a person whose father and mother were married to, or civil partners of, each other at the time of his birth include … references to any person to whom paragraph (3) applies."

[19] By Article 155(3) this applies to any person who:

> "(a) is treated as legitimate by virtue of section 1 or 2 of the Legitimacy Act (Northern Ireland) 1961;
>
> (b) is a legitimated person within the meaning of Article 32 of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989;

(ba) has a parent by virtue of section 42 of the Human Fertilisation and Embryology Act 2008 (which relates to treatment provided to a woman who is at the time of treatment a party to a civil partnership or, in certain circumstances, a void civil partnership);

(bb) has a parent by virtue of section 43 of that Act (which relates to treatment provided to woman who agrees that second woman to be parent) who—

(i) is the civil partner of the child's mother at the time of the child's birth, or

(ii) was the civil partner of the child's mother at any time during the period beginning with the time mentioned in section 43(b) of that Act and ending with the child's birth;

(c) is an adopted child within the meaning of Part V of the Adoption Order; or

(d) is otherwise treated in law as legitimate."

[20] Section 1 of the Legitimacy Act (Northern Ireland) 1961 itself references section 1 of the Legitimacy Act (Northern Ireland) 1928 which states:

> "Subject to the provisions of this section, where the mother and father of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in Northern Ireland, render that person, if living, legitimate from the commencement of this Act, or from the date of the marriage, whichever last happens."

[21] Thus, a father who subsequently marries the mother of his child automatically has parental responsibility conferred upon him and therefore no application can be brought under Article 7(3A) to have that father's parental responsibility terminated.

[22] In common with all applications to court under the 1995 Order, the welfare of the child must be the paramount consideration pursuant to Article 3(1). Thus, where

an application is made to terminate parental responsibility, the court must apply the so-called 'welfare check list' set out in Article 3(3).

[23] Where a care order is made under Article 50 of the 1995 Order, the designated Trust will acquire parental responsibility by virtue of Article 52(3)(a). In such circumstances, the parental responsibility enjoyed by individuals prior to the making of the care order persists albeit the Trust has the power, subject to certain limitations to:

> "…determine the extent to which a parent or guardian of the child may meet his parental responsibility for the child." [Article 52(3)(b)]

[24] Article 53 of the 1995 Order requires a Trust, where a care order is in place, to promote and allow contact with the child's parents (whether or not they have parental responsibility) whilst Article 26 places a Trust under an obligation to consult with, and give due consideration to the wishes and feelings of a child and its parents, before making any decision relating to the child.

[25] The court's jurisdiction to make Article 8 orders, including prohibited steps and specific issue orders, cannot be exercised whilst the child is in the care of a Trust.

The Human Rights Act 1998

[26] A Notice of Incompatibility was served pursuant to section 5(1) of the Human Rights Act 1998 ('HRA') and Order 121 of the Rules of the Court of Judicature (Northern Ireland) 1980, asserting that the provisions of the 1995 Order were incompatible with the applicants' rights pursuant to articles 6, 8 & 14 of ECHR and accordingly the Department of Finance was joined to these proceedings as a Notice Party.

[27] The 1995 Order represents 'subordinate legislation' within the meaning of section 21(1) of the HRA since it is an Order in Council made otherwise than in exercise of the Royal Prerogative or under section 38(1)(a) of the Northern Ireland Constitution Act 1973 and which does not itself amend primary legislation.

[28] Section 3 of HRA provides:

> "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

[29] Section 4 permits a court to make a declaration of incompatibility in respect of primary legislation or with regard to subordinate legislation where it is made pursuant to a power conferred by primary legislation which itself prevents the removal of the incompatibility. There is no such limitation in the instant case and

therefore if the court were to determine that some part of the 1995 Order is incompatible with Convention rights, a declaration of incompatibility is not an available remedy – see *O'Donnell v Department for Communities* [2020] NICA 36, at para [79].

[30] As a result, the applicants rely on section 6 HRA which states:

> "(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.
>
> (2) Subsection (1) does not apply to an act if—
>
> (a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or
>
> (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions.
>
> (3) In this section `public authority includes -
>
> (a) a court or tribunal"

[31] The applicants say, in accordance with *O'Donnell* [supra] and *Re Northern Ireland Commissioner for Children and Young People's Application* [2009] NICA 10, that the courts must interpret subordinate legislation compatibly with Convention rights and disregard the statutory provisions if to enforce them would infringe a Convention right.

The Convention Rights

[32] Article 6(1) ECHR provides:

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

[33] Parental responsibility clearly falls within the definition of a civil right and there is a dispute about its termination. The applicants say that their article 6 rights have been interfered with as the state has restricted their right of access to the court to have this dispute determined. The statutory right of children to apply to have the

parental responsibility of an unmarried father terminated does not extend to that of a married father.

[34] In *Mizzi v Malta* [2008] EHRR 27 the Strasbourg court held that the article 6 right must pertain to a dispute which:

> "may relate not only to the actual existence of a right but also to its scope and the manner of its exercise."

[35] Article 8 ECHR states:

> "Everyone has the right to respect for his private and family life …"

[36] It is well-established that the removal of parental responsibility engages the parent's article 8 rights. In *Strand Lobben v Norway* (2020) 70 EHRR 14 the Grand Chamber held:

> "… the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life, and domestic measures hindering such enjoyment amount to an interference with the right protected by this provision." [para 202]

[37] The corollary of this must be that the right to seek termination of the legal relationship of parental responsibility engages the article 8 rights of a child.

[38] The question then for determination is whether the lack of any mechanism for the removal of parental responsibility in these circumstances strikes the correct balance between the private and public interests in play.

[39] Article 14 of ECHR is the prohibition on discrimination which enshrines 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"

[40] In *Re DA and DS* [2019] UKSC 21, Lady Hale set out a four stage test to be followed when assessing compatibility under article 14:

(i) Does the subject matter of the complaint fall under one of the substantive Convention rights?

(ii) Does the ground upon which the complainants have been treated differently from others constitute a 'status'?

(iii) Have they been treated differently from other people not sharing that status?

(iv) Does the difference in treatment have an objective and reasonable justification? [para 136]

[41] It was not in dispute and it is evident that the applicants' article 6 and article 8 rights are engaged and they have been treated differently from children who were born to unmarried fathers in that they cannot make an application to the court under Article 7(3A) of the 1995 Order to terminate their father's parental responsibility.

[42] In *Fabris v France* [2013] 57 EHRR 19, a case concerning succession rights as between legitimate and illegitimate children, the court found that the only reason for differential treatment was that the applicant was born outside marriage and:

> "... very weighty reasons have to be advanced before a distinction on grounds of birth outside marriage can be regarded as compatible with the Convention." [para 59]

[43] These applicants contend that the same principle must apply, mutatis mutandis, to differential treatment accorded to those born within marriage. 'Birth' is a status given particular recognition by article 14. The key question will therefore be whether the difference in treatment has an objective and reasonable justification.

The Department's Evidence

[44] The Department of Finance, as notice party, submitted an affidavit from Mr Michael Foster, the Head of the Civil Law Reform unit. This Department has responsibility for policy and legislation in the field of children's law.

[45] In his evidence, he notes that the legislative position in Scotland is quite different from the rest of the United Kingdom. Under section 11 of the Children (Scotland) Act 1995, no distinction is made between mothers, married fathers and unmarried fathers in relation to court orders removing parental responsibility.

[46] Mr Foster examines some of the legislative amendments made to the 1995 Order since its enactment which have encompassed changes to the nature of familial relationships. The Human Fertilisation and Embryology Act 2008 extended the law on parental responsibility to same sex female couples. A second female parent either married to or in a civil partnership with the child's mother has parental responsibility automatically conferred; an unmarried second female parent may acquire parental responsibility in like manner to an unmarried father. The latter may be removed under Article 7(3A) of the 1995 Order; the former may not.

[47] The Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 placed fathers in an opposite-sex civil partnership on like footing with married fathers.

[48] The Family Law (Northern Ireland) Act 2001 introduced the right of an unmarried father to acquire parental responsibility by becoming registered as the father. This had been preceded by a public consultation the subject of which was the automatic acquisition of parental responsibility by unmarried fathers.

[49] This same issue was revisited in a public consultation in October 2014 but this did not result in any legislative amendment.

[50] Neither of these consultation documents directly addressed the issue of the removal of parental responsibility. The debate was limited to the question of acquisition.

[51] Mr Foster advances the case that there are powers under the 1995 Order which may achieve the same or similar ends to a removal of parental responsibility. He particularly references the court's powers under Article 8 of the 1995 Order, albeit accepting that these cannot be exercised when a care order is in place. In such a case, he says, the Trust can make a determination under Article 52(3) in relation to the extent to which a parent may meet his parental responsibility.

[52] The Department also points to the availability of relief on the application of the Trust pursuant to the inherent jurisdiction of the court.

[53] Mr Foster expresses the "objective and reasonable justification for the difference in treatment" as follows:

> "… there must be some test to protect children and mothers from unmeritorious fathers and the test is marriage and granting parental responsibility to unmarried fathers who jointly register the birth of their children with the mother, strikes a fair balance … The underlying rationale for the difference in acquisition of parental responsibility between married and unmarried fathers, is the desire to protect women who are victims of coercive relationships or whose children are conceived in transient or abusive circumstances and is in part due to the wide spectrum of unmarried fathers."

[54] This evidence speaks only to the question of the difference in treatment in relation to the acquisition of parental responsibility. It says nothing about the issue of removal.

Smallwood v United Kingdom

[55] Mr Smallwood was an unmarried father of two children who had acquired parental responsibility. Following a series of contentious court hearings, his parental responsibility was rescinded under the English equivalent of Article 7(3A) on the grounds that he was intending to use it for disruptive and negative purposes. This decision was upheld by the Court of Appeal and leave having been refused to go to the House of Lords, the applicant complained to the court in Strasbourg.

[56] One of the arguments advanced was that the applicant was discriminated against because the parental responsibility of married fathers could not be revoked. In an admissibility decision – *Smallwood v United Kingdom* [1999] 27 EHRR CD155 - the Commission found that the difference in treatment between married and unmarried fathers had an objective and reasonable justification. The reasons proffered for this were:

(i) The relationship between natural fathers and their children varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family based unit; and

(ii) The Law Commission had commented in 1986 that if courts did not have the power to revoke parental responsibility they may be reluctant to make orders in the first place and mothers may be more likely to oppose them.

[57] It must be observed that some of this reasoning is less than compelling, even allowing for the passage of time since the decision was handed down. Judicial notice can be taken of the fact that the relationship between married fathers and their children can vary greatly. This case represents one of many examples of an almost non-existent relationship between a married father and his family. The observation at (ii) may be true but this speaks only to the acquisition of parental responsibility, not the differential treatment in relation to revocation.

[58] The applicants in this case also emphasise that the *Smallwood* case was brought by a father whose conduct had been the subject of considerable expert and judicial criticism, and the ECHR issues were viewed through that prism. This case concerns a complaint that the rights of children to seek the termination of parental responsibility are interfered with in circumstances where the welfare of the children must be the courts' paramount consideration.

The Domestic Caselaw

[59] Cases in which orders have been made revoking parental responsibility are few and far between. In *Re D* [2013] EWHC 854 (Fam) & [2014] EWCA Civ 315, the Court of Appeal in England & Wales upheld an order removing an unmarried

father's parental responsibility in circumstances where he had been convicted of sexually abusing his child's half siblings.

[60] At first instance, the father had argued that the differential treatment between him and a hypothetical married father was disproportionate and the statutory provisions in relation to removal of parental responsibility were incompatible with articles 8 and 14 ECHR. Baker J held:

> "I am wholly unpersuaded that the decision in Smallwood is no longer good law. On the contrary, it seems to me that its conclusions remain firmly in line with the current legal and social context of unmarried fathers. Accordingly, I reject Miss Townshend's argument that section 4(2A) is incompatible with articles 8 and 14 of the Convention"

[61] Leave to appeal on these grounds was refused and Ryder LJ commented:

> "It is well established that the provisions of the CA 1989 are compliant with the Convention and that the Act was framed so as to take account of the Convention: Re S; Re W [2002] 1 FLR 815 at [109] and Re S-B (Children) [2010] 1 FLR 1161 at [6]. Smallwood v UK post dated the commencement of the HRA 1998 and accordingly to the extent that differences exist in the statutory treatment of unmarried and married fathers, that difference should be construed as being justified." [para 19]

[62] Ryder LJ approved the approach whereby the principle of welfare paramountcy governed such applications.

[63] In *H v A* [2015] EWFC 58, MacDonald J considered an application to revoke the parental responsibility of a father who had married the mother subsequent to the birth of the children. By virtue of the equivalent statutory provisions to those outlined at paragraphs [18] to [20] above, there was no legislative basis for such an application.

[64] Initially, counsel sought to argue that the Act should be read so as to give the court jurisdiction to make such an order on the basis that the distinction between married and unmarried fathers was unjustified, unfair and antithetical to the interests of children.

[65] However, as outlined at para [10]:

> "Following my pressing Ms McHugh further regarding her primary submission she felt compelled, sensibly, to

concede that, in circumstances where the intention of Parliament to draw a distinction between married and unmarried fathers with respect to the revocation of parental responsibility is clear on the face of the 1989 Act, and in circumstances where the *European Court of Human Rights held in Smallwood v UK* (1999) 27 EHRR 155 that such a distinction does not constitute a violation of Art 14 of the Convention taken in conjunction with Art 8 of the Convention, that the Court could not accede to her primary submission."

[66] In this jurisdiction, there has been no prior challenge brought to the compatibility of the statutory parental responsibility provisions, whether relating to acquisition or termination. In *Re A female child aged 5 years* [2021] NIFam 36 McFarland J agreed with the principles laid down by McAlinden J in *Re DD* [2019] NIFam 17:

"(a) The concept of parental responsibility describes an adult's responsibility to secure the welfare of the subject child which is to be exercised for the benefit of the child not the adult;

(b) When the court is considering an application for termination of parental responsibility, the child's welfare will be the court's paramount consideration;

(c) The paramountcy test is overarching and no one factor that the court might consider in a welfare analysis has any hypothetical priority;

(d) There is ample case-law describing the imperative in favour of a continuing relationship between both parents and a child so that ordinarily a child's upbringing should be provided by both parents and where that is not in the child's interests by one of them with the child having the benefit of a meaningful relationship with both;

(e) Where the court has applied the concept of the paramountcy of welfare, the court will have identified the correct principle to apply. If the Court analyses welfare by reference to the welfare checklist, the court will have provided itself with an appropriate analytical framework against which to provide reasons for its decision. However, the

Court may look at other potentially relevant factors such as parenthood, commitment, attachment and motive so long as the court does not raise any one or more of these factors to the status of a competing presumption or test by which the application is determined;

(f) The court must have regard to the fact that the removal of parental responsibility or indeed the refusal to make such an order clearly involves an interference with Article 8 rights of one or more of the individuals at the heart of the case and, therefore, any such interference must be in accordance with the law, necessary and proportionate in the sense that the court must take the most proportionate route to a welfare resolution which is consistent with the best interests of the child concerned;

(g) The test by which to judge proportionality is as described by Lord Reed in *Bank Mellat* [2013] UKSC 39. The Judge has to consider:

(i) whether the objective of the measure is sufficiently important to justify the limitation of a protected right;

(ii) whether the measure is rationally connected to the objective;

(iii) whether a less intrusive measure could have been used without unacceptably compromising the achievement of the objective; and

(iv) whether, balancing the severity of the measure's effects on the rights of the persons to whom it applies against the importance of the objective, to the extent that the measure will contribute to its achievement, the former outweighs the latter."

The Approach to Incompatibility

[67] In *A v J & O* [2022] NICA 3, the Court of Appeal considered a challenge to the compatibility of sections 42 & 43 of the Human Fertilisation and Embryology Act

2008 and Article 31B of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989, which relates to applications for declaration of parentage. The case related to the rights of the biological parents and those intending to care for a child born through the use of artificial insemination.

[68] The court referred to the principles set out by the Grand Chamber in *Animal Defenders International v United Kingdom* [2013] 57 EHRR 21:

> "106. It is recalled that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases (*Ždanoka v. Latvia* [GC], no. 58278/00, §§ 112-115, ECHR 2006-IV) …
>
> 107. The necessity for a general measure has been examined by the Court in a variety of contexts such as economic and social policy (*James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98; *Mellacher and Others v. Austria*, 19 December 1989, Series A no. 169; and *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, § 123, ECHR 2003-VIII) and welfare and pensions (*Stec and Others v. the United Kingdom* [GC], no. 65731/01, ECHR 2006-VI; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, 10 May 2007; and *Carson and Others v. the United Kingdom* [GC], no. 42184/05, ECHR 2010). It has also been examined in the context of electoral laws (*Ždanoka v. Latvia* [GC], cited above); prisoner voting (*Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, ECHR 2005-IX; and *Scoppola v. Italy (no. 3)* [GC], no. 126/05, 22 May 2012); artificial insemination for prisoners (*Dickson v. the United Kingdom* [GC], no. 44362/04, §§ 79-85, ECHR 2007-V); the destruction of frozen embryos (*Evans v. the United Kingdom* [GC], no. 6339/05, ECHR 2007-I); and assisted suicide (*Pretty v. the United Kingdom*, no. 2346/02, ECHR 2002-III); as well as in the context of a prohibition on religious advertising (the above-cited case of *Murphy v. Ireland*).
>
> 108. It emerges from that case-law that, in order to determine the proportionality of a general measure, the Court must primarily assess the legislative choices underlying it *(James and Others*, § 36). The quality of the parliamentary and judicial review of the necessity of the measure is of particular importance in this respect,

> including to the operation of the relevant margin of appreciation (for example, Hatton, at § 128; Murphy, at § 73; Hirst at §§ 78-80; Evans, at § 86; and Dickson, at § 83, all cited above). It is also relevant to take into account the risk of abuse if a general measure were to be relaxed, that being a risk which is primarily for the State to assess (Pretty, § 74). A general measure has been found to be a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty (Evans, § 89), of litigation, expense and delay (James and Others, § 68 and Runkee, § 39) as well as of discrimination and arbitrariness (Murphy, at §§ 76-77 and Evans, § 89). The application of the general measure to the facts of the case remains, however, illustrative of its impact in practice and is thus material to its proportionality (see, for example, James and Others, cited above, § 36).
>
> 109. It follows that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case …
>
> 110. The central question as regards such measures is not, as the applicant suggested, whether less restrictive rules should have been adopted or, indeed, whether the State could prove that, without the prohibition, the legitimate aim would not be achieved. Rather the core issue is whether, in adopting the general measure and striking the balance it did, the legislature acted within the margin of appreciation afforded to it (*James and Others v. the United Kingdom*, § 51*; Mellacher and Others v. Austria*, § 53; and *Evans v. the United Kingdom* [GC], § 91, all cited above)."

[69] In delivering the judgment of the court, Morgan LCJ noted that the scheme of the 2008 Act recognised the commitment to family life made by those who had entered into marriage or a civil partnership. For same-sex couples wishing to parent the child, the requirement of the legislation was the use of a licensed clinic to procure the artificial insemination. The appellant complained that the lack of any mechanism within the legislation to enable her to be registered as a parent infringed her rights under articles 8 & 14 ECHR.

[70] In examining whether the requisite fair balance had been struck, the court took into account:

(i) This was an area of sensitive and conflicting moral, religious and ethical views in which states will enjoy a wide margin of appreciation;

(ii) The legislative scheme was devised following a lengthy and detailed consultation and analysis;

(iii) The scheme was the subject of parliamentary scrutiny leading to primary legislation;

(iv) The concept of an 'enduring relationship' relied upon by the appellant was capable of giving rise to considerable dispute;

(v) The availability of a joint residence order under Article 8 of the 1995 Order and the acquisition of parental responsibility under Article 7 which would give an unmarried same sex partner the associated rights, duties and powers.

[71] These factors militated strongly against any interference with the statutory scheme and supported the court's conclusion that the fair balance test had been met.

[72] In considering the article 14 challenge, the court was satisfied that the case fell within one of the substantive Convention rights, namely article 8 and that there was differential treatment on the basis of protected marital and/or birth status. However, on the issue of justification, the court concluded:

> "By virtue of Articles 7 and 8 of the 1995 Order the appellant can play a decisive role in the upbringing of the child, R, and a full part in the family life of the children. We accept that the inability to register on the birth certificate is a source of frustration and disappointment to the appellant but that does not justify setting aside this carefully constructed statutory scheme" [para 32]

[73] In a quite different context, that of non-gendered passports, the Supreme Court has recently considered the interaction and application of articles 8 and 14 in *Elan-Cane v Secretary of State* [2021] UKSC 56. In particular, the court addressed the issue of the margin of appreciation which speaks to the latitude allowed by the Strasbourg courts to member states when legislating or interpreting laws relating to human rights. A narrow margin of appreciation may apply in cases where a particularly important part of an individual's identity is at stake whilst there may be a wider margin in cases relating to competing rights, economic and social policies or where there is no consensus within member states.

[74] In relation to questions of social policy, Lord Reed emphasised that courts are expert in adjudication but not in the field of policy making. Where no consensus can

be identified amongst the member states, a wide margin of appreciation should be recognised in such an area.

[75] The appellant in *Elan-Cane* advanced an argument, based on the Northern Irish case relating to adoption by unmarried couples, *Re G* [2009] AC 173, which asserted that even if an act does not result in a violation of the Convention it can nonetheless be incompatible with Convention rights as a matter of domestic law. The majority view in *Re G* was to the effect that even where the Strasbourg court held that legislation fell within the margin of appreciation enjoyed by member states, it was nonetheless open to the domestic courts to hold that the legislation was incompatible with the Convention within the meaning of the HRA. Lord Reed stated:

> "The margin of appreciation doctrine is a principle of interpretation of the Convention, based on the need for judicial restraint on the part of the European court. By applying the doctrine, the European court sets the boundaries of compliance with the Convention rights correspondingly wide, and so allows the contracting states a degree of latitude or discretion in relation to their domestic law and practice … Accordingly, where the European court applies the margin of appreciation doctrine so as to conclude that there has been no violation of the Convention, it does so by adopting a correspondingly restrained interpretation of the relevant article of the Convention."
> [paras 77 & 78]

[76] Thus, on the court's analysis, the question as to whether a particular provision violates the Convention is actually answered by the Strasbourg court when it applies the margin of appreciation test – it does not remain open to the domestic court to decide differently. A member state may go further than required by the Convention but it is under no obligation to do so. Insofar as the Law Lords in *Re G* characterised the application of the margin of appreciation as a failure to interpret the Convention, this was emphatically rejected by the Supreme Court:

> "The margin of appreciation is itself a principle of interpretation. When the European court finds that the contracting states should be permitted a margin of appreciation, it does not cede the function of interpreting the Convention to the contracting states."

[77] This analysis is supported by previous decisions of the courts at the highest level, including by Lady Hale in *Countryside Alliance v Attorney General* [2007] UKHL 52:

> "When we can reasonably predict that Strasbourg would regard the matter as within the margin of appreciation left to the member states, it seems to me that this House should not attempt to second guess the conclusion which Parliament has reached."

[78] In cases involving the entitlement to welfare benefits and state pensions, the courts have held that the policy choice of the legislature should be respected unless it could be shown to be 'manifestly without reasonable foundation'. In *SC v Secretary of State for Work and Pensions* [2021] UKSC 26 Lord Reed explained that this phrase accurately conveys the width of the margin of appreciation in this field but he also noted:

> "…it remains the position that a low intensity of review is generally appropriate, other things being equal, in cases concerned with judgments of social and economic policy in the field of welfare benefits and pensions, so that the judgment of the executive or legislature will generally be respected unless it is manifestly without reasonable foundation. Nevertheless, the intensity of the court's scrutiny can be influenced by a wide range of factors, depending on the circumstances of the particular case, as indeed it would be if the court were applying the domestic test of reasonableness rather than the Convention test of proportionality. In particular, very weighty reasons will usually have to be shown, and the intensity of review will usually be correspondingly high, if a difference in treatment on a "suspect" ground is to be justified." [para 158]

[79] Thus the intensity of review will be sensitive to the circumstances of the case. If differential treatment on a 'suspect' ground is to be justified when a Convention right is engaged, then it may be that very weighty reasons are required.

Consideration

[80] It is one of the oddities of the different legislative systems in the United Kingdom that had these applicants been making their case in the courts of England & Wales, their only remedy would have been to seek a declaration of incompatibility under section 4 of HRA. Although the 1995 Order closely mirrors the 1989 Act, it is a different species of legislation and therefore the applicants are entitled to seek an order terminating parental responsibility and effectively rewriting the statutory provisions. Even if the applicants in England & Wales succeeded in securing a declaration, their father's parental responsibility would persist unless and until Parliament determined that the legislation should be amended, and a subsequent successful application made.

[81] This is an uncomfortable dichotomy particularly where the primary legislation in England & Wales was the product of considerable analysis, consultation and parliamentary scrutiny. When she was President of the Supreme Court, Lady Hale delivered the Scarman Lecture in 2019 marking 30 years of the Children Act. She described the ground-breaking, root and branch reform of the whole field of child care law firstly through the work of the Law Commission and then its navigation through Parliament.

[82] Given that it is an Order in Council, the 1995 Order occupied little Parliamentary time but the provisions and principles contained therein had been the subject of detailed scrutiny some years previously. This court must bear in mind the admonition of Lord Reed in *SC*:

> "Since the principle of proportionality confers on the courts a very broad discretionary power, such cases present a risk of undue interference by the courts in the sphere of political choices. That risk can only be avoided if the courts apply the principle in a manner which respects the boundaries between legality and the political process" [para 162]

[83] In light of these principles, the Department's case on compatibility resolved to the following submissions:

(i) The Strasbourg institutions have already spoken on the compatibility of these legislative provisions in *Smallwood*;

(ii) Following *Elan-Cane*, it is not open to a domestic court to take a different view on the compatibility of legislation;

(iii) In any event, when the United Kingdom courts have considered the issue in *Re D* and *H v A*, any such claim to incompatibility has been roundly rejected;

(iv) The courts should be slow to interfere with the decisions of Parliament on questions of social policy;

(v) If one has to enter into the analysis, the interference with the applicants' article 8 rights is proportionate; and

(vi) Similarly, the differential treatment on the 'suspect' article 14 ground of birth status is justified.

[84] The court fully accepts that the article 6 and 8 rights of the applicants are engaged and must therefore consider whether the interference with these rights is

proportionate, applying the *Bank Mellat* tests. The applicants say that there is a positive obligation on the State to legislate to ensure their Convention rights are upheld and that this would involve securing the right to seek termination of their father's parental responsibility. The absence of such a measure, it is said, fails to strike the requisite fair balance between public and private interests.

[85] In relation to the public interest being weighed in the balance, it is evident that the focus of attention in recent years has been on the acquisition of parental responsibility by unmarried fathers, rather than on any extension of the right to terminate parental responsibility. If Parliament had legislated for the automatic acquisition by unmarried fathers, it may well have entirely repealed the court's power to terminate parental responsibility in any situation.

[86] This illustrates the point that questions around the welfare of children are archetypally matters of social policy. This is an area which, in line with *SC*, courts should be slow to intervene. It may seem incongruous to 2022 eyes that a child cannot seek to terminate the parental responsibility of a married father, even where his behaviour has been most egregious, but that is the policy decision which Parliament has taken. The 1989 Act and, in turn, the 1995 Order have both been the subject of specific legislative amendment since their enactment on the issue of parental responsibility but the general policy favouring married fathers over unmarried fathers remains. This does cause interference with the article 8 rights of children such as these applicants in circumstances where the paramount consideration of the legislation is the welfare of children. However, the court must recognise that these provisions have previously been held to be Convention compliant, albeit in a challenge from a different perspective, and *Elan-Cane* is powerful authority for the non-intervention of domestic courts in circumstances where the Strasbourg institutions have invoked the margin of appreciation in favour of member states.

[87] Applying the proportionality test, and being cognisant of the Supreme Court's admonition, I have determined that the lack of any statutory provision permitting applications to terminate parental responsibility in these circumstances does not give rise to a situation where the interference with Convention rights outweighs the objective being pursued. In common with the legislation under consideration in *A v J &* O, the 1989 Act was the product of detailed preparation, consultation, analysis and scrutiny by the democratically elected legislature. As a matter of constitutional principle, this course is to be preferred to the judicial recasting of existing statutory provisions.

[88] In terms of the article 14 challenge, the *Re DA & DS* questions can be answered as follows:

(i) The subject matter of the complaint falls under articles 6 & 8;

(ii) The differential treatment is on the grounds of the applicants' birth status, since they were born to a married rather than an unmarried father;

(iii) They have been treated differently in that they cannot make an application to the court under Article 7(3A) unlike their hypothetical comparators;

(iv) The difference in treatment does have an objective and reasonable justification. The court is fully cognisant of the articulately expressed views of these applicants but the Strasbourg courts have recognised the validity of bright line or general rules, even these give rise to hardship in individual cases. Classically, the adoption of such rules falls within the margin of appreciation of member states. Under the existing law, if a mother behaves egregiously, there is no avenue available to remove her parental responsibility, save in the case of adoption. This is a question of social policy. Simply because the Scottish Parliament has chosen to legislate differently does not indicate that any Convention right has been breached, rather it is indicative of the sphere of choice which pertains in this field. There is, of course, a valid argument to be made that any legislation which prefers mothers and married fathers to unmarried fathers ought to be reconsidered but this court must be wary of undertaking that task of legislative amendment. I therefore find that there is an objective and reasonable justification of the differential treatment based on the demonstrated commitment to family life which is shown by parties to married relationships. The special status afforded to marriage has been recognised by the Grand Chamber in *Burden v United Kingdom* [2008] ECHR 357. Whilst many married parents have caused significant harm to their children, this does not detract from the general policy which has been adopted by the legislature.

[89] In arriving at this conclusion, I have taken into account that there are other remedies which, whilst falling short of the removal of parental responsibility, can be effective to denude the concept of much of its significance. This will be further considered in the context of the Trust application before the court.

[90] For these reasons I dismiss the applicants' applications to terminate the parental responsibility of the first respondent under Article 7(3A) of the 1995 Order and reject the claim that the provisions of the 1995 Order are incompatible with the applicants' Convention rights.

The Merits of the Application

[91] Had I determined otherwise, and held that the State was in breach of the positive obligation owed under article 8, or had discriminated against the applicants contrary to article 14, then two further questions would have arisen:

(i) What relief should the court grant?; and

(ii) If the court has jurisdiction to hear the applications, what would have been the determination on the merits?

[92] I am conscious that these issues do not fall for consideration in light of my earlier finding but, having heard full argument, I propose to examine them.

[93] In terms of relief, the court would have adopted the approach of the Court of Appeal in *O'Donnell* by disregarding the provisions of subordinate legislation which breached Convention rights. I would have read in an additional provision into Article 7 stating:

> "A father who has acquired parental responsibility under Article 5(1) shall cease to have that responsibility if, on the application of the child himself with leave of the court, the court so orders."

[94] On the basis that the court then had jurisdiction to make such an order, it would have been granted on the merits. On an application of the principles set out by McAlinden and McFarland JJ (supra), and applying the paramount consideration of the welfare of the children, an order terminating parental responsibility would have followed.

[95] This would have taken account of the welfare checklist pursuant to Article 3(3) of the 1995 Order, and, in particular the following:

(i) The clearly expressed wishes and feelings of the applicants, bearing in mind their ages and experiences;

(ii) The risk of serious harm posed to them by the first respondent;

(iii) The inability of the first respondent to meet their emotional needs as evidenced by the communications sent by him whilst in prison;

(iv) The allegations made by the applicants against their father as set out in the historical reports;

(v) The serious and significant harm caused by the first respondent to the applicants' half siblings; and

(vi) The opinions of the social workers as expressed in evidence.

[96] Recognising that the termination of parental responsibility is comparatively rare, and the engagement of the father's article 8 rights, an analysis of the evidence would have led clearly to the conclusion that the father's parental responsibility should cease. I set out some of those evidential considerations when examining the Trust's application for relief.

The Trust Application

[97] I now turn to the application on behalf of the Trust brought under the inherent jurisdiction of the court and which seeks relief in the form of a declaration that the Trust is not under an obligation to share information or documents with the first respondent, or to consult with him in relation to decision making relating to the minor children.

[98] Such an application engages Article 173 of the 1995 Order:

> "(1) The court shall not exercise its inherent jurisdiction with respect to children—
>
> (a) so as to require a child to be placed in the care, or put under the supervision, of a Board or Health and Social Care trust;
>
> (b) so as to require a child to be accommodated by or on behalf of a Board or Health and Social Care trust;
>
> (c) so as to make a child who is the subject of a care order a ward of court; or
>
> (d) for the purpose of conferring on any Board or Health and Social Care trust power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.
>
> (2) No application for any exercise of the court's inherent jurisdiction with respect to children may be made by an authority unless the authority has obtained the leave of the court.
>
> (3) The court may only grant leave if it is satisfied that—

(a) the result which the authority wishes to achieve could not be achieved through the making of any order of a kind to which paragraph (4) applies; and

(b) there is reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect to the child he is likely to suffer significant harm.

(4) This paragraph applies to any order—

(a) made otherwise than in the exercise of the court's inherent jurisdiction; and

(b) which the authority is entitled to apply for (assuming, in the case of any application which may only be made with leave, that leave is granted).

(5) In this Article "the court" means the High Court."

[99] The Trust therefore requires the leave of the court to pursue any application which relies upon the court's inherent jurisdiction. It was agreed between the parties that this matter would be treated as a 'rolled-up' hearing whereby if leave were granted, the court would proceed to consider the substance of the application.

[100] The logic of Article 173 is clear – the wardship jurisdiction of the High Court should not be used so as to circumvent the detailed provisions of the 1995 Order.

[101] Article 173(1)(d) specifically prohibits the use of the inherent jurisdiction to confer on the Trust any aspect of parental responsibility which it does not already have. In this case, the Trust has parental responsibility for the minor children by virtue of the extant care order. In such circumstances, a Trust cannot seek to invoke Article 8 in relation to prohibited steps or specific issue orders.

[102] The context for this application can be found in the statutory duty imposed on the Trust under Article 26 of the 1995 Order to ascertain and take into account the wishes and feelings of parents prior to making any decisions relating to children in its care, and also the article 8 rights of the parent which exist quite independently from the question of parental responsibility. The inherent jurisdiction application is therefore free standing and does not depend on the outcome of the application to terminate parental responsibility.

[103] In *Re C* [2005] EWHC 3390 (Fam) Coleridge J recognised the jurisdiction to make declarations of the type sought in the instant case. He held that only a very exceptional case would attract this kind of relief and leave should only be granted

where there was reasonable cause to believe the child may suffer significant harm otherwise. Whilst the parent's article 8 rights were in play, it was determined that the rights of the child overwhelmed these in the context of the abuse which she had sustained at her father's hands. The court was persuaded, on the basis of the rational and objectively sensible wishes of the child, that the father had forfeited any right to be engaged in decision making relating to her future. The declaration sought was granted, save that the father was to receive an annual report of one page in relation to the child's well-being and progress.

[104] Counsel for the father placed reliance on the decision of Hayden J in *Re O* [2015] EWCA Civ 1169 when he stated:

> "Even a parent who has behaved egregiously may nonetheless have some important contribution to make in the future. The requirement to solicit the views of a parent is not contingent upon a moral judgment of parental behaviour; it is there to promote the paramount objective of the statute as a whole, i.e. the welfare of the child. These duties are a statutory recognition of the need appropriately to fetter the corporate parent." [para 27]

[105] In *A Local Authority v M* [2020] EWHC 2741 (Fam) MacDonald J recognised the procedural aspects of the article 8 rights of parents which he held required the involvement of parents at all stages of decision making by the local authority. He stated:

> "Authorities in the Strasbourg jurisprudence put a high bar on excluding a parent with parental responsibility. In this context, where a parent has parental responsibility or a right to respect for family life under article 8, a high degree of exceptionality must be demonstrated by strong countervailing factors to justify their exclusion from participation in proceedings."

[106] Counsel for the father stated unambiguously to the court that he does not accept that he raped and assaulted his stepdaughters and asserts he was wrongfully convicted. He also made the case that, in his opinion, the children did not really want the relief being sought but that the application was driven by the Trust.

[107] I have had the opportunity to closely consider the evidence relied on by the Trust. This includes the evidence of the horrific abuse perpetrated by the father against his stepdaughters and his complete lack of acknowledgement of the serious harm he has caused.

[108] The evidence also includes various items of correspondence written by the father to his children whilst he was incarcerated. These include claims that the

family will be reunited and that he will prove his innocence to them. In the opinion of social workers, the father poses a serious risk to his children. This conclusion is coupled with the evidence from the children themselves who, in a coherent and articulate fashion, have expressed their unambiguous views that they do not wish their father to play any role in their lives.

[109] I fully accept that applications such as the one being pursued by the Trust in this case ought to be exceptional and a court must closely scrutinise any attempt by a public body to deny a parent either their statutory or article 8 rights.

[110] Having analysed all the evidence, I have come to the clear conclusion that this is indeed an exceptional case in which the circumstances are such that the declaratory relief being sought by the Trust should be granted. I say this for the following reasons:

(i) The father continues to deny the really serious harm which he has inflicted and for which he was convicted;

(ii) The father seeks to deny the veracity of the wishes of the children as clearly expressed by them;

(iii) The social worker has determined that the father presents a risk of serious harm to these children;

(iv) The content of the correspondence presented to the court;

(v) The serious, albeit unadjudicated, allegations made by these children in relation to their father;

(vi) The clearly expressed wishes of the children in relation to the father.

[111] In light of all these factors, I have determined that the article 8 rights of the children must outweigh those of the father. By his own actions and behaviour, the father has forfeited any right to be involved in the decision making for the future lives of his children.

[112] I therefore grant leave to the Trust under Article 173(2) to bring the application for relief under the inherent jurisdiction and, having considered the merits of the application, I grant the declarations sought.

[113] The question of the making of an order pursuant to Article 179(14) of the 1995 Order was raised in argument. In the circumstances, I make no order in this regard.

[114] I will hear counsel as to the form of the orders and as to any consequential relief.