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IN HIS MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND (FAMILY DIVISION)

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

Between:

SV (A MINOR)

Appellant

and

PV

First Respondent

and

A HEALTH AND SOCIAL CARE TRUST

Second Respondent

and

THE DEPARTMENT OF FINANCE

Notice Party

Between:

PV

Appellant

and

A HEALTH AND SOCIAL CARE TRUST

First Respondent

and

SV, FV and GV
(Minors acting by the Official Solicitor as (Children's Court Guardian Agency)

Second Respondents

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Fiona Doherty KC with Niamh McCartney (instructed by McCoubrey Hinds Solicitors) for the Appellant SV

Noelle McGrenera KC with Cathy Downey (instructed by McIvor Farrell Solicitors) for the Respondent and Appellant PV
Claire MacKenzie (instructed by the Directorate of Legal Services) for the Respondent Health Trust
Neasa Murnaghan KC and Nessa Fee (instructed by the Departmental Solicitor's Office) for the Ministry of Justice and Department of Justice (Notice Parties)

Before: Keegan LCJ, Treacy LJ and O'Hara J

KEEGAN LCJ (*delivering the judgment of the court*)

This judgment has been anonymised to protect the identity of those involved in this case as it is a family case. This court has utilised the cyphers SV, FV and GV for the names of the children of the family and PV for the name of the father of the family. Nothing may be published that will identify any of the participants in this case.

Introduction

[1] This case concerns the extent to which a court may impose restrictions on the parental responsibility of a married father upon application by a competent child of 17 subject to a care order. The judge at first instance, Mr Justice Humphreys ("the judge") decided that the relevant applicants who were children had no right to apply for a revocation of their father's parental responsibility under the Children (Northern Ireland) Order 1995 ("the Children Order"). One child now 17, appeals that order on the basis that the statutory impediment is incompatible with his rights pursuant to articles 6, 8 and 14 of the European Convention on Human Rights ("the ECHR").

[2] The judge did, however, accede to a parallel application brought by the relevant health and social care trust ("the Trust") by granting declaratory relief to permit the Trust not to comply with various specific statutory duties to inform the father as to the three children's progress. The father appeals that order.

[3] The nub of the case is whether the Children Order is compatible with the ECHR in that a 17 year old competent child could apply to revoke the parental responsibility of his unmarried father but not his married father.

Preliminary Issues

[4] Inevitably this court enquired into the status of the one child who wanted to pursue an appeal against a refusal to revoke parental responsibility. That child was 17 at the date of hearing. However, he is a child in care and the court was concerned about issues of representation and competence. To that end the court enlisted the

assistance of the Official Solicitor and in a report filed by Claire Marshall of 18 October 2020 she confirmed the following:

> "14. SV at 17 years old, is fast approaching adulthood. SV presented as relaxed and confident and has his own well-established views, which he was quick to share with me.
>
> 15. At 17 years of age, it was no surprise to me that SV had a good understanding of the court proceedings, evidencing this by telling me he thought the law needed to be changed. While he told me he was unaware that PV was appealing the decision in relation to the declaratory application, his response was 'I didn't know he was appealing that.'
>
> 16. I have no doubt in relation to SV's capacity as he understood everything we discussed, retained pertinent information, not just from our discussion on 3 October, but also information from the original applications, before Mr Justice Humphreys, months prior. He was able to clearly articulate his views to me, explaining his reasoning, for example telling me why he did not want Mr PV to hold parental responsibility for him as set out at paragraph 9 above.
>
> 17. It is clear that, as a result of his actions in the past, SV harbours a deeply embedded anger towards PV. SV is passionate that, because of this past history and because he has nothing to do with PV now, his parental responsibilities should be terminated, he should not have any involvement in decisions about him, nor be entitled to any information about him. SV was certain he wanted to pursue this appeal and wanted the law changed."

[5] Following from the above evidence we were satisfied that SV had the capacity to instruct his own solicitors and pursue this appeal.

[6] In addition, we asked the Attorney General of Northern Ireland, Dame Brenda King, to assist us in this case in relation to a legal issue that arose as to the status of the Children Order relative to the Human Rights Act 1998 ("the Human Rights Act"). The Attorney filed a helpful written paper in relation to the issue that we raised which was whether the Children Order was primary or secondary legislation upon considering the provisions of section 21 of the Human Rights Act.

[7] A further preliminary issue we also raised was whether there was comparative law in this area from other jurisdictions. We are grateful to counsel who compiled a paper for us in relation to this.

Factual Background

[8] As with any family case there is a long history to this one made up of many different elements. The historical bundle starts with a report of 11 February 2014 which is a report for an interim care order in relation to the three children of the family. SV was born in September 2005 and so is coming 18 this year. He has a twin-sister who was born on the same day and the third child was born in July 2006. The children also have two half-sisters who lived with the family one born in 1997 and one born in 2001.

[9] The dates are relevant in that it appears from the chronology that the PSNI first attended this home on 26 July 2006, so just after the third child was born and when SV and his sister were toddlers. There are notes of attendances throughout 2006 and 2007 by the PSNI and a reference in the chronology of significant events to 16 April 2007 when the mother requested the PSNI remove the father from the family home due to an argument over consuming alcohol. Further instability is clear with attendances at the home related to alcohol and domestic violence. It appears that both parents were calling the police at this stage in relation to alcohol abuse. Notwithstanding quite a long run-in period an initial child protection case conference was only convened on 25 June 2010. At this case conference it appears that the names of the three children were placed on the Child Protection Register under the categories of suspected emotional abuse and potential physical abuse.

[10] There followed further instability in the home. As a result, a review child protection case conference was held on 24 September 2010 and 10 March 2011. Both review meetings retained the children's names on the register. For some reason which is not entirely clear to us on 8 September 2011 a review children protection case conference removed the children's names from the Child Protection Register. Notwithstanding this change there is further instability in the home which relates to alcohol abuse and domestic violence and tragically in 2012 the mother was diagnosed with breast cancer from which she subsequently died in 2014. Another child protection case conference process is begun in May 2013 and on 1 May 2013 the children's names were again placed on the register under the category of potential emotional abuse and potential physical abuse.

[11] At this time there appears to be an escalation in matters due to an incident on 13 June 2013. An emergency referral was received in relation to an incident which took place the day before. The referral reported that the PSNI had called to the family home due to a domestic incident between the parents. It was reported that the father had headbutted the mother whilst he was intoxicated. It was reported that the children were not present except a young child who appeared towards the end of the

incident. However, it was reported that the children were likely to have heard the incident. The father was arrested and held in custody overnight. As a result of this contact was regulated between the father and the children.

[12] Unfortunately, the papers reveal that there was very little progress in terms of dealing with alcohol abuse in the home. Inevitably, the children's names were retained on the register.

[13] As a result of events, care proceedings ensued, and full care orders were made in relation to the three children on 25 September 2014. This resulted in the children being placed in care. There were various different placements provided for SV initially with his sister. However, that arrangement broke down and SV was placed in residential care where he remains. The two siblings are currently in a long-term foster placement together. The placement breakdown for SV was on 18 October 2019.

[14] The father, PV, in addition to the alcohol and domestic violence issues that were apparent throughout his time within the family was also convicted on 19 October 2015 at Downpatrick Crown Court of two counts of rape and three counts of indecent assault perpetrated on the appellant SV's two elder half-siblings. These offences are said to have occurred between 11 January 2006 and 12 January 2007 in relation to most of the offences and in relation to one indecent assault between 31 December 2006 and 1 September 2008. PV was sentenced for these offences to an immediate custodial sentence of 14 years. He was also made subject to a life-long sexual offences prevention order and ordered to sign the sex offender's register for life. He was released on licence in June 2021. PV unsuccessfully mounted an appeal against his conviction in October 2015.

[15] In addition to these convictions, the twin sister of SV and his brother made disclosures of abuse against PV on 19 November 2014. SV also attended for ABE interview regarding disclosures of abuse by his father and all children engaged at the childcare centre in relation to this. Ultimately, there was no prosecution in relation to any of these matters. This caused distress among the children of the family. The litigation continues in that in January 2016 an application by way of C1 form was brought by PV for an Article 53 contact order. At this stage SV was engaging in work with the childcare centre in respect of his father and spoke about having nightmares and bad memories. The Trust proposed no order, and the Children's Court Guardian recommended a no contact order. An order for indirect contact to be retained on file for the children was made on 11 April 2016. In early 2016 there was an application for contact by the paternal grandparents.

[16] In September 2018 a further Article 53 application was made by the paternal grandparents. In the Trust papers it is noted that there was concern about the timing of this application as PV had recently transferred to prison in England & Wales and had proposed his parents' address as a release address. It was noted that this had not been approved as his parents were not protective and had not accepted their son's

convictions. The children did not want contact beyond the indirect contact being kept on file for them. It is apparent that the father engaged with the indirect contact by sending correspondence to the Trust which, as per the court order, was to be held on file. This correspondence was prolific and was often not appropriate and so was not shared with the children.

[17] The terms of the contact order of 25 April 2016 were as follows:

(i) Father may send a card or letter once per month to incorporate occasions such as Easter, Christmas in the applicable months.

(ii) Cards, letters to be sent to social services left open so that same can be reviewed by the assigned social worker for appropriateness.

(iii) Cards, letters to be shared by the Trust and provided to the children if they request them.

[18] The ensuing correspondence from the father to the children is attached in the appeal bundle. We will not recite it all save to say it is clear in terms of non-acceptance of the abuse allegations and wishing to have a reuniting of the family. Suffice to say that the children did not wish to have the correspondence shared with them. There is an affidavit from Melanie Garvey, social worker, in relation to this. This states at paragraph 25 as follows:

> "PV continues to send letters to the Trust for his children. However, none of the children wish to receive them. The vast majority are inappropriate and would not be suitable to share with the children. They continue to demonstrate the limited insight that PV is willing to display into the horrific harm he caused his family over the course of their early lives:
>
> > 'I will prove I am not guilty, if it takes the rest of my life. I take it you know about the crap social services tried to set me up for has failed. This opens more doors to clear my name.'"

[19] The social worker also refers to a poem that was sent to the children by the father on two occasions in 2020 as follows:

> "My time here will soon come to an end as being away from you has drove me round the bend. When I am home I will work hard to put things right by giving you the truth, then all the lies, corruption and claims can disappear into the night."

[20] Paragraph 29 of the affidavit continues as follows:

> "Given how PV continues to present with no insight, the Trust hold concerns about what is motivating PV to continue to seek out contact with his children and what further harm his involvement will likely cause the children during the uncertain time in their lives and recovery from trauma. The Trust maintain their assessment that PV is a dangerous and harmful man who can only cause further damage by holding delicate information in respect of the children inclusive of him knowing where they reside and would respectfully ask the court to consider this assessment when making their judgment."

[21] The next significant event is explained in the affidavit of Bronagh McMullan who is the solicitor on behalf of SV of 2 December 2021. In this she says that within the year immediately preceding PV's release from custody her client SV's behaviour deteriorated. He came to police attention on several occasions, and she acted for him in the youth court setting and in respect of an application for a secure accommodation order brought by the Trust. This application caused SV significant distress due to the fact that PV was made a party to the proceedings. SV had also been made aware by his social worker that PV had expressed a desire to mount a contact application to the court upon his imminent release from prison, which resulted in him becoming extremely distressed and presenting with challenging behaviours to the extent that the Trust felt a secure accommodation order was necessary. The secure accommodation order was made in January 2021 but was ultimately withdrawn.

The current position

[22] It is clear from the papers that each of the children do not want anything to do with their father. This is unsurprising given the allegations of physical, emotional, and sexual abuse made against him. We have been referred to some of the reports from social workers and by the Children's Court Guardian. Suffice to say that those reports also catalogue the significant harm that all of the children have suffered 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. We note that the father denies the allegations against him. However, turning to the issue of the removal of parental responsibility , it is clear this is an issue that would on the face of it, appear to assist the children as they seek to move on from the trauma of their childhood.

The relevant statutory provisions

[23] Article 5 of the Children Order contains the core provision regarding parental responsibility for children:

> "**Parental responsibility for children**
>
> 5.—(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.
>
> …
>
> (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 not have parental responsibility for the child, unless he acquires 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.
>
> …"

[24] Article 6 defines the meaning of parental responsibility:

> 6.—(1) In this Order "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.
>
> (2) It also includes the rights, powers and duties which a guardian of the child's fortune or estate (appointed, before the commencement of Part XV (guardians), to act generally) would have had in relation to the child and his property.
>
> (3) The rights referred to in paragraph (2) include, in particular, the right of the guardian to receive or recover in his own name, for the benefit of the child, property of

whatever description and wherever situated which the child is entitled to receive or recover.

(4) The fact that a person has, or does not have, parental responsibility for a child shall not affect—

(a) any obligation which he may have in relation to the child (such as a statutory duty to maintain the child); or

(b) any rights which, in the event of the child's death, he (or any other person) may have in relation to the child's property.

(5) A person who—

(a) does not have parental responsibility for a particular child; but

(b) has care of the child,

may (subject to the provisions of this Order) do what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting the child's welfare."

[25] Article 7 deals with the circumstances where there may be Acquisition of parental responsibility:

"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, in his application, orders that he shall have parental responsibility for the child.

…

(3)(A) 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."

[26] Article 52 of the Children Order defines the effect of care orders and is relevant as follows:

"(3) While a care order is in force with respect to a child, the authority designated by the order shall—

(a) have parental responsibility for the child; and

(b) have the power (subject to paragraphs (4) to (9)) to determine the extent to which a parent or guardian of the child may meet his parental responsibility for the child.

(4) The authority shall not exercise the power in paragraph (3)(b) unless it is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare.

(5) Nothing in paragraph (3)(b) shall prevent a parent or guardian of the child who has care of him from doing what is reasonable in all the circumstances of the case for the purpose of safeguarding or promoting his welfare.

(6) While a care order is in force with respect to a child, the authority designated by the order shall not—

(a) cause the child to be brought up in any religious persuasion other than that in which he would have been brought up if the order had not been made; or

(b) have the right—

(i) to consent or refuse to consent to the making of an application with respect to the child under Article 17 of the Adoption Order;

(ii) to agree or refuse to agree to the making of an adoption order, or an order under Article 57 of that Order, with respect to the child; or

(iii) to appoint a guardian for the child.

(7) While a care order is in force with respect to a child, no person may—

(a) cause the child to be known by a new surname; or

(b) remove him from the United Kingdom,

without either the written consent of every person who has parental responsibility for the child or the leave of the court.

(8) Paragraph (7)(b) does not—

(a) prevent the removal of such a child, for a period of less than one month, by, or with the written consent of, the authority in whose care he is; or

(b) apply to arrangements for such a child to live outside Northern Ireland (which are governed by Article 33).

(9) The power in paragraph (3)(b) is subject (in addition to being subject to the provisions of this Article) to any right, duty, power, responsibility or authority which a parent or guardian of the child has in relation to the child and his property by virtue of any other statutory provision."

[27] Parental contact etc. with children in care is directed by Article 53 of the Children Order:

"53.—(1) Where a child is in the care of an authority, the authority shall (subject to the provisions of this Article) allow the child reasonable contact with—

(a) his parents;

(b) any guardian of his;

(c) where there was a residence order in force with respect to the child immediately before the care order was made, the person in whose favour the residence order was made; and

(d) where, immediately before the care order was made, a person had care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children, that person.

(2) On an application made by the authority or the child, the court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and any named person.

(3) On an application made by—

(a) any person mentioned in sub-paragraphs (a) to (d) of paragraph (1); or

(b) any person who has obtained the leave of the court to make the application,

the court may make such order as it considers appropriate with respect to the contact which is to be allowed between the child and that person.

(4) On an application made by the authority or the child, the court may make an order authorising the authority to refuse to allow contact between the child and any person who is mentioned in sub-paragraphs (a) to (d) of paragraph (1) and named in the order.

(5) When making a care order with respect to a child, or in any family proceedings in connection with a child who is in the care of an authority, the court may make an order

under this Article, even though no application for such an order has been made with respect to the child, if the court considers that the order should be made.

(6) An authority may refuse to allow the contact that would otherwise be required by virtue of paragraph (1) or an order under this Article if—

(a) the authority is satisfied that it is necessary to do so in order to safeguard or promote the child's welfare; and

(b) the refusal—

(i) is decided upon as a matter of urgency; and

(ii) does not last for more than seven days.

(7) An order under this Article may impose such conditions as the court considers appropriate.

(8) The Department may by regulations make provision as to—

(a) the steps to be taken by an authority which has exercised its powers under paragraph (6);

(b) the circumstances in which, and conditions subject to which, the terms of any order under this Article may be departed from by agreement between the authority and the person in relation to whom the order is made;

(c) notification by an authority of any variation or suspension of arrangements made (otherwise than under an order under this Article) with a view to affording any person contact with a child to whom this Article applies.

(9) The court may vary or discharge any order made under this Article on the application of the authority, the child concerned or the person named in the order.

(10) An order under this Article may be made either at the same time as the care order itself or later.

(11) Before making a care order with respect to any child the court shall—

(a) consider the arrangements which the authority has made, or proposes to make, for affording any person contact with a child to whom this Article applies; and

(b) invite the parties to the proceedings to comment on those arrangements."

[28] Turning to the use of the inherent jurisdiction in public law cases there is a limitation on use of inherent jurisdiction under Article 173 of the Children Order:

"**Restrictions on use of wardship jurisdiction**

173.—(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 Health and Social Services trust;

(b) so as to require a child to be accommodated by or on behalf of a Health and Social Services 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 Health and Social Services 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."

[29] Article 26(2) of the Children Order also states in relation to Trust obligations:

"(2) Before making any decision with respect to a child whom it is looking after, or proposing to look after, an authority shall, so far as is reasonably practicable, ascertain the wishes and feelings of—

(a) the child;

(b) his parents;

(c) any person who is not a parent of his but who has parental responsibility for him; and

(d) any other persons whose wishes and feelings the authority considers to be relevant,

regarding the matter to be decided.

(3) In making any such decision an authority shall give due consideration—

(a) having regard to his age and understanding, to such wishes and feelings of the child as the authority has been able to ascertain;

(b) to such wishes and feelings of any person mentioned in paragraph (2)(b) to (d) as the authority has been able to ascertain; and

(c) to the child's religious persuasion, racial origin and cultural and linguistic background.

(4) If it appears to an authority that it is necessary, for the purpose of protecting members of the public from serious injury, to exercise its powers with respect to a child whom it is looking after in a manner which may not be consistent with its duties under this Article, the authority may do so."

[30] Article 29 of the Children Order is also relevant in relation to the promotion and maintenance of contact between child and family:

"29.—(1) Where a child is being looked after by an authority, the authority shall, unless it is not reasonably practicable or consistent with his welfare, endeavour to promote contact between the child and—

(a) his parents;

(b) any person who is not a parent of his but who has parental responsibility for him; and

(c) any relative, friend or other person connected with him.

(2) Where a child is being looked after by an authority—

(a) the authority shall take such steps as are reasonably practicable to secure that—

(i) his parents; and

(ii) any person who is not a parent of his but who has parental responsibility for him,

are kept informed of where he is being accommodated; and

(b) every such person shall secure that the authority is kept informed of the address of that person.

…

(4) Nothing in this Article requires an authority to inform any person of the whereabouts of a child if—

(a) the child is in the care of the authority; and

(b) the authority has reasonable cause to believe that informing the person would prejudice the child's welfare."

[31] In addition, certain regulations apply. The Review of Children's Cases Regulations (Northern Ireland) 1996 by regulation 7 also imposes duties around LAC reviews in relation to consultation, participation and notification as follows:

"**Consultation, participation and notification**

7.—(1) Before conducting any review the responsible authority shall, unless it is not reasonably practicable to do so, seek and take into account the views of—

(a) the child;

(b) his parents;

(c) any person who is not a parent of his but who has parental responsibility for him; and

(d) any other person whose views the responsible authority considers to be relevant,

including, in particular, the views of those persons in relation to any particular matter which is to be considered in the course of the review.

(2) The responsible authority shall, so far as is reasonably practicable, involve the persons whose views are sought under paragraph (1) in the review including, where the responsible authority considers appropriate, the attendance of those persons at part or all of any meeting which is to consider the child's case in connection with any aspect of the review of that case.

(3) The responsible authority shall, so far as is reasonably practicable, notify details of the result of the review and of any decision taken by it in consequence of the review to—

(a) the child;

(b) his parents;

(c) any person who is not a parent of his but who has parental responsibility for him; and

(d) any other person whom it considers ought to be notified."

[32] Finally, we refer to the provisions of The Human Rights Act as follows. Section 3 reads:

"**3 Interpretation of legislation**

(1) 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.

(2) This section—

(a) applies to primary legislation and subordinate legislation whenever enacted;

(b) does not affect the validity, continuing operation or enforcement of any incompatible primary legislation; and

(c) does not affect the validity, continuing operation or enforcement of any incompatible subordinate legislation if (disregarding any possibility of revocation) primary legislation prevents removal of the incompatibility."

[33] The facility to make a declaration of incompatibility is found in section 4 which reads:

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility.

(3) Subsection (4) applies in any proceedings in which a court determines whether a provision of

subordinate legislation, made in the exercise of a power conferred by primary legislation, is compatible with a Convention right.

(4) If the court is satisfied—

(a) that the provision is incompatible with a Convention right, and

(b) that (disregarding any possibility of revocation) the primary legislation concerned prevents removal of the incompatibility, it may make a declaration of that incompatibility."

[34] We have also had to examine section 21 of the Human Rights Act which is the Interpretation section which deals with primary and secondary legislation as follows:

"(1) In this Act—

…

"primary legislation" means any—

(a) public general Act;

(b) local and personal Act;

(c) private Act;

(d) Measure of the Church Assembly;

(e) Measure of the General Synod of the Church of England;

(f) Order in Council—

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in paragraph (a), (b) or (c);

and includes an order or other instrument made under primary legislation (otherwise than by the Welsh Ministers, the First Minister for Wales, the Counsel General to the Welsh Assembly Government, a member of the Scottish Executive, a Northern Ireland Minister or a Northern Ireland department) to the extent to which it operates to bring one or more provisions of that legislation into force or amends any primary legislation;
…

"subordinate legislation" means any—

(a) Order in Council other than one—

(i) made in exercise of Her Majesty's Royal Prerogative;

(ii) made under section 38(1)(a) of the Northern Ireland Constitution Act 1973 or the corresponding provision of the Northern Ireland Act 1998; or

(iii) amending an Act of a kind mentioned in the definition of primary legislation;

(b) Act of the Scottish Parliament;

(ba) Measure of the National Assembly for Wales;

(bb) Act of the National Assembly for Wales;

(c) Act of the Parliament of Northern Ireland;

(d) Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973;

(e) Act of the Northern Ireland Assembly."

This case

[35] The questions to be determined on appeal break down into these:

(i) Should the court uphold the declarations granted to the Trust under the inherent jurisdiction?

(ii) Is the statutory provision regarding the termination of parental responsibility compatible with the ECHR?

Question 1: Should declaratory relief be granted in this case?

[36] In its application for declaratory relief the Trust accepts that this is a highly unusual application which it does not bring lightly. In this jurisdiction the inherent jurisdiction is sparingly used and would very rarely arise when children are in public care. This court is not aware of any similar reported case in this jurisdiction dealing with the specific issue with which we are concerned. As we understand it the inherent jurisdiction has been invoked recently by the High Court to allow for children to reside outside the jurisdiction where there is a legislative lacuna. The High Court has also granted applications in cases where the Trust has applied not to inform a birth father of proposed adoption in extreme circumstances.

[37] In addition, Ms MacKenzie on behalf of the Trust raises the legislative impediment which flows from the terms of Article 173 of the Children Order specifically Article 173(1)(d). Leave of the court is required for any application of this nature pursuant to Article 173(3). Alternative remedies must be considered, and a threshold of harm must be satisfied.

[38] Dealing with the first hurdle of a bar emanating from Article 173(1)(d) Ms MacKenzie has provided an extract from *Butterworth's Family Law Service* chapter 47 para 6635.1 regarding the equivalent provision in the Children Act 1989. This is a helpful commentary on the issue which reads as follows:

> "Section 100(2)(d) of the CA 1989 prevents the High Court from exercising its inherent jurisdiction 'for the purposes of conferring on any local authority power to determine any question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.' In other words, while the High Court may make orders under its inherent jurisdiction in respect of a child, in doing so, it must not confer any aspect of parental responsibility upon a local authority that the authority does not already have. This is less likely to cause problems where the child is in care, since the local authority will already have parental responsibility. Hence, the determination of a particular question by the court, for example, obtaining a return order against abducting parents, will not be contrary to section 110(2)(d).
>
> Similarly, the court is free to determine the scope and extent of parental responsibility and can, for instance, make orders giving leave for a child in care to be

> interviewed by the father's solicitor to prepare a defence to criminal charges per Hale J in *Re N (Minors)* (Kerr: Leave to interview child) [1995] 1FLR 825. If the local authority do not have parental responsibility for the child, the High Court may not use its inherent jurisdiction to make orders which in any way confer parental responsibility upon the authority. Hence, for example, while the court could sanction a named couple to look after the child it could not authorise a local authority to place the child, nor a fortiori to place the child with a view to adoption. It has, however, been held wrong that section 100 be restrictively interpreted and that it is perfectly proper for a local authority to invite the court to exercise its inherent jurisdiction to protect children even if the exercise of that power would be an invasion of a person's parental responsibility, for example, by restricting a non-family member from contacting or communicating with the child in question per Thorpe J in *Devon County Council v S* [1994] Fam 169."

[39] Some of the nuances of this provision which militate against its application do not really arise in this case. That is because the Trust has parental responsibility for SV under the care order. It can make decisions as regards the exercise of parental responsibility for SV under the powers contained in Article 52(3) of the Children Order which allow regulation of any parent's responsibility in relation to a child in care. This is an important provision to which we will return. However, in the present case it is important to remember that the issue in play is only the Trust's obligations towards SV as regards information sharing and duty of consultation under the Children Order. These provisions are set out above and are found in regulations and in the specific provisions of Article 26 and Article 29. Allied to that, of course, is the article 8 ECHR obligation to involve parents in decision making particularly where a child is in care.

[40] A point of some importance is that these duties apply to PV regardless of whether he has parental responsibility or not because he is a parent. The declaratory relief is therefore directed at protecting the local authority from a claim of breach of statutory obligation or a human rights claim. It is in this context that we examine the merits of the application.

[41] In *FS v RS and JS* [2020] EWFC 63, Sir James Munby dealt with a rather unusual case whereby an adult sought maintenance from his parents. The facts are obviously different from this case but, nonetheless, we turn to what Sir James said about the inherent jurisdiction in a passage from paras 100 and 101 of that decision:

> "100. Before going any further a few general remarks about the inherent jurisdiction may not be out of place. Counsel remind me of Lord Donaldson of Lymington MR's famous description (*In re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, 13) of the common law – here, the inherent jurisdiction – as the 'great safety net which lies behind all statute law, and is capable of filling gaps left by that law, if and insofar as those gaps have to be filled in the interests of society as a whole.' But the choice of metaphor is revealing: the inherent jurisdiction is a safety net, not a springboard. And Lord Donaldson would have been the first to acknowledge that the inherent jurisdiction, whatever its theoretical reach, is, in settled practice, recognised as being subject to limitations on what the court can and should do. For an example, see his observations in *In Re R* (*A Minor) (Wardship: Criminal Proceedings*) [1991] Fam 56.
>
> 101. I recognise of course that, as Singer J said in *Re SK (Proposed Plaintiff) (An Adult by way of her Litigation Friend)* [2004] EWHC 3202 (Fam), [2005] 2 FLR 230, relief can be granted in what he acknowledged was a "novel" case. As he said:
>
> > 'the inherent jurisdiction of the High Court can, in an appropriate case, be relied upon and utilised to provide a remedy ... the inherent jurisdiction now, like wardship has been, is a sufficiently flexible remedy to evolve in accordance with social needs and social values.'"

[42] Sir James emphasised the flexibility of the inherent jurisdiction to meet welfare demands. He referred to recent utilisation of this jurisdiction in cases of forced marriage, female genital mutilation, and radicalisation as "new problems will generate new demands and produce new remedies." He also said any development of the inherent jurisdiction must be on a principled basis.

[43] This case does not call for any radical departure of principle or new usage of the inherent jurisdiction. Rather, it involves consideration of whether the requirements of Article 173 are made out. Two simple questions arise in this case. Firstly, the court must decide whether the authority's case could be achieved through the making of some other order and, secondly, there must be reasonable cause to believe that if the court's inherent jurisdiction is not exercised with respect of the child, he is likely to suffer significant harm.

[44] In answering these questions we bear in mind that the judge at first instance heard the case in some detail and reached a decision which is not impugned in law. As it is accepted that the judge applied the correct legal tests the challenge is necessarily limited. In support of his case the appellant asserts that there is a dichotomy in the decision that his parental responsibility cannot be revoked but that it should be confined to such an extent that he had no information whatsoever as regards to the welfare of his children. The appellant makes a subsidiary point in the skeleton argument in the following way.

> "The court must also remain aware of the need to appropriately fetter the corporate parent. The mother of the subject child is deceased. The children in this case have no other individual person as holder of parental responsibility. The appellant submits that it is contrary to the interest of all children that only a corporate parent would have any oversight of their welfare arrangements as would meet the best interests."

[45] Ms McGrenera KC addressed a third limb to the argument raised in the written submissions during oral submissions to the effect that that by analysis with some of the other cases the breadth of the order made was too wide. In this regard she also tentatively suggested that at least the court should have considered an annual report.

[46] There is no challenge against the fact that the judge had the power to make an order in favour of the Trust under the inherent jurisdiction. The question is whether he should have made the order on the basis of the evidence in this case which, it seems to us, is part of his evaluation. The judge decided that this case did meet the leave requirement. He considered that it was exceptional. The gravamen of his decision is found at para [110] where he says as follows:

> "[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."

[47] There can be no real dispute that the only option for a trust seeking this type of relief is recourse to the inherent jurisdiction. This is a last resort when there is no other option. The core consideration is - do the facts of this case satisfy the statutory test found in Article 171(3)(b)? There must be a 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. The judge does not directly refer to this in his ruling, but no one has really taken issue with that, and we consider it implicit that the judge found that the child would suffer significant emotional harm on the basis of the evidence he had before him were the application not to be granted. In other words, the child would be disrupted in his placement and suffer psychological trauma if he had to endure the thought of his father being given information and being consulted about his life and being invited to LAC reviews and receiving reports about him.

[48] The law governing this type of relief has been developed in a number of cases in England & Wales that we have considered such as *Re P (Children Act 1989 sections 22 and 26: Local Authority Compliance)* [2000] 2 FLR 910. Also, *Re C (Care consultation with parents not in a child's best interest)* [2005] EWHC 3390. This latter case was a decision by Coleridge J which has been consistently applied and which effectively set the standard for applications of this nature. The facts of *Re C* are similar to the position as regards SV.

[49] *Re C* involved a father who had raped and indecently assaulted a child now nearly 13 years old and was serving 11 years imprisonment for the offences. The child did not want her father to be informed or consulted at all in relation to her future and had applied for discharge of parental responsibility. It was noted that nonetheless the local authority was still obliged to consult and inform parents about their plans for a child in care even after parental responsibility had been discharged. Therefore, the

court was invited to make declarations absolving it from its duty to inform or consult the father. This was opposed but Coleridge J agreed that the court had the power to grant declaratory relief under the inherent jurisdiction. At para [32] of the decision he said this:

> "[32] The third factor, self-evidently, is that it is a very exceptional case only which would attract this kind of relief. Self-evidently – and it hardly needs the human rights legislation to remind one – a parent is entitled to be fully involved, normally, in the decision-making process relating to his, or her, child, and if not to be involved, then at least informed about it. However, insofar as that engages the father's rights to family life, then by the same token it engages S's right to privacy and a family life.
>
> [33] In my judgment, in this situation, her rights come very much further up the queue than the father's. I have to balance the rights as between the two of them. I am afraid to say that S's must overwhelm all others. It seems to me that if S was an adult now, who had been subjected to the behaviour which led to this father's imprisonment, and that as an adult she was to say, in circumstances where she needed, for instance, treatment that she did not want the perpetrator of those actions to be consulted, even if it was a parent, no one, for one moment, would suggest that such a person should be consulted. It so happens that this individual is not an adult, but should different considerations apply to this child when I am told she is intelligent and articulate; when her decisions and views seem to me to be entirely understandable and rational and objectively sensible? Thirdly, she has a mother who is fully involved in her life, albeit that she is not in this country, and a guardian, so long as these proceedings are underway, who is more than able to protect her interests, and indeed has been doing so."

[50] In *Re O (A Childcare Proceedings Issues Resolution hearing)* [2016] 1 WLR 512 the Court of Appeal discussed the fact that declarations as made in *Re C* could only be made under the inherent jurisdiction. The Court of Appeal emphasised the importance of the consultation and review process but approved Coleridge's commentary in *Re C* that such orders were to be made only in exceptional circumstances. The facts of *Re O* were not such as to warrant an order. In that case the father had assaulted the mother and been sentenced to a four-year prison term. This issue has arisen in other circumstances that have been referred to us.

[51] In *In re A Local Authority v M and others* [2020] EWHC 2741 (Fam) MacDonald J had to deal with a case where a 17-year-old was subject to a deprivation of liberty application and there was an application not to involve the father. He dispensed with service of the proceedings on the father due to a risk of potential harm to the child. The court acknowledged that the child's account was that he had suffered physical abuse at the hands of his father, had witnessed physical and sexual abuse of the mother, sexual abuse of his sibling and that whilst all of this was denied these matters continue to be very real for the child.

[52] In *A Local Authority v X and others* [2019] EWHC 2166 Theis J also granted a declaratory application in circumstances where the father had killed the mother and been convicted of murder and was sentenced to 22 years' imprisonment. In this case Theis J granted an application to discharge the father as a party to care proceedings and to grant declaratory relief to the local authority.

[53] In the *X* case the declaratory relief was framed in terms that save for the limited exception the father was to be given notice of any life-threatening medical emergency and that the local authority was relieved of their duties to consult or notify the father of matters relating to the child's welfare and progress. In a helpful section of this judgment from paras [39]-[40] Theis J outlined the key findings that had been established from the *Re C* case. She applied that authority and decided that the welfare considerations were such that the court was satisfied that it should grant relief. Specifically, there was a concern as regards significant emotional harm by way of distress and upset to the child were the father to be provided with ongoing information.

[54] Clearly it was only when the measures in place which allowed the father to send indirect contact through the prison service were no longer available that the declaratory application was contemplated. The application was also triggered by the communication from PV's legal representatives that he sought to be actively involved in ongoing decision making and information sharing in relation to the child.

[55] Ms MacKenzie summarises the Trust case at para [46] of her argument. There she points out that SV has been very clear that he does not want his father to be involved in decision making nor does he want information to be shared with his father. He was very upset at realising his father had been aware of the secure accommodation order proceedings in January 2021 and this impacted on him. The assessment of the multi-disciplinary team of professionals involved with him is that providing the father with updates about the child or involving him in consultation decision making would be emotionally harmful and psychologically abusive for SV and runs the risk of retraumatising him further. These points are of course very well made. We are quite confident that the judge had them in mind when he reached his decision although they have not been expressly articulated, they chime with the social worker's affidavit which is dated 8 June 2021.

[56] The impact on SV is amply explained from paras [28] to [35] of that affidavit. Without reciting the entire details, the affidavit refers to SV's fear of his father's release and the potential for his father to turn up in the locality. This also triggered a deterioration in SV's mood and presentation. Allied to this is the fear of the father causing harm to his siblings upon release. The social worker points to the fact that SV is engaged in disclosure work and therapeutic supports following allegations of harm to him perpetrated by the father through his childhood. A quotation from the social work report of particular resonance to us is this:

> "SV is haunted by the alleged abuse he suffered at the hands of his father and continues to suffer from sleep disturbance as a direct result. Further reference is made to the fact that SV lost his confidence after he was told that his father was informed of the secure accommodation proceedings."

[57] It is encouraging that SV is supported by Voices of Young People in Care (VOYPIC). He is engaged with therapeutic work. The affidavit evidence summarises this work as follows:

> "It is clear to the Trust and Set Connects Therapeutic Team that SV is a traumatised child and further contact, either directly or indirectly, with PV could cause SV to suffer significant harm. There is a belief that PV remaining involved in SV's life, particularly, at significant junctures such as previous secure proceedings, runs the risk of further retraumatising SV and playing into the frightfully controlling and extremely abusive dynamic that surrounded this father/son relationship. Finally, it is clear that SV voiced his fear when PV was due for home release in the summer before this application was taken and that had a detrimental effect on his well-being and emotional stability. SV felt it was his responsibility to protect his siblings and this proved a difficult time for him as he felt frightened in his own home not knowing if PV would just turn up."

[58] Therefore, it seems to us that there was sufficient evidence in relation to this application upon which a court could grant leave. We also consider that the test in Article 173(3)(d) was met, namely that the child would suffer significant emotional harm if the order were not granted. Accordingly, we consider that there is no reason to upset the ruling of the trial judge in relation to the grant of declaratory relief on the evidence available in this case.

[59] In summary, this case strikes us as an exceptional case marked by some significant features, not least the father's conviction for serious sexual offences against half-siblings, allegations made by the other children of the family, the father's persistence in wanting to control the children, the father's lack of acceptance, and the vulnerability and disturbance experienced by SV at a formative time of his life. The order was therefore merited in these circumstances to allow the Trust not to comply with its statutory duties. We reject Ms Mc Grenera's suggestion that the order was too wide or that an annual report should also have been included. In any event there is limited time left to run on the order.

Question 2: Is the Children Order compatible with the ECHR?

[60] The grant of declaratory relief is directed at one issue which is that the Trust may be absolved from undertaking its statutory duties towards the father. As such we agree that it does not deal with the father's parental responsibility. That is a different issue. As this is a public law case in that the child is subject to a care order the obvious starting point is Article 52(3) of the Children Order.

[61] Article 52(3) states that the Trust shall have parental responsibility for a child but further that the Trust has power to determine the extent to which a parent or guardian for the child may meet his parental responsibility for the child. This power is subject to paras 52(4)-(9). Article 52(4) provides the welfare test the Trust must apply when restricting parental responsibility. Article 52(5) restricts the Trust's powers where parent or guardian has actual care of a child. That does not apply here. Article 52(6) is more substantive, prohibiting the Trust from dictating religious upbring or adoption. Article 52(7) refers to change of surname or removal from the jurisdiction.

[62] In reality, none of the prohibitions are really in play here. The obvious question is therefore why Article 53(2) does not effectively allow the Trust to restrict the father's parental responsibility to the extent that he cannot exercise it, in keeping with the child's welfare?

[63] The protection afforded by public law arrangements has been discussed previously in relation to a contested vaccination application in *Finn's Application* [2020] NI Fam 12. This case refers to the fact that, in public law, Trusts have the power to determine matters of parental responsibility pursuant to Article 52(3) of the Children Order and that Trusts may also regulate contact between a parent and child under Article 53.

[64] The appellant maintains that revocation of parental responsibility goes further than any of the other remedies under the Children Order and is more definite and would have psychological benefits for the child. Whilst we do not doubt the sincerity of this argument, we doubt whether this argument truly reflects the effect of a revocation of parental responsibility. Parental responsibility is an adult's

responsibility to secure the welfare of their child to be exercised for the benefit of the child not the adult. It is the exercise of parental responsibility that can become problematic if the adult is disinterested or badly motivated. The ability to exercise parental responsibility can then be revoked by a court. However, even if parental responsibility is revoked the fact of parenthood remains difficult for a child in the position of the appellant.

[65] With these principles in mind we turn to the purpose of the legislation. This is comprehensively dealt with in the affidavit of Michael Foster dated 11 November 2021. Mr Foster has filed this on behalf of the Department of Finance to set out the history of the legislation and changes made to it. He is the Head of the Civil Law Reform Unit at the Department of Finance. It is necessary to examine his evidence as follows.

[66] From para 14 of the affidavit Mr Foster refers to the statutory provisions relating to parental responsibility for unmarried fathers in Northern Ireland and we draw from this in some detail as follows. First, comment is made upon the concept of parental responsibility which as Mr Foster says was introduced into Northern Ireland by the Children Order. This is a parallel order to the Children Act 1989 which preceded it.

[67] For present purposes we will not recite the entire history of the introduction of this legislation. It is well-known that the Children Act brought sweeping procedural and jurisdictional changes to the law relating to children. A new concept of parental responsibility was central to the legislation. Mr Foster correctly describes this as a central organising concept in his affidavit. The introduction of this concept reasserted the significance of children's welfare as the paramount consideration and framed the principal legislation in place.

[68] Reference is also made to the fact that Scotland developed its own different framework comprised in the Children (Scotland) Act 1995. Mr Foster makes some reference to the Scotland Act in his affidavit, in particular, section 11 which refers to court orders relating to parental responsibility. Section 11 is a comprehensive provision in relation to parental responsibilities, much of which does not apply to children past the age of 16. In addition, there is further definition in the Scotland Act to parental rights which makes it a very different piece of legislation to that of the Northern Ireland and England & Wales variety.

[69] The affidavit then examines the difference in treatment between married and unmarried fathers. From the coming into operation of the Children Order, Northern Ireland unmarried fathers were explicitly treated differently from married fathers in that they were not automatically granted parental responsibility but were given an opportunity to acquire it. Any parental responsibility granted to unmarried fathers was treated as contingent and a mechanism existed to remove that

responsibility. This is all comprised in Article 5 and Article 7 in the Children Order. At para 26 of the affidavit Mr Foster summarises the position as follows:

> "Since its enactment, the law in Northern Ireland has continuously recognised the distinction between biological parents in relation to parental responsibility. Whilst a child's mother has automatic parental responsibility for her child, it is not automatic for a father. I understand that a biological father in those circumstances may acquire parental responsibility through a number of mechanisms (i) becoming registered as the child's father - Article 7(1)(a) of the 1995 Order, (ii) entering into a parental responsibility agreement with the mother – Article 7(1)(b) of the 1995 Order; (iii) order of the court following an application by the father – Article 7(1)(c) of the 1995 Order, marrying the mother, obtaining a residence order in respect of the child – Article 12(1) of the 1995 Order, appointment as the children's guardian."

[70] Mr Foster then considers the public consultation which took place in relation to the issue of unmarried biological fathers not having parental responsibility. He refers to the fact that in 1999 a public consultation was held in respect of the issue of parental responsibility for unmarried fathers in Northern Ireland. The 1999 consultation led to the enactment of the Family Law (Northern Ireland) Act 2000 by the Northern Ireland Assembly. This amended the Children Order and introduced the right of a biological father to acquire parental responsibility by becoming registered as the father. The issue of automatic conferral of parental responsibility upon biological fathers was then revisited in a public consultation carried out by the Department of Finance and Personnel in October 2014. No statutory amendment followed from that.

[71] Mr Foster refers to the fact that in Scotland, the Scottish Law Commission in report number 135 of 6 May 1992 recommended that both parents should have parental responsibility whether or not they were married and absent any court order. This was not implemented and the Commission's alternative proposal that parental responsibility could be obtained by agreement was instead adopted. However, there was further publication by way of consultation from the Scottish Office in 1999.

[72] As a result of the process of consultation section 23(2) and (3) of the Family Law (Scotland) Act 2006 amended the Children (Scotland) Act 1995. The amendment in sub-section 2(b) gave parental responsibilities and parental rights to unmarried fathers who registered the birth of their child jointly with the mother after that section came into force. A father would only automatically acquire such responsibilities and rights in Scotland if he was married to the child's mother at the time of conception or subsequently. A further Scottish consultation paper published on 15 May 2018 sought

views on whether all fathers should have parental responsibility and on whether parental responsibility should be removed by the criminal court from someone convicted of a serious criminal offence.

[73] Mr Foster points out that in England & Wales a consultation exercise was conducted by the Lord Chancellor's Department in March 1998 after which the Children Act was amended by section 111 of the Adoption and Children Act 2002 so that the unmarried father who jointly registers the birth with the mother acquired parental responsibility automatically. Again, the alternative proposal to grant automatic parental responsibility to all fathers was not implemented in the 2002 Act and as far as Mr Foster is aware the proposal has not been subject to consultation or change since that time. At para 38 Mr Foster then looks at what are described as the policy considerations in each jurisdiction. He refers as follows:

> "Throughout the passage of the Children Bill which became the Children Act, considerable time was given to debate the unique position of the unmarried father, but there is no record in the relevant Hansard that the issue of removing parental responsibility from either married fathers or mothers outside of the singular case of adoption was addressed."

[74] By contrast, the Scottish Act was subject to extensive debate and scrutiny in Parliament. As a consequence, the Scottish legislation differs from the Children Act markedly in structure. In this regard Mr Foster refers to the passage of the Scottish Bill and the recorded speech of the Earl of Lindsay who was the Parliamentary Under Secretary of State in the House of Lords. The Earl of Lindsay was responding to a peers' amendment to allow for the removal of parental responsibility and rights in the event of conviction for a serious violent or sexual offence by the unmarried father if he had previously acquired parental responsibility. The government returned with their proposal maintained in the legislation in section 11. This provision allows for the revocation of parental responsibility and applies to both fathers and mothers in certain circumstances. The Scottish legislation is therefore different from that of this jurisdiction in that the Scottish courts have scope to remove parental responsibility from any parent.

[75] Mr Foster then refers to various mechanisms for restricting parental responsibility under Article 8 of the Children Order, namely a prohibitive steps order or a specific issue order. In addition, if a child is a child in care, he states at para 53 of his affidavit:

> "Each of these orders, while not removing parental responsibility in law, has, if exercised, the effect of removing the ability of the parent to exercise that authority in practice."

He also refers to the inherent jurisdiction in this part of the evidence.

[76] The final parts of the affidavit set out the Department's position as follows:

> "55. The Department maintains that Articles 5, 6 and 7 of the Children Order are lawful.
>
> 56. The Department denies that the statutory scheme of the Children Order is contrary to the applicant's article 6 rights (right of access to court to determine a civil right), his article 8 rights (right to private and family life) and his article 14 rights read with article 6 and/or article 8 discrimination in the enjoyment of article 6(8) rights on grounds of his birth to married parents of the European Convention on Human Rights.
>
> 57. The Department says there is objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights, which has been acknowledged and accepted by the European Court of Human Rights in the case of *B v UK* [2001] FLR 1 and relied upon in the domestic courts in this jurisdiction. Namely, there must be some test to protect children and mothers from unmeritorious fathers and the test is marriage in granting parental responsibility to unmarried fathers who jointly register the birth of their children with the mother, strikes a fair balance between the sometimes conflicting rights and interests of children, mothers and fathers. 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. The introduction to the Children (Northern Ireland) Order 1995 at para 2.2 highlights that parental responsibility remains unaffected by the separation of parents and parents retain parental responsibility

even if the child is in the care of the Social Services Board or the Trust.

58. The Department does not accept that article 14 of the Convention has been breached.

59. The Department maintains that adequate powers exist within the Children Order to meet the needs of the applicant in this situation. The Department maintains in particular that the right of a child to make an application to the court under Article 53(4) of the Children Order to prevent contact between a child and its parent ensures that the article 6 rights of the applicant under the Convention are fully satisfied.

60. The Department maintains that this is a controversial, difficult and culturally sensitive area of law in which member states must enjoy a wide discretion in how best to legislate an organised provision. It is believed that the legislature is best placed to consider the difficult and complex policy consequences of changes to the statutory scheme, and the granting of an order in favour of the applicant in the terms sought introduces the risk of creating a greater inequality between mothers and fathers generally than currently exists between married and unmarried fathers.

61. In light of all of the foregoing the Department does not accept that the applicant's grounds of challenge have been made out."

[77] It follows from the above discussion of the evidence that there has been significant public consultation on giving rights to unmarried fathers which resulted in amendment to the Children Order. It also flows that in Scotland further amendment was allowed to provide for the revocation of parental responsibility in extreme circumstances for both mothers and fathers. That was clearly a legislative choice.

[78] The position in Northern Ireland is in unison with that in England & Wales in that whilst parental responsibility can be obtained by unmarried fathers it can also be revoked in relation to them. The rationale for revocation in these circumstances is that once acquired it can be revoked in circumstances where, in a sense, the person obtaining parental responsibility is unmeritorious. However, there remains a bar on

the revocation of parental responsibility for married fathers. Mr Foster's affidavit proffers that the reason for this is the difference between married and unmarried fathers. Of course, in any case in Northern Ireland no matter how egregious the behaviour, there cannot be revocation of a mother's parental responsibility.

[79] The judge considered the incompatibility question in his judgment from para [67]. There is no real issue with the methodology he applied. In particular, he refers to the case of *A v J and O* [2022] NICA 3 where our Court of Appeal considered a challenge to the compatibility of sections 42 and 43 of the Human Fertilisation and Embryology Act 2008 and Article 31(b) of the Matrimonial and Family Proceedings (Northern Ireland) Order 1989 which relates to applications for declarations of parentage. In that case the court referred to the Grand Chamber case of *Animal Defenders International v UK* [2013] 57 EHRR 21.

[80] At para [69] the judge also refers to *in A v J and O* in which Morgan LCJ noted that the scheme of the 2008 Act recognised the commitment to family life made by those entering into a 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 and 14 ECHR. However, it is plain in that case that she did not utilise the use of a licenced clinic which was part of the statutory imperative.

[81] The judge also refers to the case of *Elan-Cane v Secretary of State* [2021] UKSC 56 which was a challenge to the refusal of a non-gendered passport. In that case the court referred to the latitude allowed by Strasbourg to member states when legislating or interpreting laws relating to human rights. In particular, a wide margin is allowed in cases relating to competing rights, economic and social policies or where there is no consensus within member states. 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."

[82] In another Supreme Court case *SC v Secretary of State for Work and Pensions* [2021] UKSC 26 Lord Reed explained the margin of appreciation to be applied in the field of social policy. At para [158] the following is found:

> "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."

[83] Turning to the Strasbourg jurisprudence there are a number of relevant cases to consider albeit of some vintage. *Smallwood v United Kingdom* [1999] 27 EHRR 155 is relied on by the respondent. Drawing from this case and *McMichael v UK* [1995] EHRR 205 the European Court of Human Rights ("ECtHR") has decided that a difference in treatment between "married" and "unmarried" families, in the context of unmarried fathers, and the revocability of a married father's parental responsibility are compatible with article 8 and/or article 14. In the latter case it was concluded that "a difference in treatment between unmarried mothers and fathers with respect to the recission of parental responsibility cannot give rise to an appearance of a violation of article 8 in conjunction with article 14 of the Convention."

[84] We have also considered the Grand Chamber decision of *Fabris v France* application 16754/08 in the context of inheritance rights. There the court found discrimination against a person "born of adultery" when compared to a person born of marriage for the purposes of article 1 protocol 1 and article 14. This followed a previous case of *Mazurek* brought against French inheritance laws. The subject matter is different from this case, however, the court reiterated some general principles from paras 56-59 which are worthy of repetition and enforce the position that very weighty reasons have to be advanced before a distinction on grounds of birth outside marriage can be regarded as compatible with the ECHR.

[85] At paras [57] and [58] of this decision the court observed the consensus among Member States on this as follows:

> "57. According to the Court's established case-law since Marckx, cited above, the distinction established for inheritance purposes between children "born outside marriage" and "legitimate" children has raised an issue under Article 8 of the Convention taken alone (see Johnston and Others v. Ireland, 18 December 1986, Series A no. 112) and under Article 14 of the Convention taken in conjunction with Article 8 (see Vermeire v. Belgium, 29 November 1991, Series A no. 214-C, and Brauer v. Germany, no. 3545/04, 28 May 2009) and Article 1 of Protocol No. 1 (see Inze v. Austria, 28 October 1987, Series A no. 126; Mazurek, cited above; and Merger and Cros, cited above). The Court has extended this case-law to voluntary dispositions by confirming the prohibition on discrimination where testamentary dispositions are concerned (see Pla and Puncernau v. Andorra, no. 69498/01, ECHR 2004-VIII). Accordingly, as early as 1979, in Marckx, the Court held that restrictions on children's inheritance rights on grounds of birth were incompatible with the Convention. It has constantly reiterated this fundamental principle, establishing the prohibition of discrimination on grounds of a child's birth "outside marriage" as a standard of protection of European public order.
>
> 58. The Court also observes that common ground between the member States of the Council of Europe regarding the importance of equal treatment of children born within and children born outside marriage has been established for a long time, which has, moreover, led to a uniform approach today by the national legislatures on the subject – the principle of equality eliminating the very concepts of legitimate children and children born outside marriage – and to social and legal developments definitively endorsing the objective of achieving equality between children."

[86] These cases were examined in a recent decision in this area of the High Court in England & Wales: *MZ, FZ v X & Y by their guardian v The Secretary of State for Justice* [2022] EWHC 295 That case concerned two children aged 13 and nine at the date of the final hearing. The primary application brought by their mother was for protective orders under the Children Act 1989 and injunctive relief. A secondary application was made pursuant to the Human Rights Act for a declaration of incompatibility as to the Children Act provisions which does not allow for the revocation of parental responsibility of a married father.

[87] The case was uncontested by the father and the protective orders and injunctive relief was granted. The declaration of incompatibility was refused. In essence the judge relied upon the fact that other remedies were available and that there was justification for any difference of treatment based upon the fact that marriage remains part of the established social legal framework in the United Kingdom.

[88] In addition, we have considered some cases in domestic law which deal with the test for revoking parental responsibility. These are extremely rare given the high threshold required to revoke parental responsibility. There is one decision in this jurisdiction which is a decision of McAlinden J where parental responsibility was revoked. We have also been referred to *Re D* [2013] EWHC 854 and [2014] EWCA Civ 315 in the Court of Appeal in England & Wales. More recently decided is the case of *H v A* [2015] EWFC 58 in which MacDonald J helpfully set out the strictures of such an application and refused an application in that case. However, we are not concerned with the substantive merits of an application to revoke parental responsibility.

[89] The principles there are laid down in *Re A (A female child aged 5 years)* [2021] NIFam 38 by McFarland J and are clear in relation to the high threshold that needs to be met. Rather, we are dealing with whether or not there is a difference in treatment in relation to married and unmarried fathers which is incompatible with the ECHR because a competent child can apply to revoke parental responsibility against one and not the other.

[90] In another case of *P v D & Ors* [2014] EWHC 2355, the point was made that in a revocation application the court has the power to make an order prohibiting a parent from taking any steps in the exercise of parental responsibility. This was endorsed by MacDonald J in *H v A* [2015] when he said:

> "Where, however, the manner in which a parent chooses to exercise an aspect of their parental responsibility is detrimental to the welfare of the child, the court may prescribe, to whatever extent is in the child's best interests and proportionate, the exercise by that parent of their parental responsibility."

[91] MacDonald J also said that "the basic test would remain the child's best interests, applying the principle of the paramountcy of the child's welfare and the checklist in section 1(3), CA 1989, and which (to make it clear beyond peradventure) I applied when making the comprehensive orders in this case; effectively stripping FZ of all parental responsibility and leaving only the term "parental responsibility"; the recognition of parenthood."

[92] At this juncture we return to the ECHR arguments. At first instance the court accepted that articles 6 and 8 of the appellant's rights were engaged. We are not so convinced in relation to article 6 which protects the right to a fair trial. Article 6 is

concerned with procedural fairness in the determination of both criminal charges and obligations. This includes family matters. The provision is directed at procedure. Article 6 does not control the content of a state's substantive domestic law. However, article 6(1) may apply where there is procedural, rather than substantive bar, preventing or limiting the possibility of bringing a domestic claim to it.

[93] This point is illustrated by the decision in *Wilson v First County Trust Ltd No.2* [2003] UKHL 40 which dealt with the inability of the court to enforce consumer credit agreements under section 127(3) of the Consumer Credit Act 1974 which had not been properly executed under regulations. The court found that this omission did not violate article 6(1) since it was merely a limitation on the substantive scope of a creditors rights and did not offend against the rule of law.

[94] It is not always easy to trace the dividing line between substantive limitations (to which article 6 will not normally apply) and procedural limitations to which it may apply. Given that a substantive limitation is apparent in this case article 6 does not easily apply. We are unconvinced that a valid challenge can be mounted based on article 6 of the ECHR.

[95] However, article 8 is clearly engaged in this case in relation to the private life and the family life of this child. This is a qualified right which protects private and family life. The child is an independent holder of article 8 rights. Against the individual right of the child to a private life are wider considerations which must be weighed in the balance.

[96] As Humphreys J said, 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. As such it is clear to us that this issue has, in fact, not actually been consulted upon or thought through to any great extent in more recent times.

[97] The Children Order has kept pace with the changing variety of family structures and different forms of parenthood by virtue of various amendments made to it. At para [86] of his judgment, the judge also commented as follows:

> "It may seem incongruous to 2022 eyes that a child cannot seek to terminate the parental responsibility of a married father, even when his behaviour has been the 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."

[98] Ultimately, the judge applying the proportionality test, cognisant of the Supreme Court decisions we have discussed, found that as a matter of constitutional principal that Parliament had decided on a policy which should not be recast by judicial expansion.

[99] However, that is not the end of the matter because we must consider article 8 alongside article 14 of the ECHR. Article 14 is the non-discrimination provision in the ECHR which provides that:

> "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such a sex, race, colour, language, religion political or other opinion, national or social origin, association with a national minority, property, birth or other status."

[100] At para [37] of *SC* Lord Reed set out the approach adopted to article 14 by the ECtHR applying *Carson v UK* [2010] 51 EHRR 13. At para [37] of the judgment Lord Reed explains how an article 14 claim should be addressed as follows:

> "37. The general approach adopted to article 14 by the European court has been stated in similar terms on many occasions, and was summarised by the Grand Chamber in the case of *Carson v United Kingdom* 51 EHRR 13, para 61 ("Carson"). For the sake of clarity, it is worth breaking down that paragraph into four propositions:
>
> (1) The court has established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of article 14.
>
> (2) Moreover, in order for an issue to arise under article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.
>
> (3) Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

(4) The contracting state enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of this margin will vary according to the circumstances, the subject matter and the background."

[101] At para [39] of the ruling Lord Reed also says that:

> "According to the case law of the European court, the alleged discrimination must relate to a matter which falls within the "ambit" of one of the substantive articles. This is a wider concept than that of interference with the rights guaranteed by those articles, as Judge Bratza explained in his concurring judgment in *Adami v Malta* (2006) 44 EHRR 3, para 17."

[102] Applying the test set out above the appellant's argument is that the appellant comes within the protection of article 14 by virtue of birth. The appellant maintains that another person in an analogous position that is a child of an unmarried father would be treated more favourably by being able to apply to revoke that parental responsibility. This is the opposite to the situation of children of unmarried parents who are treated less favourably. Such treatment has consistently been said to amount to discrimination.

[103] The mirror image is more difficult as the child has a characteristic of being a child of married parents which does not usually amount to discrimination. However, in this case it seems the child is worse off than a child of unmarried parents where the father is unworthy of exercising parental responsibility. Therefore, we are prepared to accept that the first two elements of the article 14 test can be established.

[104] However, to our mind, the insurmountable problems arise at the next stage of the analysis. We think that there is a justifiable reason for interference which applies to this case, namely the status afforded to marriage. This position is within the state's margin of appreciation. That is because our society retains marriage as a long-established social norm. In addition, the Department rightly maintains that this is a controversial, difficult, and culturally sensitive area of law in which member states must enjoy a wide discretion in how best to legislate.

[105] The Department maintains that there is objective and reasonable justification for the difference in treatment between married and unmarried fathers regarding the automatic acquisition of parental rights, which has been acknowledged and accepted by the ECtHR in the case of *B v UK* [2001] FLR 1 and relied upon in the domestic courts in this jurisdiction. We have not been told that there is any European consensus to the contrary.

[106] The Children Order which replicates the Children Act established different provisions for married and unmarried fathers. That was a choice that Parliament made. The reason for the choice has been comprehensively explained by the Department upon affidavit which we have discussed above. Part of that explanation which we accept is that there must be some test to protect children and mothers from unmeritorious fathers. The grant of parental responsibility to unmarried fathers who jointly register the birth of their children with the mother, strikes a fair balance between the sometimes-conflicting rights and interests of children, mothers, and fathers.

[107] It also appears clear that the underlying rationale provided for the difference in acquisition of parental responsibility between married and unmarried fathers, is driven by the desire to protect women who are victims of coercive relationships or whose children are conceived in transient or abusive circumstances. This is in part due to the wide spectrum of unmarried fathers who may not properly exercise parental responsibility once it is given to them and therefore should have it revoked. To our mind this is a legitimate rationale for the statutory provision at issue.

[108] We also accept the Department's submission that adequate powers exist within the Children Order to meet the needs of the appellant in this situation. In private law there are prohibited steps orders or specific issue orders that can be applied for. In this case declaratory relief is appropriate. In addition, the Trust may control the exercise of the father's parental responsibility. Specifically, the Trust or the child may make an application to the court under Article 53(4) of the Children Order to prevent contact between a child and its parent.

[109] Of course we know that the distinction in domestic law between "married" and "unmarried" families is not limited to parental responsibility. It is also present in financial remedies after divorce and on the separation of unmarried couples when it comes to financial relief for children. That financial remedies retain that difference in treatment and whether it is itself discriminatory is not the subject of these proceedings.

[110] Accordingly, whilst sympathetic to the appellant who we have said is a capable young man, we are not convinced that his argument can win the day in law for the reasons we have given. In addition, we are not convinced that in the circumstances of this case that revocation of parental responsibility is the panacea to the problem which in truth seems to be a wish to expunge the father's parenthood altogether. That would remain even if parental responsibility were extinguished as we have said.

[111] Ultimately, we think that it is for Parliament to decide if married status should no longer prevail to prevent the revocation of parental responsibility for fathers or mothers. The legislature is best placed to consider the difficult and complex policy consequences of changes to the statutory scheme. We also agree with the Department that the granting of an order in favour of the appellant in the terms sought in this case

introduces the real risk of creating a greater inequality between mothers and fathers generally than currently exists between married and unmarried fathers.

[112] The comparative law that we have read does not assist us save that we do think it significant that Scotland has different legislative provisions. That fact raises some valid questions and may well spur some further consideration of the Children Order provisions under examination in this case and at the very least result in the consultation which is required before there would be any change of legislative direction.

Remaining issues

[113] Whilst the issue is moot given the conclusions, we have set out above, we will deal with whether the Children Order is primary or secondary legislation given the submissions we have received from the parties on this point. The Attorney General's paper sets out why this form of Order in Council has been treated as subordinate legislation. We accept the Attorney's conclusion which is reached on a reading of section 21 of the Human Rights Act with the modifications made by Schedule 12 to the Northern Ireland Act 1998 (construction of references in existing laws). The statutory framework is set out below from the Attorney's note:

> **"Statutory framework**
>
> 3. The Children Order was made in exercise of the powers conferred by paragraph 1 of Schedule 1 to the Northern Ireland Act 1974. Paragraph 1(7) of Schedule 1 stated that "references to Measures [of the Northern Ireland Assembly established in 1973] in any enactment or instrument (whether passed or made before or after the passing of this Act) shall, so far as the context permits, be deemed to include references to Orders in Council under this paragraph." This was the legislative position when the Human Rights Act was enacted (that Act was enacted in the same year as, but before, the Northern Ireland Act 1998 was enacted).
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> 4. The Northern Ireland Act 1998 repealed the Northern Ireland Act 1974 but made provision for the construction of certain references in existing laws (section 95 and Schedule 12 to the 1998 Act). In particular, paragraph 3(4) of Schedule 12 provides:
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> > 'A reference to a Measure of the Assembly so established [ie under section 1 of the Northern Ireland Assembly Act 1973] shall be

> construed as including a reference to an Order in Council under paragraph 1 of Schedule 1 to the Northern Ireland Act 1974.'
>
> 5. Section 21 of the Human Rights Act specifies what is to be considered 'primary legislation' and what is to be 'subordinate legislation' for the purposes of that Act. Subordinate legislation includes a 'Measure of the Assembly established under section 1 of the Northern Ireland Assembly Act 1973' - see section 21(1)(d) in the definition of "subordinate legislation."
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> 6. Applying paragraph 3(4) of Schedule 12 to the Northern Ireland Act 1998, such Measures include the Children Order. The Children Order is therefore subordinate legislation for the purposes of the Human Rights Act.
>
> 7. It is submitted that this specific provision for Orders in Council made under the Northern Ireland Act 1974 displaces any general interpretation arising from the provision made in section 21(1) for Orders in Council as a whole, for example, the reference in section 21(1)(f)(iii) to Orders in Council amending an Act.
>
> 8. None of the authorities to date appear to have engaged with the particular interpretative provision for the category of Order in Council into which the Children Order falls."

[114] This position accords with authority to date dealing with this point in relation to adoption legislation from Northern Ireland in *Re P* [2008] UKHL 38. We agree with the Attorney General's analysis that the legislation is subordinate legislation for the purposes of the Human Rights Act.

[115] Our final thoughts are these. The young man who is the appellant in this case should be reassured by the fact that the declaratory relief is in place and the Trust will protect him until he is 18. After that he is an adult and so different legal rules apply.

Conclusion

[116] Accordingly, the appeals are dismissed.