Neutral Citation Number: [2023] EWCA Civ 689

Case No: CA-2022-000580

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
FAMILY DIVISION
(Ms Justice Russell
[2022] EWHC 295 (Fam))

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 16/06/2023

Before :

SIR ANDREW MCFARLANE PRESIDENT OF THE FAMILY DIVISION
LORD JUSICE MOYLAN
and
LORD JUSTICE DINGEMANS

- -

RE A (PARENTAL RESPONSIBILITY)

- -

Ms Caoilfhionn Gallagher K.C and Mr Christopher Barnes (instructed by **ITN Solicitors**) for the **Appellant**
Mr Mark Jarman K.C and Ms Maria Stanley (instructed by **Cafcass Legal**) for the **Respondent Children**
Mr Ben Jaffey K.C, Ms Carine Patry K.C and Mr Alexander Laing (instructed by **Government Legal Department**) for the **Lord Chancellor and Secretary of State for Justice**

Hearing dates : 29th and 30th March 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on 16th June 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Sir Andrew McFarlane P:

1. The focus of the present appeal is upon the distinction that is made within the Children Act 1989 ['CA 1989'] between married and unmarried parents with respect to the court's power to revoke parental responsibility. In short, where parents are married or are in a civil partnership, there is no power to revoke the parental responsibility of a father or second female parent. That position is in contrast to unmarried fathers, unmarried second female parents or step-parents where, by CA 1989, ss 4(2A), 4ZA(5) or 4A(3) respectively, the court has the power to bring their parental responsibility to an end. The appellant mother asserts that this distinction adversely discriminates against married mothers in breach of their rights, and those of their children, under the European Convention on Human Rights ['ECHR']. The judge at first instance, Ms Justice Russell, dismissed the mother's application for a declaration of incompatibility under Human Rights Act 1998 ['HRA 1998'], in part because the judge made a prohibited steps order which in practical terms removed from the father the right to exercise his parental responsibility. The mother now appeals to this court against that decision with the permission of the judge.

2. This judgment has the following structure:

    - The statutory scheme [paragraphs 4 to 11]
    - The factual background [paragraphs 12 to 13]
    - The prohibited steps order [paragraphs 14 to 15]
    - Declaration of incompatibility [paragraphs 16 to 17]
    - The Appellant's case [paragraphs 18 to 46]
    - The position of the children's guardian [paragraphs 47 to 51]
    - The Lord Chancellor's case [paragraphs 52 to 77]
    - Discussion:
        (a) The historical context [paragraphs 78 to 83]
        (b) ECHR Article 14 taken with Article 8 [paragraph 84]
        (c) Status [paragraphs 85 to 86]
        (d) Justification [paragraphs 87 to 102]
    - Northern Ireland decision [paragraph 103]
    - Russell J's decision [paragraphs 105 to 106]
    - Conclusion [paragraph 107].

3. During the hearing it was accepted that this court will need to determine for itself whether to grant a declaration of incompatibility. In those circumstances, and without

intending any disrespect to the judge or to counsel's arguments with respect to the appeal, I will only turn to consider the reasons given for dismissing the claim in the first instance judgment after reaching a conclusion on the substantive application.

Acquisition and revocation of parental responsibility: the statutory scheme

4. One of the central concepts introduced by CA 1989 was that of 'parental responsibility'. Parental responsibility is an umbrella term meaning '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' [CA 1989, s 3(1)].

5. Acquisition of parental responsibility is primarily provided for by CA 1989, s 2(1)-(2A):

> '(1) Where a child's father and mother were married to, or civil partners of, each other at the time of his birth, they shall each have parental responsibility for the child.
>
> (1A) Where a child—
>
> (a) has a parent by virtue of section 42 of the Human Fertilisation and Embryology Act 2008; or
>
> (b) has a parent by virtue of section 43 of that Act and is a person to whom section 1(3) of the Family Law Reform Act 1987 applies,
>
> the child's mother and the other parent shall each have parental responsibility for the child.
>
> (2) Where a child's father and mother were not married to, or civil partners of, each other at the time of his birth—
>
> (a) the mother shall have parental responsibility for the child;
>
> (b) the father shall have parental responsibility for the child if he has acquired it (and has not ceased to have it) in accordance with the provisions of this Act.
>
> (2A) Where a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 and is not a person to whom section 1(3) of the Family Law Reform Act 1987 applies—
>
> (a) the mother shall have parental responsibility for the child;
>
> (b) the other parent shall have parental responsibility for the child if she has acquired it (and has not ceased to have it) in accordance with the provisions of this Act.

6. The effect of CA 1989, s 2 is that, in all cases, whether married or not, a child's mother will have parental responsibility. Where a child's father and mother were married to, or civil partners of, each other at the time of the birth, the father will have parental responsibility. Where a woman was married to, or in a civil partnership with, a mother

who has given birth in the circumstances stipulated in Human Fertilisation and Embryology Act 2008, s 42 or s 43 together with Family Law Reform Act 1987, s 1(3), that woman will be treated as a parent and will have parental responsibility [CA 1989, s 2(1A)].

7. Where a child's father, or second female parent, were neither married nor in a civil partnership with the child's mother at the relevant time they will only have parental responsibility 'in accordance with the provisions of' CA 1989. The further provisions that are there referred to are s 4 (fathers), s 4ZA (second female parents) and s 4A (step-parents):

> **4 Acquisition of parental responsibility by father.**
>
> (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 under any of the enactments specified in subsection (1A);
> >
> > (b) he and the child's mother make an agreement (a "parental responsibility agreement") providing for him to have parental responsibility for the child; or
> >
> > (c) the court, on his application, orders that he shall have parental responsibility for the child.
>
> (1A) The enactments referred to in subsection (1)(a) are—
>
> > (a) paragraphs (a), (b) and (c) of section 10(1) and of section 10A(1) of the Births and Deaths Registration Act 1953;
> >
> > (b) paragraphs (a), (b)(i) and (c) of section 18(1), and sections 18(2)(b) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and
> >
> > (c) sub-paragraphs (a), (b) and (c) of Article 14(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.
>
> (1B) The Secretary of State may by order amend subsection (1A) so as to add further enactments to the list in that subsection.
>
> (2) No parental responsibility agreement shall have effect for the purposes of this Act unless—
>
> > (a) it is made in the form prescribed by regulations made by the Lord Chancellor; and
> >
> > (b) where regulations are made by the Lord Chancellor prescribing the manner in which such agreements must be recorded, it is recorded in the prescribed manner.

(2A) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.

(3) The court may make an order under subsection (2A) on the application—

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

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

subject, in the case of parental responsibility acquired under subsection (1)(c), to section 12(4).

(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

4ZA Acquisition of parental responsibility by second female parent

(1) Where a child has a parent by virtue of section 43 of the Human Fertilisation and Embryology Act 2008 and is not a person to whom section 1(3) of the Family Law Reform Act 1987 applies, that parent shall acquire parental responsibility for the child if—

(a) she becomes registered as a parent of the child under any of the enactments specified in subsection (2);

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

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

(2) The enactments referred to in subsection (1)(a) are—

(a) paragraphs (a), (b) and (c) of section 10(1B) and of section 10A(1B) of the Births and Deaths Registration Act 1953;

(b) paragraphs (a), (b) and (d) of section 18B(1) and sections 18B(3)(a) and 20(1)(a) of the Registration of Births, Deaths and Marriages (Scotland) Act 1965; and

(c) sub-paragraphs (a), (b) and (c) of Article 14ZA(3) of the Births and Deaths Registration (Northern Ireland) Order 1976.

(3) The Secretary of State may by order amend subsection (2) so as to add further enactments to the list in that subsection.

(4) An agreement under subsection (1)(b) is also a "parental responsibility agreement", and section 4(2) applies in relation to such an agreement as it applies in relation to parental responsibility agreements under section 4.

(5) A person who has acquired parental responsibility under subsection (1) shall cease to have that responsibility only if the court so orders.

(6) The court may make an order under subsection (5) on the application—

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

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

subject, in the case of parental responsibility acquired under subsection (1)(c), to section 12(4).

(7) The court may only grant leave under subsection (6)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

4A Acquisition of parental responsibility by step-parent

(1) Where a child's parent ("parent A") who has parental responsibility for the child is married to, or a civil partner of, a person who is not the child's parent ("the step-parent")—

(a) parent A or, if the other parent of the child also has parental responsibility for the child, both parents may by agreement with the step-parent provide for the step-parent to have parental responsibility for the child; or

(b) the court may, on the application of the step-parent, order that the step-parent shall have parental responsibility for the child.

(2) An agreement under subsection (1)(a) is also a "parental responsibility agreement", and section 4(2) applies in relation to such agreements as it applies in relation to parental responsibility agreements under section 4.

(3) A parental responsibility agreement under subsection (1)(a), or an order under subsection (1)(b), may only be brought to an end by an order of the court made on the application—

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

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

(4) The court may only grant leave under subsection (3)(b) if it is satisfied that the child has sufficient understanding to make the proposed application.

8. Whether or not parental responsibility, once it has been acquired by a father or second female parent, can be revoked depends upon the method of acquisition. Where parental responsibility is acquired under CA 1989, s 2, because the father or second female parent was married to, or in a civil partnership with, the mother, no provision is made in s 2, or elsewhere in the Act, for their parental responsibility to be brought to an end. This is in contrast to unmarried fathers, unmarried second female parents or step-parents, where the court is given power to bring parental responsibility to an end under ss 4(2A), 4ZA(5) or 4A(3). The parental responsibility of any person is, however, extinguished by adoption [Adoption and Children Act 2002, s 46(2)].

9. The appellant mother in the present appeal asserts that the distinction between married or civil partnered parents, and those who are neither married nor in a civil partnership,

is in breach of the ECHR rights of married mothers and their children in circumstances where the father has acted in a manner that would justify removal of parental responsibility if they were unmarried.

Control of the exercise of parental responsibility in the statutory scheme

10. Irrespective of whether or not there is a statutory power to bring parental responsibility to an end, in every case the court may control and limit a parent's ability to exercise parental responsibility through the making of prohibited steps orders, and may enhance the ability of the other parent to exercise parental responsibility with respect to specific issues. CA 1989, s 8(1) provides that:

> '"a prohibited steps order" means an order that no step which could be taken by a parent in meeting his parental responsibility for a child, and which is of a kind specified in the order, shall be taken by any person without the consent of the court;
>
> "a specific issue order" means an order giving directions for the purpose of determining a specific question which has arisen, or which may arise, in connection with any aspect of parental responsibility for a child.'

Whilst a prohibited steps order and/or a specific issue order may normally be made to regulate one or more aspects of the exercise of parental responsibility, it is accepted that, where the facts of the case justify it, the court may make a combination of orders which have the effect of prohibiting a parent from taking any step in the exercise of his or her parental responsibility and clothing the other parent with the exclusive right to exercise parental responsibility without reference to any other person who holds parental responsibility.

11. For example, in *P v D* [2014] EWHC 2355 (Fam) at [109] Baker J, as he then was, noted that, in very exceptional cases, the power to grant a prohibited steps order extends to making an order prohibiting a parent from taking any steps in the exercise of his or her parental responsibility. In *H v A (No 1)* [2015] EWHC 58 (Fam) MacDonald J granted an order prohibiting a father from taking any steps in the exercise of his parental responsibility with respect to each of his children until they achieved the age of 18 years and a restriction order under CA 1989, s 91(14) was granted for a similar period. In *HH Sheikh Mohammed Bin Rashid Al Maktoum v HRH Princess Haya Bin Al Hussein* [2021] EWHC 3480 (Fam), I made orders affording the mother in a high-profile case sole responsibility over any aspect of the children's medical care or schooling.

Factual Background

12. The factual background to the present case is described in detail in the judgment of Russell J ([2022] EWHC 295 (Fam)). It is only necessary to indicate the principal features here:

    a) Two children, X and Y, were born in 2007 and 2010 respectively;

    b) Their parents had married in 2006 and, by virtue of CA 1989, s 2, their father has parental responsibility for both children;

c) During the marriage, the father was physically, emotionally, psychologically and sexually abusive to the mother. More generally, he behaved in a coercive and controlling manner towards her;

d) The parents separated in 2013 and the children have remained in the care of their mother;

e) The father's abusive and threatening behaviour towards the children and the mother continued and worsened after the separation;

f) By 2015, the children had been placed on child protection plans by the local social services as a result of their father's behaviour and the social workers advised that he should not be permitted to have any contact with the children;

g) The children last saw their father in December 2016, over six years ago;

h) On police advice, in order to protect herself and the children from the father's behaviour, the mother and children moved to a confidential location, resulting in the loss to the children of their familiar home, friends and school. In addition, the children's names have been changed;

i) In 2018, the father was convicted in the crown court for breaching a non-molestation order. Based upon a diagnosis of paranoid schizophrenia, the court made a Hospital Order and imposed an indefinite Restraining Order under the Protection from Harassment Act 1997;

j) Before Russell J it was assumed that the father had been released from hospital some time in 2019, whilst his whereabouts were known, and he was served with notice of the proceedings and each hearing, there was very limited information about his current circumstances. ;

k) In her judgment, Russell J made extensive findings of violent, abusive and coercive/controlling behaviour by the father towards his wife and the children, both before and after separation;

l) The children, particularly X, the eldest, have clear recollections of their father's violent and disturbing behaviour. Russell J found that the cumulative impact upon X of the father's behaviour had been profound.

13. Looking at the father's course of conduct as a whole the judge accepted that [paragraph 34]:

> '… when considered in the context of [the father's] continuous harassment, threats, and abuse over a prolonged period of time, it is evidence of dangerous, obsessive behaviour which led [the mother] and the children to feel like prisoners in their own home. It must be observed that it is almost impossible for those who have not experienced it to understand the powerlessness, lack of control over one's own life, fear and trauma induced in victims of stalking. [The mother] has suffered from PTSD (and is prescribed medication for anxiety) which is directly attributable to [the father's] abusive behaviour and harassment.'

Russell J also held [paragraph 127] that the abuse and ill treatment suffered by the mother and children over a prolonged period 'arguably came near to meeting the ECHR Article 3 minimum level of severity if it had been perpetrated by an agent or agents of the State'.

The prohibited steps order

14. On the basis of the findings that she had made, Russell J was readily persuaded to make extensive orders under CA 1989, s 8 giving to the children's mother the right to exercise parental responsibility exclusively, and without reference to their father. The substantive order, made on 7 July 2021 ['the prohibited steps order'], which is a combination of specific issue and prohibited steps orders, states that the mother 'is expressly permitted to make all decisions and give parental consent unilaterally without reference to, without informing, and without consulting with [the father]'. A non-exhaustive list is then given of decisions which are to be exclusively taken by the children's mother, including matters concerning the children's names, travel, which country they are to live in, education and medical treatment. The order goes on to state plainly that the mother is not required to engage with the father 'in the exercise of any aspect of parental responsibility'.

15. The July 2021 order prohibits the father from removing the children from the care of their mother, or from any educational, medical or other institution to which she has entrusted their care. He is prohibited from requesting (or getting others to do so on his behalf) any information about the children's schooling or health. The order directs that he is to have no contact by any means with the children. In addition, the order imposes a prohibition upon the father making any application to the court under CA 1989 without the prior leave of the court, pursuant to CA 1989, s 91(14).

Declaration of incompatibility

16. The mother argued that the statutory scheme was incompatible with her right to a private and family life under Art 8 ECHR, and taken together with Art 14, discriminates against married mothers and children of married parents.

17. Human Rights Act 1998, s 4 gives the court the power to declare that primary legislation is incompatible with a Convention right. Pursuant to s 4(2), if the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of incompatibility. A declaration of incompatibility does not affect the validity, continuing operation or enforcement of the provision and is not binding on the parties to the proceedings in which it is made (HRA 1998, s 4(6)).

Declaration of incompatibility: the Appellant's case

18. At the centre of the Appellant's case, which was presented with clarity by Ms Caoilfhionn Gallagher KC and Mr Chris Barnes, is the assertion that some vulnerable children and their mothers are barred from obtaining recognition from the State that their father has acted in a way that justifies the removal of his parental responsibility. It is argued that no amount of prohibited steps or other orders reducing the exercise of parental responsibility can equate with an order for the removal of parental responsibility. The removal of parental responsibility is to be seen as 'the gold standard', yet it is not available to a particular class of children and mothers.

19. Where courts are given the power to remove parental responsibility in other circumstances, the absence of such a power for mothers who are married or in a civil partnership is, Ms Gallagher submits, incompatible with the ECHR and cannot be justified as a distinction simply based on birth status.

20. Within the ECHR, Ms Gallagher targeted the main focus of her submissions on Art 14 taken with Art 8.

21. By ECHR Art 8:

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

By Art 14:

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

These obligations are for the State, as a public authority.

22. The Art 14 discrimination relied upon by the Appellant is the inability for married mothers and their children *to apply* for removal of parental responsibility, irrespective of whether the remedy would be granted in any particular case. It is discrimination based solely upon marital/birth status. It is not gender specific discrimination, as the legislation applies to fathers and to second female parents, but it is specific as to parental status.

23. Reference was made to the relevant Scottish law which, in contrast to CA 1989, by virtue of the Children (Scotland) Act 1995, s 11(2)(a), enables the court to make an order depriving any person of some of all or his parental responsibilities or parental rights in relation to a child.

24. In describing the holding of parental responsibility as affording a 'status' to a parent, Ms Gallagher relies upon a reference to that effect that I made in *Re W (Direct Contact)* [2012] EWCA Civ 999 at paragraph 80:

> "Whether or not a parent has parental responsibility is not simply a matter that achieves the ticking of a box on a form. It is a significant matter of status as between parent and child and, just as important, as between each of the parents…."

25. The appellant's case is, therefore, that parental responsibility is a matter of status and that it cannot be reduced to being a mere label. Ms Gallagher accepted the court's observation that, irrespective of parental responsibility, the separate status of being a

child's 'father' cannot be removed and that position is the same whether or not the parents were ever married or in a civil partnership. She nevertheless pointed to the continued possession of parental responsibility as being a distinct and different status to that of being a 'father'.

26. In a statement in support of her application, the Appellant states that she finds it incredibly hard to understand how it is fair for the father to retain parental responsibility simply because they were married. She says 'I feel forced to have an ongoing [parental] relationship with him and this presence feels both intimidating and intrusive to our lives'.

27. The primary remedial measure available to a court under HRA 1998 to meet a possible conflict between domestic legislation and ECHR Convention rights is for the court to read the domestic provision down in a compatible manner. By HRA 1998, s 3(1), a court is required, so far as it is possible to do so, to give effect to primary and secondary legislation in a way that is compatible with Convention rights. The Appellant's case is that reading down is not possible in the present case having regard to the provisions of CA 1989, s 2 when read in the light of s 4, which applies to unmarried parents. The Lord Chancellor agrees that it is not possible to read in, or to infer that there is, a power of revocation of parental responsibility for married parents. That concession is not, however, a concession that the provisions of the CA 1989 on this issue are incompatible with the ECHR.

28. Turning to focus her submissions on Art 14 taken with Art 8, Ms Gallagher first noted that it was conceded at first instance that the issues engaged in this case are within the ambit of Art 8 rights to family life. No point is taken within the appeal and this court is invited to accept that that is so.

29. Secondly, in order to establish that there has been discrimination, Ms Gallagher points to the reference in Art 14 to 'or birth status'. It is agreed that marriage is a status for these purposes and the appellant's primary case is that the rule that married fathers cannot be deprived of parental responsibility is prima facie discrimination based upon the status of marriage or civil partnership or birth status in the case of the child/children concerned. Again, no issue is taken on these points by other parties.

30. Once a prima facie case of discrimination is established, Ms Gallagher correctly submitted that the burden shifts to the State to justify the difference in treatment. Ms Gallagher based her submissions on justification on the leading Supreme Court authority of *R (Tigere) v Secretary of State for Business, Innovation and Skills (Just for Kids Law intervening)* [2015] UKSC 57 where, at paragraph 33, Baroness Hale DPSC described the fourfold test that is to be applied:

> '33. With those considerations in mind, I turn to the issue of justification. It is now well-established in a series of cases at this level, beginning with *Huang v Secretary of State for the Home Department* [2007] UKHL 11, [2007] 2 AC 167, and continuing with *R (Aguilar Quila) v Secretary of State for the Home Department (AIRE Centre intervening)* [2011] UKSC 45, [2012] 1 AC 621, and *Bank Mellat v HM Treasury (No 2)* [2013] UKSC 39, [2014] AC 700, that the test for justification is fourfold: (i) does the measure have an legitimate aim sufficient to justify the limitation of a fundamental right; (ii) is the measure rationally connected to that aim;

(iii) could a less intrusive measure have been used; and (iv) bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, has a fair balance been struck between the rights of the individual and the interests of the community?'

31. Ms Gallagher referred to European Court of Human Rights ['ECtHR'] authority establishing that 'very weighty reasons' must be advanced to justify a distinction based upon a person's birth status [*Fabris v France* [GC] (2013) 57 EHRR 19; *Wolter and Sarfert v Germany* (2018) 66 EHRR 13] or marital status [*Sahin v Germany* [GC] [2003] 2 FLR 671; *Sommerfield v Germany* [GC] (2004) 38 EHRR 35]. Ms Gallagher submitted that the court was, therefore, required to identify very weighty reasons in the present case where the discrimination was based upon marital and/or birth status.

32. Ms Gallagher referred to three ECtHR cases which, in different ways, focussed upon a distinction drawn between married and unmarried parents.

33. In *PM v UK (App 6638/03)* the court found a breach of Art 14 with regard to a difference in treatment for tax purposes relating to child support between fathers who had been married parents and those that had not been married. It was held that where an unmarried father had acted to support his child as a married father would do, there was no reason for treating him differently to a father who was now divorced and separated.

34. In *McMichael v UK* (1995) 20 EHRR 205, the case, in so far as it is relevant, related to the acquisition of parental responsibility where different regimes as between married and unmarried fathers were justified. Ms Gallagher submitted that such justification is not proportionate where a distinction which promotes traditional family values through marriage is to be maintained in the face of conduct which would otherwise justify the recission of the parent's status.

35. The third case, *Smallwood v UK* (1998) 27 EHRR CD155 concerned an unmarried father who complained of discrimination following an order under CA 1989, s 4 rescinding his parental responsibility, which could not have been made had he been married to his child's mother. In the context of the issue raised in *Smallwood*, the ECHR Commission considered that the distinction between married and unmarried parents fell within the UK's margin of appreciation so that no appearance of violation of Art 8 in conjunction with Art 14 was disclosed. Ms Gallagher submits that the issue before the Commission in *Smallwood* did not apply to the present case.

36. More generally, Ms Gallagher submitted that the fact that there may be a rationale for a distinction between married and unmarried parents in other contexts, does not mean that such a distinction in the present circumstances is justified.

37. Ms Gallagher submitted that it was a flawed approach for the court to rely upon the fact that the Law Commission and subsequently Parliament had established and maintained the current distinction between married and unmarried fathers with respect to the discharge of parental responsibility. The court was taken to the first Law Commission Report on 'Illegitimacy' (1982: Law Comm 118) ['the first LC Report']. The primary focus of this first report, which looked at proposals for removing some or all distinctions between children born in or out of wedlock, was upon the acquisition of parental rights rather than their removal, but consideration was given to removal in paragraphs 4.41 and 4.42. Paragraph 4.41 considered a proposal for the law to allow for the restriction

of the rights of all parents (married or unmarried) when they are shown to be 'obviously unsuitable parents'. That proposal was roundly rejected by the Commission at paragraph 4.42:

> '4.42 For a number of reasons we are not attracted to this kind of solution. In the first place it would affect many more married than unmarried couples and would thus go far beyond the scope of this Report. Moreover it would involve a fundamental change in legal philosophy for which we have not found any great support or real justification. Our law (in common with that of other common law countries) is firmly based on the principle that the family is a unit in which there exists a broad parental authority. Whilst we are aware that there will be occasions on which even married parents abuse that authority, we believe that the law already follows the right course in relation to them by providing machinery for intervention when necessary, rather than by imposing rigid and artificial limitations when not strictly necessary. A further objection to this type of solution is, we think, that it would raise very considerable problems in defining the parental rights which might be restricted or the circumstances in which they would not be exercisable. We have already pointed out that it is not easy, as the law stands at present, to make an exhaustive catalogue of "parental rights". In view of this fact, we do not think that it would, in the absence of a comprehensive codification of the law on this topic, be possible to define satisfactorily those rights to which parents would or would not be entitled or the circumstances in which all or any parental rights could not be exercised.'

38. The Law Commission's 2nd Report on 'Illegitimacy' (1986: Law Comm 157) ['the second LC Report'] contained more settled proposals for reform and, at paragraph 3.3, drew the distinction between married and unmarried fathers with respect to the removal of parental rights:

> '3.3 There is one respect in which the position of a father who has been granted all the parental rights and duties by means of an order under clause 4 of the draft Bill will differ from that of a married father, in that the court will have power to revoke the order. This was provided for in our earlier Report and, in the present state of the law relating to family responsibilities, we consider that it should be retained. We recognise that, owing to the widely varying extent to which unmarried fathers in fact assume responsibility towards their children (and indeed towards the mothers who bring those children up), it would not be in the best interests of the children if fathers were automatically to enjoy full parental status. Where the parents are in fact living together and co-operating in bringing up their children, we hope that such orders will frequently be applied for and granted. However, unless the courts are able to remove parental powers where it subsequently proves not to be in the child's best interests for the father to have them, the courts may be reluctant to make such orders at all. A court will necessarily have to have regard to the extent to which it will be able to protect the child's interests should the need arise in the future and under the present law the powers of the divorce courts in relation to married couples are somewhat more extensive than those under the Guardianship of Minors Acts. The time may come when the general framework of the law relating to the responsibilities of parents, not only towards their children but also towards one another, is such that this can be reconsidered; but for the time

being we consider that the power to revoke these orders, in what we hope will be exceptional circumstances, should be available.'

39. By the Law Commission's 3rd and final report on this area, their proposals had been broadened into the wider scheme that was then taken up by Parliament and enacted in the CA 1989 ('Family Law: Review of Child Law Guardianship and Custody' 1988 Law Comm 172) ['the third LC Report']. It was in this 3rd Report that the Commission set out and developed the concept of 'parental responsibility' and, at paragraph 2.11, recommended, as a matter of principle, that parental responsibility should only be lost through adoption:

> '2.11 Allied to this is the principle that parents should not lose their parental responsibility even though its exercise may have to be modified or curtailed in certain respects, for example if it is necessary to determine where a child will live after his parents separate. Obviously, a court order to that effect will put many matters outside the control of the parent who does not have the child with him. However, parents should not be regarded as losing their position, and their ability to take decisions about their children, simply because they are separated or in dispute with one another about a particular matter. Hence they should only be prevented from acting in ways which would be incompatible with an order made about the child's upbringing. … These principles form part of our general aim of "lowering the stakes" in cases of parental separation and divorce, and emphasising the continued responsibility of both parents, to which we shall return. However, they are equally important where children are committed to local authority care. The crucial effect of a care order is to confer parental responsibilities upon the authority and there will be detailed regulations about how these are to be exercised. But the parents remain the parents and "it will continue to be important in many cases to involve the parents in the child's care". Clearly, the order will leave little scope for them to carry out their responsibilities, save to a limited extent while the child is with them, because the local authority will be in control of so much of the child's life. But the parents should not be deprived of their very parenthood unless and until the child is adopted or freed for adoption.'

The Law Commission, however, maintained the distinction established in their earlier reports so that parental responsibility acquired by an unmarried father could be brought to an end by a court order (paragraph 2.18).

40. Ms Gallagher considered that reliance upon the analysis and justification of the Law Commission, which was subsequently adopted by Parliament, for the distinction between married and unmarried fathers was flawed because the focus of the justification was upon encouraging the acquisition of parental responsibility by unmarried fathers. If, as was held in *McMichael* and *Smallwood*, there is justification for a distinction between married and unmarried fathers at the time of acquisition, that does not, in the Appellant's submission, justify there being a distinction in the approach to recission of parental responsibility on the basis of marital status. It is the Appellant's case that no valid justification for this distinction can be put forward.

41. Drawing her submissions together, Ms Gallagher referred to the four stages of the test set out by Baroness Hale in *Tigere*. She accepted that (i) was established and that recognising the importance of parental responsibility being held by both parents in a stable family unit was a legitimate aim.

42. In relation to (ii), however, she questioned how there could be any rational connection between that aim and the protection of a uniquely harmful group of abusive fathers. Indeed, she submitted, that there was a total disconnection between protecting such a group and the maintenance of a stable family unit.

43. In any event, a less intrusive measure, namely permitting a mother or children to apply to revoke the parental responsibility of a married father, would be entirely proportionate. In those circumstances, Ms Gallagher submits that it is not possible to hold that a fair balance has been struck, as required by stage (iv) of the *Tigere* test.

44. Ms Gallagher cautioned against reliance upon the analysis of the Law Commission more than 30 years ago. It was an analysis made before any of these provisions had come into force and on the basis of the limited proposals that were made for an unmarried father to gain parental responsibility either by agreement or court order. Following the change in the law providing for parental responsibility to follow the naming of a father on the child's birth certificate, the number of unmarried fathers who have parental responsibility has greatly increased. That has been a very significant change and it was not one within the contemplation of the Law Commission back in the 1980's.

45. At the core of Ms Gallagher's submission is the assertion that the justification that exists for a distinction between married and unmarried fathers with respect to the acquisition of parental responsibility does not carry through to justifying a distinction between those two groups with respect to revocation. Her case is that there is no necessary connection between acquisition and revocation. In any event, Ms Gallagher questioned whether the justification that existed when the CA 1989 was enacted of encouraging mothers to make parental responsibility agreements, or for courts to make a parental responsibility order, is valid where the acquisition is by the father being named on the birth certificate. There was, Ms Gallagher pointed out, no evidence that the distinction has any impact or relevance upon a mother deciding to agree to a father being named in their child's birth certificate. A blanket bar against revocation of a married father's parental responsibility goes further than the policy or objective of encouraging the acquisition of parental responsibility by unmarried fathers so that it protected married fathers from an application for removal even where they have committed marital rape or murder.

46. Ms Gallagher challenged Mr Jaffey's contention, based upon *R (SC and others) v Secretary of State for Works and Pensions [2021] UKSC 26,* that neither a strict review, nor a high standard, should be applied where the context was one of social policy being developed over time. Ms Gallagher relied on the summary given by Lord Reed at paragraph 142 which demonstrated that the broad or narrow nature of the margin to be afforded to Parliament may vary depending upon a range of factors, but, where the basis of a difference in treatment depends upon one of the 'suspect' grounds, such as birth status, there is a general need for strict scrutiny. Ms Gallagher also relied on Lord Reed's later description of the approach at paragraph 158:

> '158 Nevertheless, it is appropriate that the approach which this court has adopted since *Humphreys* [2012] 1 WLR 1545 should be modified in order to reflect the nuanced nature of the judgment which is required, following the jurisprudence of the European court. In the light of that jurisprudence as it currently stands, 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. Those grounds, as currently recognised, are discussed in paras 101—113 above; but, as I have explained, they may develop over time as the approach of the European court evolves. But other factors can sometimes lower the intensity of review even where a suspect ground is in issue, as cases such as *Schalk, Eweida* and *Tomþs* illustrate, besides the cases concerned with "transitional measures", such as *Stec, Runkee* and *British Gurkha*. Equally, even where there is no "suspect" ground, there may be factors which call for a stricter standard of review than might otherwise be necessary, such as the impact of a measure on the best interests of children.
>
> 159 It is therefore important to avoid a mechanical approach to these matters, based simply on the categorisation of the ground of the difference in treatment. A more flexible approach will give appropriate respect to the assessment of democratically accountable institutions, but will also take appropriate account of such other factors as may be relevant.'

The position of the children's guardian

47. The appeal is supported by Mr Mark Jarman KC and Ms Maria Stanley on behalf of the children's guardian.

48. Mr Jarman was clear that, whilst the ruling was not accepted as correct by the children's guardian, no challenge was made to the judge's finding that if she had had the power to do so, she might not have made an order revoking the father's parental responsibility in this case. At paragraph 131 of her judgment, Russell J said:

> "The rights of these children were given primary consideration by this Court in making the orders that it did; I have already alluded to the fact that had the court had the power to revoke parental responsibility, the considerations and conclusions in respect of best interests of the children would not necessarily coincide with the case put on behalf of [the mother]".

49. Mr Jarman took the court to the helpful distillation of the four key steps when considering whether or not there has been a breach of ECHR, Art 14 read with Art 8 as set out by Baroness Hale PSC in *Re McLaughlin* [2018] UKSC 48 at paragraph 15:

> 'Article 14 of the Convention provides that:

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

As is now well known, this raises four questions, although these are not rigidly compartmentalised:

(1) Do the circumstances fall within the ambit of one or more of the Convention rights?

(2) Has there been a difference of treatment between two persons who are in an analogous situation?

(3) Is that difference of treatment on the ground of one of the characteristics listed or other status?

(4) Is there an objective justification for that difference in treatment?'

50. Mr Jarman submitted that there was no justification for affording a privileged position to married parents in this context and he pointed to the position under Scottish law where no such distinction is drawn. In short, the difference in treatment as between those parents who are married, and those who are not, is a clear case of discrimination in breach of Art 14 read with Art 8.

51. Whilst Mr Jarman accepted that there would be no practical impact upon the mother or children if parental responsibility is removed from the father in the present case, given the comprehensive orders that have been made to limit his ability to exercise it, there was nevertheless a psychological impact that arose from knowing that he still held parental responsibility for the children.

Declaration of Incompatibility: Lord Chancellor's response

52. Mr Ben Jaffey KC, leading Ms Carine Patry KC and Mr Alex Laing on behalf of the Lord Chancellor and Secretary of State for Justice, invited this court to uphold the decision to refuse a declaration of incompatibility and to dismiss the appeal.

53. Mr Jaffey commenced his submissions by drawing attention to the underlying policy of the CA 1989 which provides that parental responsibility granted to every mother is permanent and can only be revoked in the event that her child is subsequently adopted. The cohort of uniquely unmeritorious parents whose parental responsibility cannot be removed must, therefore, include some mothers who have acted in a wholly negative manner towards their children.

54. The policy of the CA 1989 is to afford priority to marriage or civil partnership, and, despite the relevant provisions having been amended on a number of occasions since 1989, that priority has been maintained by Parliament. Rather than the difference in treatment being 'simply' because of marriage, as characterised by Ms Gallagher, Mr Jaffey submitted that the status of being married or in a civil partnership established a fundamental difference that was maintained throughout the legislative scheme. When a child is born, there is a need for at least one person to have parental responsibility, namely the child's mother. Parliament has established that, where a couple are married

or in a civil partnership, then parental responsibility, on the same irrevocable terms, should be extended to the other parent.

55. In terms of the acquisition of parental responsibility, the choice made by Parliament not to give automatic parental responsibility to all unmarried parents is justified on account of the wide range of personal relationships that may exist, in distinction to those who have positively committed to the establishment of a family unit through marriage or civil partnership. A further aspect of the policy was for everything to be done to encourage unmarried fathers to gain and hold parental responsibility. Part of that latter aspect was to allow for revocation in order to encourage mothers and/or the courts to agree to the grant of parental responsibility to unmarried fathers.

56. Mr Jaffey further submitted that it was artificial to divide consideration of acquisition from revocation; the two are inextricably linked. There is a different scheme for acquisition and a different scheme for revocation, depending on marital status. This is a distinction which has been firmly maintained by Parliament.

57. In those cases where the parental relationship has broken down and a parent has behaved in a manner that justifies doing so, Parliament has given the courts power to neutralise and prevent the exercise of parental responsibility by that parent, whether they be mothers or fathers, married or unmarried. Parliament has not, therefore, left a mother without an effective remedy. In this manner, Mr Jaffey submitted that the scheme as a whole was justified.

58. Turning to the detailed provisions in CA 1989, Mr Jaffey drew attention to

s 1(2A):

> '(2A) A court, in the circumstances mentioned in subsection (4)(a) or (7), is as respects each parent within subsection (6)(a) to presume, unless the contrary is shown, that involvement of that parent in the life of the child concerned will further the child's welfare.'

The circumstances mentioned in s 1(7) are whether to grant parental responsibility to a parent under s 4(1)(c) or (2A) or s 4ZA(1)(c) or (5). Mr Jaffey submitted that these provisions established a presumption in favour of the grant of parental responsibility to unmarried fathers in the event of there being a dispute on the issue.

59. Secondly, Mr Jaffey pointed to the fact that Parliament had, through the Domestic Abuse Act 2021, expanded the court's powers to prohibit further CA 1989 applications by inserting a new section, s 91A, into the Act, with the result that these prohibitive powers were now even more readily available. These expanded powers have been described by Hayden J in *F v M* [2023] EWFC 5 in clear terms:

> '20. The provisions within Section 91A are transformative. The section provides a powerful tool with which judges can protect both children and the parent with whom they live, from corrosive, demoralising and controlling applications which have an insidious impact on their general welfare and wellbeing and can cause real emotional harm. This amended provision strikes me as properly recognising the very significant toll protracted litigation can take on children and individuals who may already have become vulnerable, for a variety of reasons. It also dovetails with

> our enhanced understanding of the nature of controlling and coercive behaviour. When all other avenues are lost, too often the court process becomes the only weapon available. Lawyers and judges must be assiduous to identify when this occurs, in order to ensure that the court is not manipulated into becoming a source of harm but a guarantee of protection.'

It is of particular note that the underlying facts in *F v M* were described by Hayden J as being 'at the highest end of the index of gravity, within the sphere of coercive and controlling behaviour'.

60. In support of his general submission that the distinction between married and unmarried parents in this context is justified, Mr Jaffey placed particular emphasis upon paragraph 4.42 in the first LC report [see paragraph 37 above] where it is said that 'our law … is firmly based on the principle that the family is a unit in which there exists a broad parental authority'. The position endorsed by the Commission in that paragraph is that, whilst some parents may abuse their status, such circumstances can be met by bespoke orders rather than the alteration of the underlying structure as to the holding of parental authority.

61. The principled approach of the Law Commission in the first report was maintained through to the third and final report so that, at paragraph 2.11 [see paragraph 39 above] the recommendation was that parents would retain the status of being a parent, and retain parental responsibility, save upon the making of an adoption order.

62. Mr Jaffey commended the regime in CA 1989, Part 1 as a very well thought through scheme which deliberately sought for parents to retain parental responsibility, save for the exception established, in order to encourage the grant of parental responsibility to unmarried parents.

63. Mr Jaffey relied upon the ECtHR decision in *McMichael* to the extent that a distinction in Scottish law, which did not afford automatic parental rights to an unmarried father in contrast to the position for married fathers, was both legitimate and proportionate in that it provided a mechanism for identifying 'meritorious' fathers to whom rights could be granted. Consequently, no breach of Art 14 read with Art 8 was established [*McMichael* paragraphs 96 to 99].

64. Mr Jaffey submitted that the *Smallwood* decision was directly on point with the present case. In particular, the Commission held, in line with the ECtHR decision in *McMichael*, that there was an objective and reasonable justification for the difference in treatment between married and unmarried fathers:

> 'The Commission recalls that under English law a father automatically acquires parental responsibility for his children only if he is married to their mother. In contrast, the Commission notes that an unmarried father must apply for parental responsibility for his children born out of wedlock, which may be granted to him by court order or by agreement with the mother. The Commission recalls that the relationship between natural fathers and their children varies from ignorance and indifference to a close stable relationship indistinguishable from the conventional family based unit (see the above-mentioned *McMichael v UK*, para. 98). For this reason the Court has held that there exists an objective and reasonable justification

> for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights (*ibid*.).'

65. Mr Jaffey pointed out that the decision in *Smallwood* had been applied in this court in *Re D (Withdrawal of Parental Responsibility)* [2014] EWCA Civ 315 where permission to appeal on the grounds of discrimination had been refused. Ryder LJ described the court's approach:

> '[8] The question of the differential treatment of married and unmarried fathers by the statutory scheme is not before this court for consideration. Neither mothers nor married fathers can have their parental responsibility removed. That was the issue in *Smallwood v United Kingdom (Application No 29779/96)* (1999) 27 EHRR 155, an admissibility decision of the Commission in which it was held that the difference in treatment between mothers, married and unmarried fathers in the context of the jurisdiction of the court to make an order which removes an unmarried father's parental responsibility is not a violation of Art 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (European Convention) taken in conjunction with Art 14. On that basis the father in this case was refused permission to appeal on the question of whether the differential treatment was proportionate and whether s 4(2A) of the CA 1989 was incompatible with the rights set out in Arts 8 and 14 of the European Convention.'

66. By way of further illustration, Mr Jaffey referred to *H v A (No 1)* [2015] EWHC 58 (Fam) in which MacDonald J had encouraged counsel to abandon a 'bold' submission that the court should read into CA 1989 a power to revoke the parental responsibility of a married father on the basis that it had been Parliament's intention to draw the distinction between married and unmarried fathers and that the ECtHR had held that the distinction did not establish a breach of Art 14 with Art 8.

67. On the question of what test the court should apply with respect to evaluating the policy decision underlying the distinction between married and unmarried fathers in this context, Mr Jaffey referred to the decision of the Supreme Court in the Scottish case of *R (SC) v Works and Pensions Secretary* [2021] UKSC 26. In the course of an extended passage in his judgment, commencing at paragraph 97, Lord Reed PSC conducted a comprehensive review of the case law relating to the applicable test for justification, with particular focus upon 'suspect' grounds such as gender, marital status or birth status. At paragraph 115 the approach is summarised:

> '115 In summary, therefore, the court's approach to justification generally is a matter of some complexity, as a number of factors affecting the width of the margin of appreciation can arise from "the circumstances, the subject matter and its background". Notwithstanding that complexity, some general points can be identified.
>
> (1) One is that the court distinguishes between differences of treatment on certain grounds, discussed in paras 100—113 above, which for the reasons explained are regarded as especially serious and therefore call, in principle, for a strict test of justification (or, in the case of differences in treatment on the ground of race or ethnic origin, have been said to be incapable of justification), and differences of treatment on other grounds, which are in principle the subject of less intensive review.

> (2) Another, repeated in many of the judgments already cited, sometimes alongside a statement that "very weighty reasons" must be shown, is that a wide margin is usually allowed to the state when it comes to general measures of economic or social strategy. That was said, for example, in *Ponomaryov*, para 52, in relation to state provision of education; in *Schalk*, para 97, in relation to the legal recognition of same-sex relationships; in *Biao v Denmark*, para 93, in relation to the grant of residence permits; in *Guberina*, para 73, in relation to taxation; in *Bah v United Kingdom*, para 37, in relation to the provision of social housing; in *Stummer v Austria*, para 89, in relation to the provision of a state retirement pension; and in *Yigøit v Turkey*, para 70, in relation to a widow's pension. In some of these cases, the width of the margin of appreciation available in principle was rejected in the statement that the court "will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'": see *Bah*, para 37, and *Stummer*, para 89.
>
> (3) A third is that the width of the margin of appreciation can be affected to a considerable extent by the existence, or absence, of common standards among the contracting states: see *Petrovic* and *Markin*.
>
> (4) A fourth, linked to the third, is that a wide margin of appreciation is in principle available, even where there is differential treatment based on one of the so-called suspect grounds, where the state is taking steps to eliminate historical inequality over a transitional period. Similarly, in areas of evolving rights, where there is no established consensus, a wide margin has been allowed in the timing of legislative changes: see *Inze v Austria*, *Schalk and Stummer v Austria*.
>
> (5) Finally, there may be a wide variety of other factors which bear on the width of the margin of appreciation in particular circumstances. The point is illustrated by such cases as *MS v Germany*, *Ponomaryov and Eweida v United Kingdom*.'

68. Mr Jaffey submitted that, as Lord Reed made clear, an issue such as that in the present case, where social policy is developing over time, is not one to which a strict approach or a high standard should be applied. The court should respect the choices that have been made by the legislature.

69. Having described the manner in which the margin of appreciation is applied by the Strasbourg court, Lord Reed considered how such considerations were to be reflected in decisions of a domestic court at paragraph 143 onwards:

> '*The approach of domestic courts*
>
> 143 The concept of the margin of appreciation is specific to the European court. Nevertheless, domestic courts have generally endeavoured to apply an analogous approach to that of the European court. They have done so for two reasons. The first was explained by Baroness Hale in *R (Countryside Alliance) v Attorney General* [2008] AC 719, para 126:
>
> > "But when we can reasonably predict that Strasbourg would regard the matter as within the margin of appreciation left to the member states, it seems to me that this House should not attempt to second guess the conclusion which Parliament has reached. I do not think that this has to do with the subject

> matter of the issue, whether it be moral, social economic or libertarian; it has to do with keeping pace with the Strasbourg jurisprudence as it develops over time, neither more nor less: see *R (Ullah) v Special Adjudicator* [2004] 2AC 323, para 20."

> Accordingly, where the European court would allow a wide margin of appreciation to the legislature's policy choice, the domestic courts allow a correspondingly wide margin or "discretionary area of judgment" (*R v Director of Public Prosecutions, Ex p Kebilene* [2000] 2 AC 326, 380).

> 144 The second reason is that domestic courts have to respect the separation of powers between the judiciary and the elected branches of government. They therefore have to accord appropriate respect to the choices made in the field of social and economic policy by the Government and Parliament, while at the same time providing a safeguard against unjustifiable discrimination. As Lord Neuberger of Abbotsbury observed in *R (RJM) v Secretary of State for Work and Pensions* [2009] AC 311, para 57, "there will come a point where the justification for a policy is so weak, or the line has been drawn in such an arbitrary position, that, even with the broad margin of appreciation accorded to the state, the court will conclude that the policy is unjustifiable".'

70. Mr Jaffey submitted that on the issue of revocability of parental responsibility Parliament had to provide a coherent scheme, which, whilst it may not please everyone, does contain sufficient powers of mitigation to meet different situations.

71. Moving on, Mr Jaffey stressed that, in determining the issue of incompatibility, the court should not focus upon the individual circumstances of the mother and children in the present case; an approach which had been made clear in the judgment of the court in *R (McConnell) v Registrar General for England and Wales* [2020] EWCA Civ 559 at paragraph 58:

> '58 The second question is whether there is a legitimate aim for the interference. There clearly is. It consists of the protection of the rights of others, including any children who are born to a transgender person, and the maintenance of a clear and coherent scheme of registration of births. It is important in this context to bear in mind that this is a question to be addressed at a general level. It does not turn on the facts of this or any other particular case. The question is not whether it would be in the best interests of YY [the child] to have the person who gave birth to him described as his mother on the long-form birth certificate. The question is whether the rights of children generally include the right to know who gave birth to them and what that person's status was.'

72. Mr Jaffey also relied upon the judgment in *McConnell* [at paragraph 59] as a recent re-statement of the established approach to be taken to determining proportionality:

> 'The requirements of proportionality in the human rights context are now well established: see eg the decision of the Supreme Court in *Bank Mellat v HM Treasury (No 2)* [2014] AC 700, para 20 (Lord Sumption JSC) and para 74 (Lord Reed JSC).

> There are four questions to be asked:

> (i) Is there a sufficiently important objective which the measure pursues?
>
> (ii) Is there a rational connection between the means chosen and that objective?
>
> (iii) Are there less intrusive means available?
>
> (iv) Is there a fair balance struck between the rights of the individual and the general interests of the community?'

It was accepted that the formulation in *McConnell* was on all fours with that of Baroness Hale in *Tigere* [see paragraph 30 above].

73. Mr Jaffey drew the court's attention to paragraphs 80 to 82 in the judgment in *McConnell* in which Lord Burnett of Maldon LCJ focussed on engagement in the domestic context with the international law concept of 'margin of appreciation', which he described as the 'margin of judgment', which is to be afforded by a domestic court to Parliament. The Lord Chief Justice identified two foundations of the margin of judgment relevant in that case. Firstly, the institutional competence of the courts as compared to Parliament. In doing so he described the limited perspective that a court must necessarily have to engage with issues of social policy, when compared to the broad field of vision and resources available to Parliament. The second foundation is the democratic legitimacy of Parliament:

> '82 The second foundation is that Parliament enjoys a democratic legitimacy in our society which the courts do not. In particular, that legitimises its interventions in areas of difficult or controversial social policy. That is not to say that the courts should abdicate the function required by Parliament itself to protect the rights which are conferred by the HRA. The courts have their proper role to play in the careful scheme of the HRA, as Lord Bingham emphasised in *A v Secretary of State for the Home Department* [2004] UKHL 56, at para 42. In appropriate cases that can include making a declaration of incompatibility under section 4 in respect of primary legislation where an incompatibility between domestic legislation and Convention rights has been established and the interpretative tool provided by section 3 does not provide a solution. Democratic legitimacy provides another basis for concluding that the courts should be slow to occupy the margin of judgment more appropriately within the preserve of Parliament.'

74. Mr Jaffey's overall submission on this point is that because the question in the present case involves an issue of social policy the margin to be afforded to the decision of Parliament is a wide one.

75. In determining whether or not incompatibility with the ECHR is established, there is a need to consider the question of degree; is breach of just one individual's ECHR rights in consequence of a legislative provision sufficient to establish incompatibility? Mr Jaffey pointed to the decision of the UKSC in *Re Abortion Services (Safe Access Zones) NI Bill* [2022] UKSC 32 as establishing [at paragraph 19] the test as being that described by the UKSC in *Christian Institute v Lord Advocate* [2017] UKSC 29 at paragraph 88:

> 'If a legislative provision is capable of being operated in a manner which is compatible with Convention rights in that it will not give rise to an unjustified

> interference with article 8 rights *in all or almost all cases*, the legislation itself will not be incompatible with Convention rights . . .' [emphasis added].

In so holding, Lord Reed PSC disapproved the alternative formulation given by Baroness Hale PSC in *Re McLaughlin* [2018] 1 WLR 4250, [2018] UKSC 48 that the provision 'will inevitably operate incompatibly in a legally significant number of cases'.

76. Mr Jaffey concluded by submitting that a deliberate policy choice had been made by Parliament in distinguishing between married and unmarried fathers in this context. That choice was justified and, despite the distinction that was thereby drawn, it was not incompatible with the Convention. In any event, where no withdrawal of parental responsibility could take away the hurt and harm done to the mother and children by the father's abusive behaviour, where he would, in any event, retain the status of 'father', and where his ability to exercise parental responsibility has been totally removed, the impact on the mother and children of the difference in treatment was, as Russell J had found, minor.

77. Mr Jaffey accepted that the point of focus in the current challenge is upon the mother and children not being able to apply for revocation, but, he submitted that it is the scheme as a whole which is being challenged and incompatibility should be determined on that basis.

Discussion

(a) The historical context

78. It is important to commence consideration of the status of parenthood under the law of England and Wales by looking at the recommendations of the Law Commission in the 1980's. It is important to have some understanding of what had gone before and the basis upon which parental rights and the status of parenthood had been afforded to mothers and fathers, whether married or unmarried, in the lead up to that period and prior to the CA 1989.

79. The common law in England and Wales at the beginning of the 20th century as to who held parental authority over a child born during a marriage was clear and simple:

> 'The father of a legitimate child was exclusively entitled to exercise parental authority over the child; and the child's mother had no legal right to custody or care and control.' [Stephen Cretney '*Family Law in the Twentieth Century*' p 566]

The position was reversed for an illegitimate child, with the mother having sole parental authority and the father having none [*Barnado v McHugh* [1891] AC 388]. Although the Legitimacy Act 1926 increased the opportunities for legitimation, the distinction between a married father having sole parental authority and an unmarried father having none was maintained as was the position of married mothers. Save for the making of an adoption order, there was no power to revoke or remove parental authority from a married father.

80. Reform was achieved by s 1 of the Guardianship Act 1973, which equalised the rights of a married father and mother with respect to their child. Separately, the Children Act 1975, s 85 established the twin concepts of parental rights and duties yet maintained that the mother of an illegitimate child had those rights and duties 'exclusively' [s 85(7)]. The only route by which the father of an illegitimate child could obtain parental authority was to be appointed as guardian following the death of the child's mother, or by obtaining a custody order from the court under the Guardianship of Minors Act 1971.

81. These core provisions provided the landscape within which the Law Commission then undertook its work during the 1980's culminating in the CA 1989.

82. Against the background of a very long-established legal structure within which, for much of the time, it was only the child's father who held parental authority for a legitimate child, and where only a decade or so earlier the child's mother had come to share such rights in equal measure, it is not correct to characterise the clear distinction drawn in the CA 1989 between married and unmarried fathers as being 'simply' or 'merely' because of marital status. On the contrary, in terms of who did or did not hold parental authority for a child, the distinction between being married or unmarried was legally the determinative factor.

83. Regarding the direction of travel under these reforms, the historical perspective demonstrates that the positions of the married and the unmarried father were moving from diametrically opposite starting points. The one, automatically having full, irrevocable, and until recently sole, parental authority for his child, and the other having no rights during the life of the child's mother save for those that might be afforded by a revocable court order. In terms of the CA 1989 reforms, it had always been a given under the law that the father of a married child would have full, irrevocable parental authority (save for adoption). The changes to be made related to the need to expand the avenues by which an unmarried father might obtain parental responsibility, and, as the relevant passages in its reports demonstrate, it was to that issue that the Law Commission gave its attention, and it was into that context that the question of revocation of parental responsibility was introduced.

(b) ECHR Article 14 taken with Article 8

84. There is essentially no dispute, and this court has readily accepted, that the issue raised in this appeal engages with family life rights within Art 8 and that a distinction is drawn between a married father and an unmarried father arising from the inability to apply to revoke the parental responsibility of the former. There is, therefore, prima facie discrimination based upon marital (or civil partnership) status.

(c) Status

85. Whether or not a parent has parental responsibility gives them a status in their child's life which differs from that or a parent who does not have parental responsibility. It is, however, necessary to understand any such status as being of flexible weight or standing. Much, for example, will depend upon the degree to which a parent is able or permitted to exercise parental responsibility when determining the importance of that status for others in the family, be they the children or the other parent.

86. When evaluating the importance of the status that is afforded by having, or not having, parental responsibility, it is also necessary to understand that there will be a separate status, namely that of 'father' or 'parent'. In the present case, even if it were possible to revoke the father's parental responsibility, he would still remain the children's biological father. Insofar as it is said that there is an adverse psychological and emotional impact on the children and their mother from knowing that the father retains parental responsibility, it must be the case that a similar negative consequence will flow from knowing that he remains their father and that that status cannot be removed. These factors are of some importance when it comes to assessing the degree of significance of any discrimination resulting from the different treatment of married and unmarried fathers.

(d) Justification

87. A prima facie case of discrimination with respect to a relevant status having been established, focus shifts to the question of justification and the four-fold test set out in similar terms in *Bank Mellat, Tigere* and *McLaughlin,* firstly, whether the distinction has a legitimate aim sufficient to justify limiting the rights of a mother and/or children of a married father.

88. The long-standing position under the law of England and Wales, as previously described, has been that a married father has always been afforded parental authority for his child and that this could not be revoked, save by adoption. The legitimate aim of prioritising the state of marriage, and ensuring clarity over legal authority and responsibility for a child within the marital family is plain to discern. Prioritising the state of matrimony, and more recently civil partnership, over other less formalised relationships has been maintained by Parliament as a central tenet of Family law, both with respect to children and in relation to the division of property in the event of separation.

89. The Law Commission emphasised the fundamental nature of the priority to be afforded to parental responsibility within a marriage at paragraph 4.42 of its 1st Report:

> 'Moreover it would involve a fundamental change in legal philosophy for which we have not found any great support or real justification. Our law (in common with that of other common law countries) is firmly based on the principle that the family is a unit in which there exists a broad parental authority.'

90. Until the 1989 Act an unmarried father could not be afforded any parental rights or authority, save by a revocable custody order. The CA 1989, both initially and by later amendment, has altered that position by bringing some unmarried father's into a position closer to that of their married counterparts by allowing them to acquire parental responsibility by agreement, court order or by being named on the birth certificate. But elements of the long-standing distinction with married fathers have remained in that some unmarried fathers will not have parental responsibility and those that do acquire it may have it removed by subsequent court order. This distinction, from the perspective of the Art 14 rights of an unmarried father, has been held not to establish a breach of the ECHR [see paragraphs 33 to 35 above].

91. The legitimate aim of maintaining the status of married fathers and supporting the priority that has consistently been afforded by Parliament to the state of matrimony is plainly capable of justifying the limitation of a fundamental right.

92. The second *Bank Mellat* consideration is whether the measure is rationally connected to that aim. The answer on this point must be in the affirmative. The legitimate aim is to maintain the priority afforded to the married state and to retain the irrevocable parental authority/responsibility of a married father that has existed for more than a century. The newly created ability to grant, but also to revoke, parental responsibility for unmarried fathers is not connected with the legitimate aim of prioritising the creation of, what are hoped to be, stable and enduring family relationships within marriage or civil partnership. The spectrum of relationships which may lead to a child being born to parents who are not married is broad and may run from a transient encounter to one which endures for as long as many marriages. The separate aim underpinning the law relating to unmarried fathers is, firstly, to allow parental responsibility to be afforded to some such fathers, and, secondly, to encourage that to take place by agreement, court order or by birth certificate by allowing for the responsibility to be revoked at a later time if that is justified.

93. On that basis, the existence of a different scheme for unmarried fathers does not provide the support that the Appellant seeks to place upon it. That scheme can be separately objectively justified, and the reasons underpinning that scheme cannot be applied to married parents. The justification for there being a difference in treatment for married parents is, thus, not only the significance ascribed to them being married, but also the justification for there being a separate scheme for acquisition and revocation in the wider social setting within which unmarried parentage may occur.

94. The third consideration requires consideration of whether a less intrusive measure could have been used to achieve the policy and can be taken shortly. Where the policy aim is to afford priority to the status of marriage or civil partnership by ensuring that the parental responsibility of both parents is retained, save for adoption or parental order, it must follow that any measure which allows for that status to be reduced would defeat the object of the policy. Here the element of discrimination arises solely from the ability of a mother or child to apply to revoke parental responsibility of an unmarried father. It is binary; either the same facility is introduced for married fathers, or it is not; there is no 'less intrusive' measure to be contemplated.

95. Finally, there is the question of whether, bearing in mind the severity of the consequences, the importance of the aim and the extent to which the measure will contribute to that aim, a fair balance has been struck between the rights of the individual and the interests of the community.

96. In assessing the issue of balance, it is important to address a submission at the core of the Appellant's case which is that, although a father's ability to exercise parental responsibility may be reduced by prohibited steps and other orders, and/or by a prohibition on further court applications under CA 1989, s 91(14), this is not an adequate remedy. For reasons that have already been given, it is accepted that simply holding parental responsibility, irrespective of any ability actually to use it, is a relevant status in this context, and it is right that emptying a person's status of any power to deploy it, does not remove the status itself. But the fact that the status remains does not mean that the ability of a court to make orders removing that status of all value is not

an adequate remedy. In terms of protecting the mother and children from any future involvement of the father in their lives, the orders made in this case and similar cases is, indeed, an adequate remedy. The remaining status of being a holder of parental responsibility is but an empty vessel and, when determining what weight is to be attached to its continuing impact on the mother and children, it is likely to attract only minimal weight at most.

97. A further feature that is relevant to the assessment of a fair balance, is the point made earlier that, irrespective of parental responsibility, the status of being the children's father will remain and cannot be revoked, save by adoption or parental order.

98. Taking those two factors together, the consequences of maintaining a distinction between married and unmarried fathers, and not permitting an application for revocation of a married father's parental responsibility, are either of minimal severity or of little weight. Other than the maintenance of the status of holding parental responsibility, revocation would not cause any material change in the lives of the mother and children in the present case. The children's father in the present case is wholly unable to exercise any aspect of his parental responsibility. He does not know where his children live and he does not even know their names.

99. On the other side of the balance, it must be the case that, for families where a father has behaved so badly that removal of his parental responsibility may be justified, no weight will attach to the maintenance of stable family life within the context of a marriage. That aspect of an individual case does not, however, detract from the importance of the overall social policy aim of affording priority to marriage and civil partnership in the community as a whole, particularly where the court can provide practical protection by making a prohibited steps order.

100. In granting permanent parental responsibility to all married fathers, Parliament was continuing to uphold a long-established principle of Family law in England and Wales. In the CA 1989 a new, and different, scheme was created for the attribution of parental responsibility to unmarried fathers. For reasons that have been upheld in the Strasbourg cases, the new scheme provided for parental responsibility to be revoked in order to encourage mothers (or courts) to consider agreeing to grant it. The two schemes for acquisition and revocation of parental responsibility by married, on the one hand, and unmarried fathers, on the other, are distinct from each other. Each of the schemes is justified on its own terms, the former being based on long-standing legal principle, and the latter on the need to provide for parental responsibility for some unmarried fathers where previously there had, effectively, been none. The distinction between the two schemes exists because they have different aims and they are designed to meet different circumstances.

101. Drawing matters together, it is clear that the difference in the treatment of unmarried and married fathers is justified by the long-standing principle that married fathers (and mothers) should have irrevocable parental authority/responsibility for their children. Ms Gallagher's repeated characterisation of the difference in treatment as being 'simply' because the father was married misses the point. Affording priority to the establishment, and maintenance, of stable family life by commitment through marriage or civil partnership is what it is all about. Whilst there is, therefore, a difference in treatment, and thus prima facie discrimination, as between married and unmarried fathers, the impact of that difference upon their children and the children's mothers is,

in reality, minimal. Parliament has given the court power to empty a father's parental responsibility of all content and to prevent him making future applications to the court. A revocation order in the present case would make no material difference to the lives of the mother or children. Whilst the father retains the status of having parental responsibility, he also retains the status of being the children's 'father'; if the former could be removed, the latter would remain, with the consequence that the psychological or emotional benefit of revocation could only be minimal. The negative impact on a family that arises from an inability to apply to revoke parental responsibility, is, therefore, comprehensively outweighed by the overall benefit to the community of maintaining the priority that is attributed to marriage and civil partnership.

102. Although the point does not arise here, given the clear justification for the two different schemes relating to parental responsibility, if matters were more finely balanced, this court would need convincing evidence of a significant adverse impact of the policy on the wives and children of married fathers before holding that Parliament had acted incompatibly with the HRA and ECHR in this area of social policy in casting the law as it has done. For the reasons that I have given, the evidence of adverse impact fails to come close to achieving that quality.

103. In all the circumstances, the Appellant has failed to establish that the scheme within CA 1989, Part 1, and in particular the absence of a power for the court to revoke the parental responsibility of a married father, is in breach of ECHR Art 14 taken with Art 8, and the application for a declaration of incompatibility must, therefore, also fail.

Northern Ireland decision

104. In a Northern Ireland High Court case of *SV, FV and GV* [2022] NIFam 11, Humphreys J considered the same issue, albeit in the slightly different legislative context of the Children (Northern Ireland) Order 1995. Humphreys J concluded that the distinction between married and unmarried fathers with respect to revocation of parental responsibility was justified and did not establish a breach of the ECHR rights of married mothers and their children. Humphreys J's analysis is essentially on all fours with the approach of this court. This court was told that the applicants in *SV, FV and GV* had appealed to the Court of Appeal in Northern Ireland and that the appeal had been heard with judgment reserved.

Russell J's decision

105. In the light of the conclusion reached on the substantive application, it is not necessary to consider the first instance judgment of Russell J in detail. The judge's analysis included the following steps and conclusions:

a) The institution of marriage is a fundamental part of the socio-legal familial framework in the United Kingdom;

b) Parliament intended to give mothers and married parents a special status;

c) The underlying principles of the legislation have been upheld by the ECtHR;

d) There is little or no difference between an order for revocation, on the one hand, and a series of prohibited steps and other orders, on the other;

e) The approach under the ECHR requires that respect should be given, by applying a wider margin of appreciation to issues of economic or social strategy so that decisions of a State's legislature will normally be respected unless 'manifestly without reasonable foundation';

f) The fact that a married father retains the status of having parental responsibility for his children, despite orders having been made to remove any ability to exercise it, cannot be considered to be an interference with the ECHR Art 8 rights of the children and their mother;

g) In the context of Art 14 taken with Art 8, 'the difference in treatment, such as it is, is minor' and was justified;

h) Consequently, the statutory scheme is not incompatible with the ECHR.

106. Although this court has reached the same conclusion by a process of analysis which, to a degree, differs from that of the judge, that is no basis for allowing the appeal which, it follows, must be dismissed.

Conclusion

107. For the reasons that I have given, the application for a declaration of incompatibility is refused and the appeal dismissed.

Lord Justice Moylan:

108. I agree.

Lord Justice Dingemans:

109. I also agree.