Independent Human Rights Act Review

Response to the call for Evidence submitted on behalf of the Family Law Bar Association

Introduction

1. This is the Family Law Bar Association's response to the call for evidence for the Independent Human Rights Act Review. The Family Law Bar Association ("FLBA") is the specialist Bar Association for barristers practising in all areas of family law.

2. The FLBA has nearly 2200 members. The elected National Committee is based in London and is headed by a team of Executive Officers. In addition, the FLBA has a strong regional network as a result of a number of regional committees, which are based across England and Wales.

3. The FLBA holds an annual conference each Spring at Cumberland Lodge and a National Conference each Autumn, the location of which varies from year to year. The FLBA also holds a series of accredited CPD lectures each year which a cover a wide spectrum of family law topics from financial provision to international child abduction. In addition, the FLBA organises conferences, seminars, meetings and social events for its members throughout the year.

4. The FLBA produces a magazine, Family Affairs, three times a year, to keep its members up to date with events around the country and important developments in family law and procedure. Regular updates are also provided via e-mail. The FLBA also publishes 'At A Glance' annually. This has become an invaluable reference guide for practitioners and the judiciary conducting finance cases.

5. The FLBA is regularly consulted by both the Judiciary and Government Departments, including the Legal Aid Agency and the Ministry of Justice, in all important initiatives affecting family law and family barristers and it responds to consultations on matter of

policy and practice which fall within the expertise of its members and which are relevant to the practice of family law in the jurisdiction of England and Wales.

Overview of the FLBA Response

6. The FLBA welcomes the opportunity to respond to the Call for Evidence. The FLBA is well placed to comment on and to offer views on the interpretation and application of the HRA in the Family Courts over the past 18 years and to provide some insight as to how it operates in the practice of family law.

7. By its very nature, the business of the Family Courts requires decisions to be made about the most sensitive and private issues. The recognition of the family as a rights holder in and of itself is reflected generally in the restrictions placed on State intervention in the family. This can lead to complex legal issues as to the parameters of family life and the necessity to justify the way in which the State regulates private relationships between family members. The competing interest of family members are often difficult to reconcile and the human rights of the family unit, and those of its individual members, can sometimes conflict. It is unsurprising therefore that the interplay between human rights considerations and family law is a central question in many cases.

8. In family cases, particularly those involving children, the parties are often vulnerable. The adults and children who are the subjects of, and the parties to, public law Children Act proceedings are among the most socially and economically disadvantaged in society. Promotion and protection of the human rights of parents and children arise often and the Court is required to carefully balance those interests. Decisions about whether a child should be removed from their birth family are among the most challenging that come before the English Courts. Decisions about whether a child should live with one parent over another can be life altering for a child. Similarly, in financial remedies cases, the Courts are required to determine issues of asset distribution between spouses and for the benefit of children and such cases present uniquely challenging questions about gender equality and fair process. The Family Court is frequently dealing with cases in which serious allegations of domestic abuse is alleged and the procedural rights of parties who may be victims of sexual violence arise. Culturally sensitive questions which necessitate strict scrutiny of rights issues arise in cases of forced marriage and female genital mutilation.

9. In short, the Family Court is required on a daily basis to make decisions at all levels which have lifelong consequences for the family life of children, parents, adults and the wider family. The HRA impacts on the development of procedural and substantive rights which are at issue in Family Court. Article 6, which guarantees the right to fair trial, and Article 8, which requires the state to respect the right the private and family life of individuals, have the greatest resonance for Family Law. However, the Family Court has also considered the liberty of young persons placed in secure accommodation under Article 5, the rights of children and adults to freedom of expression under Article 10 and the Right to marry and found a family under Article 12.

10. The FLBA observes that the overarching obligation within the HRA that Courts interpret legislation in way which is compatible with the HRA has not presented significant difficulties in family law. This is evidenced by the fact that over the 18-year history of the Act there have only been three declarations of incompatibility made in family cases. In each of those cases the Government conceded the necessity of reforming the relevant legislation or practice in advance of the Court making the declaration.[1] The FLBA also notes that the impact of the HRA has been generally positive on the development of family law and in particular it has enhanced the procedural protection of the rights of individuals in a way which fully accords with the UK's international obligations. The FLBA suggest that any alterations to the Act which limit the power of the courts to interpret and apply the HRA are unlikely to advance the substantive protection of the rights of those indivudals who come before the family court.

11. The FLBA recognizes that the particular focus of the review is the impact of the HRA on the relations between the judiciary, the legislature and the executive. It is the view of the FLBA that, in the context of family law, the judiciary has struck the correct balance between the function of the Courts to interpret and apply legislation and the necessity of respecting Parliamentary Sovereignty and the executive responsibility in setting the parameters of public policy. By its nature, questions of public policy regularly arise in family law proceedings. In this document the FLBA provides examples across a number

[1] See Bellinger v Bellinger [2003] 2 AC 467, Re Z (A child) (No.2) [2017] Fam 25 and Steinfeld and Keidan v Secretary of State for International Development [2018] UKSC 32, further analysed at paragraph 62 of this document.

of cases studies to illustrate how the Courts have sought to resolve those issues. It is not possible in the confines of this review to cover all areas of family law and practice.

12. The FLBA does not consider that it is necessary to reform or repeal any interpretive provisions of the HRA. The current framework provides the correct balance between the roles of the executive and the judiciary. A primary aim of the legislation was to ensure that individuals could seek redress for human rights breaches in the domestic courts rather than being required to make applications to Strasbourg. The opportunity to do so has led to better protection and promotion of the rights and in particular those of children and other vulnerable groups. The FLBA consider that to be an important and welcome development.

Theme one – The relationship between domestic courts and the European Court of Human Rights (ECtHR)

a. How has the Court applied the obligation under s.2(1) of the HRA to take into account any judgment of the ECtHR.

13. As is clear from the wording of s.2 (1) of the HRA, the obligation is to 'take into account' the case law of the Strasbourg Court and it is not treated as binding on the English Court. This has been interpreted to mean that the English court should follow the established case law of the ECtHR and decisions which clearly interpret the Convention Rights.[2] The FLBA observes that, in general, with regard to family law, and in particular in respect of the protection afforded to children, there has been a high degree of alignment between the English law and the decisions of the ECtHR. Thus, decisions of the Strasbourg Court often confirm the existing procedural and substantive rights rather than develop new principles. In other areas of law and practice such as in relation to surrogacy, modern family structures, same sex parenthood, same sex relationships, the English law has often been more advanced in the protections offered to the family members and individuals.[3]

14. Core interpretive principles of the ECtHR have been developed by the English courts across all areas of law and practice. Of particular note in the family law context are the principles that any interference with the rights of individuals must be demonstrated to be

[2] See for example R (on the Application of Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions [2001] UKHL 23 [2003] 2 AC 295 at para 26.
[3] See generally Butterworths Family Law, at 4.005

proportionate and necessary. The Strasbourg case law has led to recognition of the necessary balancing exercise which is to be undertaken when reconciling competing rights of individuals. It is helpful to review the approach of the Courts across a number of case studies.

Adoption and Public Law Children Act Cases

15. The initial view of the English courts following the coming into force of the HRA was to emphasise the alignment of the domestic practices with the Strasbourg case law. Thus, in **Re B (a Minor) (Respondent) [2001] UKHL 70** Lord Nicolls of Birkenhead considered the approach to be taken Children Act cases in which HRA issues arose and he stated at paragraph 70;

> '*There is no need to have recourse to the s.3 of the HRA 1998…the balancing exercise required by Article 8 does not differ in substance from the like balancing exercise undertaken by a court when deciding whether, in the conventional phraseology of English law, an adoption would be in the best interests of the child. The like considerations fall to be taken into account. Although the phraseology is different, the criteria to be applied in deciding whether an adoption order is justified under Article 8(2) lead to the same result as the conventional test applied by English law.*

16. In **YC v UK [2012] 55 EHRR 33** the Strasbourg Court confirmed that the balancing exercise which was required by s.1 of the Children Act 1989 and the Adoption and Children Act 2002, and which applied in any case in which a child was removed from parents and placed for adoption by the Court, was compliant with the obligation to protect the right to respect for family life under Article 8. Particular emphasis was placed on the importance of properly and carefully considering the right of the child to be brought up in their birth family if possible, which was to be balanced against the necessity that their development in a safe and secure environment. The court emphasized that it was not enough to show that a child could be placed in a more beneficial environment but that the maintenance of family ties would harm their development and health.

17. In **Re B (Care Proceedings: Appeal) [2013] 1 WLR 1911** the UKSC considered the correct approach to be taken to balancing the competing interests of children and parents and the necessity to protect and promote their right to family life in adoption cases. Lord

Wilson emphasized at paragraph 34 that, in respect of the balancing exercise which was to be undertaken in an adoption case, '*the same thread therefore runs through both domestic law and Convention law, namely that the interests of the child must render it necessary to make an adoption. The word 'requires' in section 52(1) (b) "was plainly best chosen as conveying…the essence of the Strasbourg jurisprudence" (Re P (Placement Orders: Parental Consent) [2008] EWCA Civ 535 [2008] 2 FLR 625, para 125].*

18. The UKSC in **Re B** considered in some detail the proper approach to be taken by an appellate court to any challenge to the proportionality of a care order made with a view to adoption. It was clear that neither the Convention nor the HRA (s.6(1)) required the appellate court to consider issues arising under the Convention with any particular degree of intensity. At paragraph 36, Lord Wilson noted that appellate courts must discharge their duty under s.6(1) of the HRA but that it was a matter for Parliament or for rules made under its authority as to how this was to be done. That approach was endorsed by the Lord Neuberger in delivering the judgment of the Court at para 86.

19. While the UKSC in **Re B** went on to find that the degree of scrutiny which a first instance tribunal should apply to an application for a care order with a plan of adoption was high and that a court must be satisfied that 'nothing else will do', the way in which the Court took into account the Strasbourg case law is instructive. The Court noted the emphasis in the Strasbourg case law that closer scrutiny of evidence was required in any case in which a care plan of adoption was sought. **Re B** illustrates the measured way in which the English courts approach the necessity to read domestic legislation in a way which gives effect to the Convention rights, taking into account the Strasbourg case law but aligning it where appropriate with the domestic law.

20. In **BS (Children) [2013] EWCA Civ 1146**, the Court of Appeal provided further guidance addressing judicial concerns as to the inadequacy of the analysis and reasoning set out in evidence in cases where care and adoption orders were sought. Interestingly, while the procedural rights and obligations under Article 8 and 6 were central to the resolution of the issues in the case, the Court again emphasized the uniform approach to safeguarding those rights as between the Strasbourg Court in **YC** and the domestic courts in **Re P** and **Re B** above.

Relocation and International Abduction Cases

21. The process of taking into account ECtHR jurisprudence in relocation disputes has had an enormously beneficial impact. In particular it has in general terms deepened the court's analysis of the child's welfare, particularly by making explicit that the court must balance the competing rights and considerations of all realistic options in any private law case. The substantive provisions of the ECHR have encouraged the courts to move away from extra-statutory presumptions about what a child's best interests will require. As with public law and adoption cases it ushered in a 'proportionality cross-check' as the final stage in decision making.

22. It is notable that as with adoption cases, at the time of the entry into force of the HRA 1998, the Court of Appeal sought to emphasise that English law was already closely aligned to ECtHR jurisprudence. In **Payne v Payne [2001] Fam 473,** the Court of Appeal considered that the principle of the best interests of the Children Act 1989 was in no way inconsistent with human rights obligations: although it used different language, the Court of Appeal considered that the ECtHR recognised that the child's welfare is the paramount consideration.[4]

23. More recent English jurisprudence has expanded the analysis of a child's best interests, drawing on developments in the ECtHR and increasing awareness of the meaning and application of Article 8 in particular. For example, in **Re F (A Child) (International Relocation Case) [2017] 1 FLR 979**, Ryder LJ noted the applicability of the Convention to private law disputes and the particular significance of relocation applications on family relationships. He quoted from **Glaser v UK (2001) 33 EHRR 1**:

> "*Art 8 includes a right for a parent to have measures taken with a view to his or her being reunited with the child. This applies… also to cases where contact and residence disputes concerning children arise between parents and/or other members of the children's family… The key consideration is whether those authorities have taken all necessary step to facilitate contact as can reasonably be demanded in the special circumstances of the case*" [65], quoted at [31]

[4] See, for example, Johansen v Norway [1996] 23 EHRR 33; L v Finland Application No 25651/94 (27 April 2000); Scott v UK [2000] 2 FCR 560

24. Ryder LJ held, further, that relocation applications, unlike most private law applications, may well need an explicit proportionality evaluation:

> *"Many if not most private law children applications will be more than adequately protected by the domestic statutory regime and the jurisprudence of this court. International relocation applications under s 13 of the CA 1989 may require a proportionality evaluation because of the likelihood of the severance of the relationship between the child and one of her parents"* [32]

25. In respect of proportionality, the English courts have grappled with what exactly is required. At one end of the spectrum, it may "*amount to no more than an acknowledgement that one option is better than the other and that the preferred option represents a proportionate interference in the Art 8 Convention rights of those involved"* **Re F [2017] 1 FLR 979, [33]**; similarly, proportionality must not lead to the judge ordering an outcome not in the welfare best interests of the child (per Black LJ, **Re C (Internal Relocation] [2016] Fam 253, [61]**). At the other, proportionality is "*likely to mean that the judge will be that much more alert to the importance and thus weight to be afforded to the child's right to maintain contact with the left-behind parent and their rights to a stable and secure family life with their primary carer, if there is one"* (per Williams J, **Re C (Relocation: Appeal) [2019] 2 FLR 137**, **[15]).** Parents' "*wishes and interests"* will be "*carefully examined… within the welfare analysis"* (per Knowles J, **WS v KL [2020] EWHC 2548 (Fam)**, **[21]**).

26. The court further considered the notion of a 'proportionality evaluation' in **Re C (Internal Relocation) [2016] Fam 253**, an unsuccessful appeal by F against a decision giving M permission to relocate with the child to Cumbria. Black LJ reviewed the recent ECtHR case of **Nazarenko v Russia [2015] 2 FLR 728**, which held that Art 8 requires domestic authorities to strike a '*fair balance'* between the rights of parents and children ([63], quoted at [59]). She was satisfied that relocation cases were already dealt with in a way "*broadly in line with what is expected by the ECtHR. The interests of the parents are not ignored but, if it is not possible to accommodate everyone's wishes, the best interests of the child dictate the outcome"* [60]. However, the Court declined in that case to impose an obligation that a proportionality cross check following the welfare analysis must be carried out in every case taking the view that it was not necessary nor was it required by the ECtHR case law.

27. In **Re C (Relocation: Appeal) [2019] 2 FLR 137**, Williams J examined the tension in the case law, with Re F saying a distinct evaluation should be undertaken and Re C expressing doubts about how it could be undertaken. He considers that:

> *"in most cases in practice the proportionality issue will be subsumed within the overall holistic evaluation, in particular when considering effect of change and risk of harm. In reality, in the judicial consideration of the welfare checklist, it simply is likely to mean the judge will be that much more alert to the importance and thus weight to be afforded to the child's right to maintain contact with the left-behind parent and their rights to a stable and secure family life with their primary carer, if there is one"* [15]; emphasis added

28. The increasing attention given to the right to family life between 'left-behind' parents and children has developed alongside and informed statutory change. The amendment brought in by the **Children and Families Act 2014** to the **Children Act 1989** provides that, unless shown otherwise, the involvement of each parent in a child's life will further their welfare **(s1(2A), (2B)**).

Child Abduction

29. The English courts have developed the law relating to abduction proceedings, particularly proceedings under the 1980 Hague Convention, in line with ECtHR jurisprudence in the number of ways. The Courts have for example held that there is a discrete 'human rights' defence in Hague Convention proceedings, namely Article 20 (despite not being explicitly incorporated into domestic law): **Re J (A Child) (Return to Foreign Jurisdiction: Convention Rights) [2006] 1 AC 80; Re D (Abduction: Rights of Custody) [2007] 1 AC 619; SP v EB and KP [2014] EWHC 3964 (Fam)**. Guidance has been developed on the proper approach to hearing a child's perspective in Hague proceedings in line with Art 6: **Re KP (Abduction: Child's Objections) [2014] 2 FLR 660**. The Courts have considered a child's Art 8 rights as part of an assessment of whether a return to her home state would place her in an intolerable situation: **Re D (Abduction: Rights of Custody) [2006] UKHL 51; SP v EB and KP [2014] EWHC 3964 (Fam)**. It has explicitly recognised and evaluated the Art 8 rights of various family members following findings of domestic abuse perpetrated by F, in the course of determining a return application: **DT v LBT (Abduction: Domestic Abuse) [2011] 1 FLR 1215;**

30. The English Courts have, however, also been willing to depart from ECtHR decisions. This was particularly evident in the reaction to the ECtHR decisions of **Neulinger v Switzerland (Application No 41615/07) [2011] 1 FLR 122** and **X v Latvia (Application No 27853/09) [2012] 1 FLR 860.** Both the High Court (**DT v LBT (Abduction: Domestic Abuse) [2011] 1 FLR 1215**) and then, later, the Supreme Court (**Re E (Children) (Abduction: Custody Appeal) [2012] 1 AC 144**[5]**; Re S (A Child) (Abduction: Rights of Custody) [2012] 2 AC 257)** declined to follow these judgments insofar as they required, in every case, the courts to conduct an 'in depth examination' of a family's circumstances in determining a return order application. This was held to undermine the objective of the Hague Convention in providing the summary return of children to their home state. Instead, domestic courts have held that the structure of the Hague Convention itself is ECHR-compliant, without the need for an in-depth analysis of the family's circumstances in every case. The Supreme Court provided an interpretation of **Neulinger** that was compatible with existing domestic jurisprudence, holding that the Hague Convention was "*designed with the best interests, not only of children generally, but also of the individual child as a primary consideration"* [17], both in terms of being reunited with their parents as soon as possible and being brought up in a "*sound environment, in which they are not at risk of harm"* [52]; the Hague Convention is "*designed to strike a fair balance between those two interests"* [52]; if courts faithfully apply its provisions, they will be complying with the UN Convention on the Rights of the Child [18]. ECtHR jurisprudence has consistently held that Art 8 "*must be interpreted in the light of the requirements of the Hague Convention"* [19]. The ECtHR's finding of an Art 8 violation occurred in the context of a 5 year delay after the child's removal from the home state [24]; the violation in **Neulinger** is best understood as arising from delay rather than the operation of the Hague Convention itself [26]. It is "*possible to imagine other, highly unusual cases in which a return might be in violation of the European Convention"*, such as when there is a risk of torture, or "*flagrant denial of a fair trial"*. In such a case it would be "*unlawful for the court, as a public authority, to act incompatibly with the European Convention rights".* However, this will rarely occur: "*in virtually all cases, as the Strasbourg court has shown, they march hand in hand"* [27].

[5] The Supreme Court noted that *Neulinger* had caused "*concern, nay even consternation in some quarters"* because of its potential impact on the domestic operation of the Hague Convention 1980

31. The implications of **Neulinger** were again considered by the Supreme Court the following year in **Re S (A Child) (Abduction: Rights of Custody) [2012] 2 AC 257.** The court allowed M's appeal against a return order made by the Court of Appeal in the context of her allegations of drug use and violence by F and her poor mental health. The court considered the further ECtHR decision of **X v Latvia (Application No 27853/09) [2012] 1 FLR 860** which, like **Neulinger**, "*unfortunately reiterated"* that Hague Convention proceedings should involve an 'in depth examination' of the family's circumstances. In perhaps stronger terms than in **Re E,** in that it explicitly departed from the ECtHR's jurisprudence rather than sympathetically reinterpreted it in line with domestic law, the court holds:

> *"With the utmost respect to our colleagues in Strasbourg, we reiterate our conviction, as Reunite requests us to do, that neither the Hague Convention nor, surely, Art 8 of the European Convention requires the court which determines an application under the former to conduct an in-depth examination of the sort described. Indeed it would be entirely inappropriate."* [38]

32. The Supreme Court is currently considering the relationship between (undetermined) asylum applications and Hague Convention return orders (on appeal from **Re G (A Child) (Child Abduction) [2020] EWCA Civ 1185**). In the course of its analysis, the Court of Appeal noted that Art 8 imposes "*positive procedural obligations"* on states to determine the issue of return fairly and effectively [34]. ECtHR caselaw recognises the "*irremediable consequences for relations between a child and the [left behind] parent"* (**Maumousseau and Washington v France (Application No 39388/05 (2007) 51 EHRR 35, [83]**), which reinforces the "*requirement to act expeditiously"* included in the domestic Family Procedure Rules [34].

Surrogacy and Parentage

33. The requirement to take into account decisions and judgments of the European Court of Human Rights ("ECtHR") has, in the context of cases involving the welfare and parentage of donor-conceived children, enabled the court to interpret legislation in a manner which ensures that such children's family relationships are legally recognised.

34. The parentage of donor-conceived children is predominantly, although not exclusively, determined by the Human Fertilisation and Embryology Act 2008 ("HFEA 2008"). Perhaps the most significant provision in the HFEA 2008 is section 54, which empowers the court to make a "parental order" in respect of a child conceived by way of a surrogacy arrangement. Such an order confers legal parentage upon the intended parents (i.e. the couple who commissioned the surrogacy, at least one of whom must be genetically related to the child) and extinguishes the parentage of the legal parents (i.e. the surrogate and, if she is married, her husband).

35. Section 54 includes a number of criteria which must be satisfied before a parental order can be made. The High Court has relied upon ECtHR jurisprudence so as to interpret the legislation purposively and with a view to recognising and securing the child's legal relationships with her intended parents. In summary, the domestic courts have taken into account, and followed, ECtHR jurisprudence in two respects, namely in n applying the principle that there is a positive obligation on the State, where a family life exists between a child and *de facto* parent, to recognise in law and safeguard that relationship; and, in interpreting the scope of Article 8, including when a *de facto* family life is established.

36. For example, in ***A v P* [2012] Fam 188**, a couple conceived a child by way of a surrogacy arrangement and the child had lived with them since his birth. They applied for a parental order. However, after the application was made, but prior to its determination, the intended father died. Theis J was required to consider whether the court was entitled to make a parental order, notwithstanding that section 54 HFEA 2008 envisaged an application made by two applicants, and required that *'the child's home must be with the applicants'* at the time of the applicant *and* the making of the order. Theis J drew heavily on the decisions of the ECtHR in **Marckx v Belgium (1979) 2 EHRR 330** and **Pini v Romania (2004) 40 EHRR 312**, which emphasised the positive obligation on Member States pursuant to Article 8 to ensure that *de facto* family relationships are recognised and protected by law and that, once family life is established, the State must facilitate and protect that right. In particular, the State must ensure that the child is in an equivalent relationship with each parent. Relying on these principles, alongside similar principles in relation to a child's identity in the United Nations Convention on the Rights of the Child, and in circumstances where no other legal remedy was available to recognise the parent – child relationship, Theis J determined that the court did have the power to make the order. To hold otherwise

would have left the child without a legal relationship with one of the two adults who were, in every meaningful way, his parents.

37. This decision, and the reasoning, based on ECtHR jurisprudence, has proved seminal. A number of subsequent cases has seen the same approach adopted in order into interpret the various criteria within section 54 HFEA 2008 in a manner which ensures that *de facto* family relationships are recognised in law and that, consequently, a child's identity needs are met[6].

38. Perhaps the most significant decision to have applied the reasoning in ***A v P***, and consequently to have taken into account the ECtHR jurisprudence, is that of Sir James Munby P, former President of the Family Division, in **Re X (A Child) (Surrogacy: Time Limit) [2015] 1 FLR 349**. The President was required to consider whether the statutory requirement in section 54(3) that the application for a parental order be made within six months of the child's birth *did not* prevent the court from making the order where the application was made after the expiration of the six-month period. He held that it did not and made a parental order.

39. Although the President's primary reasoning was based on domestic principles of statutory interpretation, he held in the alternative that the HRA 1998 required him to interpret the HFEA 2008 so as to make the parental order. In so determining, the President had regard to the positive obligation on the State, arising from Article 8 ECHR, articulated in **Marckx v Belgium** and **Pini v Romania**. However, in interpreting the scope of Article 8, the President also had regard to the decision of the ECtHR in **Kroon and Others v The Netherlands (1994) 19 EHRR 263**, in which it accepted that family life existed between two parents and their children even though the parents had never married, did not cohabit and lived in separate houses.

40. A further example of the English court taking into account the decision in ***Kroon*** is the decision of Keehan J in **Re A (A Child: Surrogacy: Section 54 Criteria) [2021] 1 FLR 357**. Keehan J followed the reasoning of the ECtHR, not only in relation to the scope of

[6] See, for example: ***AB and CD v CT (Parental Order: Consent of Surrogate Mother)*** **[2016] 1 FLR 41**; ***R A and B (Parental Order)*** **[2016] 2 FLR 446**; ***M v F and SM*** **[2017] EWHC 2176 (Fam)**; ***Re N*** **[2019] 3 WLR 317**; ***Re X (Parental Order: Death of Intended Parent Prior to Birth)*** **[2020] 2 FLR 1326**; ***Re A (A Child: Surrogacy: Section 54 Criteria)*** **[2021] 1 FLR 357**.

Article 8 in terms of what constitutes "family life", but in relation the principle that "respect" for that "family life" requires that biological and social reality prevail over legal presumption.

Secure Accommodation and Deprivation of Liberty

41. Secure accommodation cases and deprivation of liberty of children involve careful balancing of the protective role of the family court weighed against the autonomy of children. S.25 Children Act 1989 permits a court to authorize the placement of a child in secure accommodation if the child has a history of absconding from other accommodation and if the child is likely to suffer significant harm if he absconds. It is an enormously controversial provision not least because it offends well established principles of children's autonomy and it severely restricts the liberty of a young person. It was the subject of an early challenge as to its compatibility with the HRA 1998, and in particular Article 5 of the ECHR, which prohibits the deprivation of liberty subject to very limited exceptions. In **Re K (Secure Accommodation Order: Right to Liberty) [2001] 1 FLR 526**, Butler Sloss P considered whether it was possible to read the provisions of s.25 of the CA 1989 as compliant with Article 5 and further whether it was in essence detaining a child for the purposes of educational supervision which was a permitted exception Article 5(1) (d) of under the ECHR.

42. At paragraph 35, the Court noted that ECtHR jurisprudence and in particular **Boumar v Belgium (1989) 11 EHRR 1** noted that orders to place children in secure accommodation in that jurisdiction were not isolated orders but arose in circumstances where there had been a long history in which less interventionist measures were pursued to assist the child. The Court considered that the ECtHR jurisprudence required that proper and careful examination of education supervision was undertaken, and if the court was satisfied that this comprised an important component of any SCO then it would not offend Article 5. The Court declined to make a declaration of incompatibility.

43. More recently, the Supreme Court and Court of Appeal have, in a series of decisions, drawn upon the ECtHR decisions in **Storck v Germany (2005) 43 EHRR 96** and **Guzzardi v**

Italy (1980) 3 EHRR 333, in interpreting the scope of Article 5 and the protections guaranteed by it[7].

Transparency in Family Proceedings

44. Family proceedings, and in particular proceedings concerning children, have always been considered an exception to the principle that "justice must be seen to be done". Family proceedings are, as a matter of routine, held in private. **Section 12 of the Administration of Justice Act 1960** makes it a contempt of court to publish any information relating to proceedings, where, put simply, those proceedings relate to welfare, maintenance or upbringing of a child. **Section 97 of the Children Act 1989** prohibits the publication of any information likely to identify a child as being the subject of such proceedings.

45. Since its enactment, the HRA 1998 has proved pivotal in the court's approach to determining applications for the court to exercise its *'disclosure'* or *'restrain'* jurisdictions, and in its approach to controlling information relating to proceedings more generally. In so doing, the court has relied heavily on the ECtHR jurisprudence. The most significant example of the domestic court taking into account the reasoning and decisions of the ECtHR is the House of Lords' decision in **Re S (A Child) (Identification: Restrictions on Publication) [2005] 1 AC 593**, relying on the previous decision of the same court in **Campbell v MGN Ltd [2004] 2 AC 457**. **Re S** was an appeal from a decision in care proceedings concerning a young child whose brother had died of salt poisoning, and whose mother was indicted for his murder. On an application of the child's guardian, the trial judge granted an injunction prohibiting, *inter alia*, publication in any report of the criminal trial of the name or photograph of the mother or the deceased child. A local newspaper appealed against that decision.

46. In his seminal opinion, and in allowing the appeal, Lord Steyn took into account ECtHR jurisprudence as establishing that there is *'a general and strong rule'* in favour of unrestricted publicity of any proceedings in a criminal trial (taking into account: **Werner v Austria (1997) 26 EHRR 310**; **Malhous v Czech Republic (Application No 33071/96) (unreported) 12 July 2001**; **Bakova v Slovakia (Application No 47227/99)**

[7] **Cheshire West v P [2014] 2 WLR 642**, **Re D (A Child) [2020] 1 FLR 549**, **Re T (A Child) [2019] 2 WLR 1173**.

(unreported) 12 November 2002). Notably, Lord Steyn remarked that this was akin to the approach which had previously developed under the common law.

47. However, the key principles established in **Re S** derive from the earlier decision of **Campbell v MGN Ltd**, in which the House of Lords took into account the principle established by Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe, at [11], namely that the right to privacy guaranteed by Article 8 and the right to freedom of expression guaranteed by Article 10 are neither absolute nor hierarchical, but are of equal value. This led Lord Steyn to articulate four principles, at [17], which have governed the domestic court's approach to the exercise of the *'restraint'* and *'disclosure'* jurisdiction in family proceedings, namely:

    a. Neither Article 8 nor Article 10 has precedence over, or "trumps", the other;

    b. Where the values under the two articles are in conflict, '*an intense focus on the comparative importance of the specific rights being claimed'* is necessary;

    c. The justifications for interfering with or restricting each right must be taken into account;

    d. Finally, *'the proportionality test must be applied to each'* in what Lord Steyn described as '*the ultimate balancing test'*.

48. This approach has been followed in innumerable cases since, predominantly those relating to children but also those relating to financial matters between spouses or parents. Such cases have as a matter of routine taken into account, and followed, ECtHR jurisprudence as informing the court's *'ultimate balancing test'* as between Articles 8 and 10. In **A v Ward [2010] 1 FLR 1497**, Munby J relied upon **Moser v Austria [2007] 1 FLR 702** for the proposition that a distinction must be drawn between private law proceedings (concerning a disputes as to parental responsibility or the arrangements for a child between two parents) and public law proceedings (where the State commences proceedings for the protection of children), such that, in the case of the latter, *'the reasons for excluding a case from public scrutiny must be subject to careful examination'*.

49. In both **Newman v Southampton City Council [2020] 4 WLR 108** and **Re G (A Child) (Wider Family: Disclosure of Court File) [2018] 4 WLR 120**, the court has relied upon ECtHR jurisprudence as establishing the principle that the confidentiality and privacy attaching to medical evidence is of *'fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by article 8'* (see **Z v Finland (1997) 25 EHRR 371** and **MS v Sweden (1997) 28 EHRR 313**). In **HRH Prince Louis of Luxembourg v HRH Princess Tessy of Luxembourg (Publication of Offer) [2018] 2 FLR 480**, Macdonald J relied upon a number of ECtHR decisions as establishing the principle that the ambit of a child's private life, as protected by Article 8, is a wide one, *'encompassing not only the narrow concept of personal freedom from intrusion but also psychological and physical integrity, personal development and the development of social relationships and physical and social identity'* (see **Botta v Italy (1998) 26 EHRR 241 and Bensaid v United Kingdom [2001] ECHR 82**)[8].

50. In **Re Webster [2007] 1 FLR 1146**, Munby J relied upon **Bergens Tidende v Norway (2001) 31 EHRR 16** and **Prager and Oberschlick v Austria (1996) 21 EHRR 1** as establishing three propositions in respect of Article 10 when undertaking the *'ultimate balancing exercise'*, namely: (i) that it confers journalistic freedom, which includes recourse to a degree of exaggeration or provocation[9]; (ii) the role of the press as a *'public watchdog'* means that the State's margin of appreciation in this respect is circumscribed; and, (iii) the Press is one of the means by which politicians and the public can verify that judges are discharging their responsibilities in a manner which conforms with the aim of the task entrusted to them.

Is there a need for any amendment of section 2?

51. The FLBA consider that the wide range of cases in which the English court has applied Strasbourg jurisprudence illustrate a number of important points;

    i. The domestic Courts have carefully and properly considered ECtHR case law and its application where appropriate.

    ii. The interpretation of Strasbourg case law has strengthened protection of vulnerable groups in particular children and its impact has been positive

[8] See also **Re Roddy (A Child) (Identification: Restriction on Publication) [2004] 2 FLR 949**, in which Munby J relied upon **Botta, Bensaid** and also **Pretty v United Kingdom (2002) 35 EHRR 1**.

[9] See also **Re J (A Child) [2013] EWHC 2694 (Fam).**

as to the development of procedural rights within Children Act proceedings.

iii. There has been a high degree of complementarity between domestic decisions and Strasbourg case law.

52. The FLBA has provided a comprehensive survey of case law across a range of areas to assist the Independent Review in gaining a full and accurate picture as to the impact of the ECtHR jurisprudence in family law over 18 years. It would be difficult to reach the conclusion that the ECtHR caselaw as applied and interpreted demonstrates a pattern of the Courts usurping the parliamentary function. The FLBA does not in the circumstances consider that s.2 should be amended and takes the view that the case law demonstrates that the Courts have properly and authoritatively exercised their powers under it as Parliament intended.

b) When Taking into account the Jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence?

53. The FLBA notes that the application of the margin of appreciation is to a great extent confined to the Strasbourg court and reflects the tensions around state sovereignty in two contexts. Firstly, those matters of public or social policy where there is a wide divergence among member States and the Strasbourg court applies a wide margin of appreciation. Secondly issues of particular sensitivity to a member state in which the Strasbourg court considers it appropriate to defer to the domestic authorities. Neither scenario transposes itself into the domestic arena and as such the FLBA makes the preliminary observation that the margin of appreciation, which is an interpretive principle applied by the Court and not found in the Convention itself, is of limited application under the HRA. In family law the margin of appreciation has not featured particularly in the jurisprudence under the HRA. There are few examples of the domestic courts applying the margin, although the Courts often identify restrictions on their own powers to determine sensitive issues of public policy (See **Owens v Owens [2018] AC 899**).

54. **In Re P (adoption: unmarried couple) [2008] 2FLR 1084**, Lord Hoffman considered the application of the margin of appreciation in respect of a matter of social policy which prohibited an unmarried couple in Northern Ireland from applying for approval as adopters

of a child. He noted that the parameters of the margin of appreciation were not a matter for Parliament alone and that the Courts had been charged with responsibility under the HRA with interpreting the Convention provisions stating at paragraph 37 that where Parliament asserted that such a prohibition was matter of social policy;

> *"it is for the Court in the UK to interpret Arts 8 and 14 and to apply the division between the decision making powers of courts and Parliament in a way which appears appropriate for the UK. The margin of appreciation is there for division between the three branches of government according to our principles of separation of powers. There is no principle by which it is automatically appropriated by the legislative branch".*

55. However, it is clear that while the question of whether the margin of appreciation applies to any particular case may be as much a matter for the Court as for the legislature and the executive it has not featured heavily in family law decisions and where it has been deemed to apply the Courts often decline to resolve complex issues of public policy. For example, in **Wilkinson v Kitzinger [2007] 1 FLR 295**, the President concluded that the margin afforded to Parliament was wide in circumstances where the claimant sought recognition of a same sex marriage from outside the jurisdiction before same sex unions or marriage were lawfully protected in England. The Court declined to recognise the marriage deferring to Parliament on the basis that margin of appreciation applied in the case.

56. In **Steinfeld and Keidan v Secretary of State for International Development [2018] UKSC 32** the Supreme Court had considered arguments on as to the exclusion of heterosexual couples from the civil partnership scheme focusing on the justification based on the premise that the European Court of Human Rights in **Schalk and Kopf 53 EHRR 20** had recognised that in terms of timing of legislative change to recognise different forms of relationship, a wide margin of appreciation is appropriate. This was rejected by the Supreme Court. Lord Kerr (for the whole Court) said at 426 [28],

> *i.* **"***In the first place, the approach of the ECtHR to the question of what margin of appreciation member states should be accorded is not mirrored by the exercise which a national court is required to carry out in deciding whether an interference with a Convention right is justified. As Baroness Hale said In re G (Adoption: Unmarried Couple) [2009] AC 173, para 118:*

ii. *"it is clear that the doctrine of the 'margin of appreciation' as applied in Strasbourg has no application in domestic law. The Strasbourg court will allow a certain freedom of action to member states, which may mean that the same case will be answered differently in different states (or even in different legal systems within the same state). This is particularly so when dealing with questions of justification, whether for interference in one of the qualified rights, or for a difference in treatment under article 14. National authorities are better able than Strasbourg to assess what restrictions are necessary in the democratic societies they serve. So to that extent the judgment must be one for the national authorities."*

[29] *It follows that a national court must confront the interference with a Convention right and decide whether the justification claimed for it has been made out. It cannot avoid that obligation by reference to a margin of appreciation to be allowed the Government or Parliament, (at least not in the sense that the expression has been used by ECtHR)."*

Is any change required?

57. The FLBA takes the view that the way in which the margin of appreciation has been applied in family law cases before the Court is very limited which is somewhat surprising given the interface between family law generally and public policy considerations. However, it reflects perhaps the fact that there has been a clear pattern of judges in this jurisdiction carefully delineating the role of the judiciary and the executive. There does not seem to be any justification for amendment.

c. Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK?

58. The FLBA notes again there are limited examples of open judicial dialogue and it is therefore difficult to comment on this particular question. One illustration of the "dialogue" that exists between the Courts, the executive and the legislature in the UK arises from The Civil Partnership Act 2004. This created the status of civil partnership, whereby same sex partners could obtain formal legal recognition of their relationship. By sections 1 and 3(1)(a) of the 2004 Act two people were not eligible to register as civil partners of each other if they were not of the same sex.

59. Parliament subsequently enacted legislation that opened marriage to same sex couples by way of the Marriage (Same Sex Couples) Act 2013. This created an imbalance whereby same sex couples had a choice of status and others did not. The 2013 legislation recognised

this, in that section 15 of the 2013 Act required the Secretary of State to arrange for a review of the operation and future of the 2004 Act to begin as soon as possible and to include a full public consultation. The anomaly was challenged in the Court. However this failed in the Court of Appeal who considered that the bar constitutes a potential violation of the appellants' human rights under article 14 ECHR (prohibition of discrimination) when read with article 8 (right to respect for private and family life.") However, the majority held that the prohibition formed part of the Secretary of State's policy of "wait and evaluate." In the context of a pending Private Members Bill (sponsored by Tim Loughton MP) on the issue, the Court refrained from making a declaration of incompatibility with the appellants' rights under the ECHR. It was apparent that the Court was left unimpressed by arguments that the Government should be given time to remedy the anomalous state of affairs when the Court believed that it had created a new form of discrimination by the way it framed the Marriage (Same Sex Couples) Act 2013.

60. In **Steinfeld and Keidan v Secretary of State for International Development [2018] UKSC 32** the Court found that the Government had created a new form of discrimination by the way it framed the Marriage (Same Sex Couples) Act 2013, the index provisions were contrary to article 14 of ECHR taken in conjunction with article 8. The Court also used a paragraph from its Judgment in **R (Nicklinson) v Ministry of Justice (CNK Alliance Ltd intervening) [2015] AC 657** at [343] to explain the significance (and limitations) of its eventual course of action namely, a Declaration of Incompatibility:

> "*An essential element of the structure of the Human Rights Act 1998 is the call which Parliament has made on the courts to review the legislation which it passes in order to tell it whether the provisions contained in that legislation comply with the Convention. By responding to that call and sending the message to Parliament that a particular provision is incompatible with the Convention, the courts do not usurp the role of Parliament, much less offend the separation of powers. A declaration of incompatibility is merely an expression of the court's conclusion as to whether, as enacted, a particular item of legislation cannot be considered compatible with a Convention right. In other words, the courts say to Parliament, 'This particular piece of legislation is incompatible, now it is for you to decide what to do about it.' And under the scheme of the Human Rights Act 1998 it is open to Parliament to decide to do nothing."*

61. The consequence was that, with Government support, the statutory scheme was amended by way of Tim Loughton's private member's Bill enacted as, Civil Partnerships, Marriages and Deaths (Registration etc) Act 2019 (2019 c 12).

Theme Two

General views on how the role of the Courts, Government and Parliament are balanced in the operation of the HRA

a. Should changes be made to the framework established by Sections 3 and 4 of the HRA

62. The FLBA note that in the family law field the Courts have generally been able to give effect to the obligation under s.3(1) of the HRA to interpret legislation in a way which has been compatible with the Act. This is reflected in the fact that there have only been three declarations of incompatibility made in family law cases over the 18 years of the HRA. Interesting in each of the three cases the Government had indicated a willingness to modify the legislation to correct the incompatibility *before* the Court made its decision. Those cases were as follows;

    a. In **Bellinger v Bellinger [2003] 2 AC 467**, a decision in which the House of Lords found that the Matrimonial Causes Act 1973 s.11 (c) was incompatible with Articles 12 and 8 because it did not make any provision for gender reassignment.

    b. In **Re Z (a child) (No.2) [2017] Fam 25**, the President of the Family Division Sir James Munby found that s.54(1) and (2) of the Human Fertilisation and Embryology Act 2008 which prevented a single person from applying for a parental order to ensure legal recognition of a child born through surrogacy breached their right to respect for their family life under Article 8. The Secretary of State did not oppose the making of the declaration having informed the Court of his intention to bring a reform in the law before Parliament.

    c. In **R (Steinfeld and Keidan) v Secretary of State for International Development**, the Supreme Court found the legislation which permitted a same sex couple to enter into a civil partnership but prevented a heterosexual couple from doing likewise amounted to a breach of Articles 8 and 14. In this case again the Secretary of State indicated before the UKSC that it intended to reform the law to remove the incompatibility and therefore did not oppose the making of any declarations.

63. This pattern arguably demonstrates the use of the capacity to make declarations has been restrained with the focus being on the section 3 obligation to interpret and apply the legislation in a way which is HRA compatible.

64. The FLBA considers that a number of important points arise as to the application of section 3 and 4 which are:

    a. The role of the Court in the interpretation and application of the HRA as set out in section 3 of the Act is central to the effective protection and promotion of the rights enshrined in the Convention.
    b. The case law set out above illustrates how the courts when determining family law applications have focused to a significant extent on harmonizing the obligations which arise under the Convention with the domestic legal provisions.
    c. Any modification of the Court's powers under s.3 would result in a dilution of rights protection domestically and could result in a significant increase in applications to the ECtHR, a factor which was a significant motivation behind the HRA.
    d. The interpretive functions of the Court have particular resonance for the protection of the most vulnerable groups in society including children, parents with learning difficulties, young people deprived of their liberty, women subject to domestic abuse, young people subjected to forced marriage or to FGM. Any dilution of the Court's functions would be contrary to wider public policy goals in prioritizing the protection of such groups.
    e. The effect of a declaration of incompatibility should not be overstated or misrepresented. It accords fully with parliamentary sovereignty and the division of powers between the judiciary and the executive. The role of the Court in identifying where law or policy offend the Convention rights of individuals is fundamental to the operation of the HRA. It is sparingly used which demonstrates that the judiciary fully recognizes the consequence of it. Moreover, the executive response to such declarations in the family law field evidences a co-operative and constructive dialogue between the judiciary and the executive.

65. The FLBA does not in the circumstances consider that any amendment of either section 3 or 4 is either necessary or appropriate.

66. The FLBA does not comment on the remainder of the issues raised in Theme 2.

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