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*The European Convention on Human
Rights and its Impact on Family*

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The European convention on Human Rights and its Impact on the Family: the Human Rights Act 1998 (UK).

The European Convention

The Convention for the Protection of Human Rights and Fundamental Freedoms (known as the European Convention of Human Rights) (“the European Convention”) was an international response to the horrors of the Second World War and the Holocaust. At the first session of the Parliamentary Assembly of the Council of Europe in 1949 Sir Winston Churchill expressed the hope that a “European Court may be set up, before which cases of the violation of these (human) rights...might be brought before the civilised world”. In fulfilment of that hope on 4th November 1950 the European Convention was signed in Rome and established the first international complaints procedure, which enabled an individual to have access to an international court against the State.

The principal Article of the European Convention which directly concerns the family is Article 8 and this Article will have a fundamental influence upon family law. Article 8 (1) provides that

‘Everyone has the right to respect for his private and family life...’

Article 8(2) provides that

‘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... for the protection of health and morals or for the protection of the rights and freedoms of others’.

The essential object of Article 8 is ‘to protect the individual against arbitrary action by the public authorities¹’. It is a qualified right; that is, Article 8(1) sets out the right guaranteed under the Convention and Article 8(2) sets out the justification upon which the State may

¹ *Kroon v Netherlands* (1994) 19 EHRR 263, para 31

interfere. There are three components to that justification. The first is that the interference is ‘in accordance with the law’. The second component is that the interference is in pursuit of one of the legitimate aims defined in Art 8(2); the protection of the rights and freedoms of others encompasses the interests of the child. The third component is that the intervention must be ‘necessary in a democratic society’: that is to say, the reasons given for the interference must be ‘relevant and sufficient’; it must meet a pressing social need and be proportionate to that need².

The Human Rights Act 1998: ‘Bringing the Convention Rights Home’

The European Convention has been international law for 50 years and on 2nd October 2000 the Human Rights Act 1998 (“the Act”) came into force in England and Wales ‘to give people in the United Kingdom opportunities to enforce their rights under the European Convention (directly) in British Courts... to bring those rights home³’. As the Lord Chancellor, Lord Irvine of Lairg put it: “The Convention rights are the magnetic north and the needle of judicial interpretation will swing towards them⁴”.

The Act is, therefore, a fundamental constitutional measure. It “incorporates” the European Convention into our domestic law by providing a statutory scheme, by which our domestic law is enacted, interpreted and amended so that it is compatible with the Convention.

The power house driving the Act is the concept of *compatibility*.

- Under section 3, so far as it is possible to do so, our domestic legislation must be read and given effect to so as to be compatible with Convention rights.
- Under section 4 the higher courts may make a declaration of incompatibility where they are satisfied that the legislation is incompatible with the Convention.
- Section 10 and Schedule 2 provide “a fast track procedure” for remedial action to amend the legislation where a declaration of incompatibility is made.
- Under section 6 it is unlawful for a public authority, including a court, to act in a way, which is incompatible with a Convention right, unless it is required to do so by primary legislation which cannot be interpreted compatibly with the Convention.

² *Re W & B; Re W (Care Plan)* [2001] EWCA Civ 757, para (54), per Hale LJ *Re B (Adoption by One Natural Parent to Exclusion of Other)* [2001] 1 FLR 589 at 599 (39), per Hale LJ.

³ White Paper: *Rights Brought Home: The Human Rights Bill* Preface p.1 & para 1.19

⁴ H.L. Debates, vol 585 at col. 840

- Section 7⁵ enables an individual to bring proceedings against a public authority, which has acted incompatibly with a Convention right in breach of section 6.

This provides a strong form of incorporation and under s 2 our UK courts are required to take account of Strasbourg jurisprudence.

Since 2nd October 2000 the needle of our judicial interpretation has swung decisively towards the Convention's magnetic north. Under section 3 of the Act the Court's new interpretative task is to find a possible meaning which will prevent the need for a declaration of incompatibility⁶.

In respect of family law legislation, the domestic courts have, thus far, been successful in finding an interpretation that is compatible with Convention rights⁷. A prime example is *Re K (Secure Accommodation Order: Right to Liberty)*⁸ where the Court of Appeal held that a secure accommodation order under s 25 of the Children Act 1989 was a deprivation of liberty within the meaning of Art 5⁹, but was not incompatible with the Convention, where it was justified under Art 5 (1)(d) as the detention of a minor by lawful order for the purpose of educational supervision.¹⁰ Dame Elizabeth Butler-Sloss P said¹¹:

‘The duty of the English Court under the Human Rights Act 1998 is to attempt to find a compatible interpretation. If a compatible interpretation can be found, there is no justification for a declaration of incompatibility’

⁵ See: *Re W & B; Re W (Care Plan)* [2001] EWCA Civ 757, paras (72-76), per Hale LJ, in which she sets out the appropriate procedure under s 7 in family proceedings and makes the practical suggestion of having a single court able to grant all available remedies

⁶ Lord Cooke of Thornhill 582 HL Official Report (5th Series) col 1272 (3 November 1997); “*Incorporation and Devolution-A Few Reflections on the Changing Scene*”: Lord Steyn [1998] EHRLR 153 at 155; Lord Irvine of Lairg 582 HL Official Report (5th Series), cols. 1230-1231: Section 3 “will ensure that, if it is possible to interpret a statute in two ways-one compatible with the Convention and one not- the courts will always choose the interpretation which is compatible. In practice, this will prove a strong form of incorporation...”

⁷ Lord Irvine of Lairg: “...in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility”: 585 HL Official Report (5th Series) col 840 (5 February 1998); also the Home Secretary, Jack Straw MP, 306 HC Official Report (6th Series) col 780 (16 February 1998): “ We expect that in almost all cases, the courts will be able to interpret legislation compatibly with the Convention”.

⁸ [2001] 1 FLR 526

⁹ Thorpe LJ dissenting on this point.

¹⁰ The European Court had considered the applicability of Art 5(1) (d) in *Koniarska v UK* (12 October 2000). The applicant who had passed school leaving age claimed that her detention was not ‘for’ the purpose of educational supervision which was incidental to the real reason, namely the need for protection and containment pending the actioning of her care plan. This was rejected, the European Court considering that in the context of the detention of minors, ‘the words “educational supervision” must not be equated rigidly with notions of classroom teaching. In particular, in the present context of a young person in local authority care, educational supervision must embrace many aspects of the exercise by the local authority of parental rights for the benefit and protection of the person concerned...’

¹¹ [2001] 1 FLR 526 at 540 (41)-(42)

and went on to agree with the extra-judicial observation of Lord Cooke of Thornhill who said:

‘Section 3 (1) will require a very different approach to interpretation from that to which the United Kingdom courts are accustomed. Traditionally the search has been for the true meaning, now it will be for a possible meaning that prevents the making of a declaration of incompatibility¹²’.

Again in *Re W and B; Re W (Care Plan)*¹³ Hale LJ emphasised that

‘...the Human Rights Act 1998 was carefully designed to promote the search for compatibility, rather than incompatibility, between primary legislation and the Convention rights’.

A declaration of incompatibility is, therefore, to be regarded as a last resort¹⁴.

i. The Family

It is ‘the right to respect for family life’ under Article 8 of the European Convention, which will play a particularly important role in the future development of family law.

The European Convention is a “living instrument”, which must be interpreted in the light of present-day conditions¹⁵ and Article 8 has been one of its most dynamically interpreted provisions. Thus the concept of “family life” has been widely interpreted to embrace different social relationships and continues to evolve to reflect changing social standards. A classic example is the landmark case of *Marckx v Belgium*¹⁶, which broke new ground in holding that Art 8 made no distinctions between the legitimate and illegitimate family.

In the jurisprudence of the European Court, the concept of “family life” has developed from marital families to embrace other de facto relationships¹⁷:

¹² See footnote 5 above.

¹³ [2001] EWCA Civ 757; August [2001] Fam Law 581

¹⁴ See also: *Donoghue v Poplar Housing Regeneration Community Association Ltd* [2001] 2 FLR 284 which gives guidance on s 3 and 4 of the Human Rights Act 1998. ‘If there was a potential for legislation to breach the Convention, the court was required, so far as possible, to interpret that legislation in a way which was compatible with the Convention. If interpretation was required, the court ought to limit the extent of the modified meaning to that which was necessary to achieve compatibility. The court was not entitled to legislate; it could only interpret. If it was necessary to alter radically the effect of legislation to obtain compliance, that was an indication that more than interpretation was involved. If it was not possible to achieve an interpretation of the legislation which was compatible with the Convention, the court was not required to grant a declaration, but could do so, in its discretion’.

¹⁵ *Tyer v UK* (1978) 2 EHRR 1, para 31

¹⁶ (1979) 2 EHRR 330

¹⁷ “*Current Topic: The Concept of Family Life under the ECHR*” by Jane Liddy, Member of the European Commission of Human Rights in [1998] EHRLR 17

- First, ‘the relationship created between spouses by a lawful marriage has to be regarded as “family life”. It follows from the concept of family on which Article 8 is based that the child born of such a union is... part of that relationship; hence from the moment of the child’s birth and by the very fact of it, there exists between him and his parents a bond amounting to “family life”, even if the parents are not then living together’¹⁸. “Family life”, therefore, always exists within marriage and does not cease upon the separation or divorce of the parents¹⁹ and can only be broken in exceptional circumstances²⁰.
- Secondly, “family life” exists between a natural father and a child where there has been cohabitation or other factors, which show a relationship of sufficient constancy and commitment to create de facto ties²¹. Equally this can only be broken in exceptional circumstances. However, the European Court’s current view, as spelt out in *B v UK*,²² is that it is legitimate to treat married and unmarried fathers differently. It considered that the justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights relates to the range of possible relationships between unmarried fathers and their children ‘from ignorance and indifference to a close stable relationship indistinguishable from the conventional family-based unit’
- Thirdly, a unit, which has the appearance of being indistinguishable from the traditional notion of “family life”, such as a transsexual, his partner and the latter’s child, may constitute “family life” in circumstances²³, where the transsexual has lived for many years in society as a man, bears a male name and fulfils the overt role in society of male partner and parent²⁴.
- Fourthly, “family life” has been held to include the relationship between an adopted child and the adoptive parents²⁵ and between a foster-child and a foster-parent²⁶
- Fifthly, the family life of a natural or of an adopted child extends to grandparents²⁷ and other family relationships such as siblings²⁸ and uncles/nephews and nieces²⁹.

¹⁸ *Berrehab v The Netherlands* (1988) 11 EHRR 322 para 21; also *Abdulaziz Cabales and Balkandi v UK* (1985) 7 EHRR 471

¹⁹ *Keegan v Ireland* (1994) 18 EHRR 342

²⁰ *Berrehab v The Netherlands*, (1988) 11 EHRR 322, para 21

²¹ *Kroon v The Netherlands* (1994) 19 EHRR 263, para 30

²² [2000] 1 FLR 1; also *McMichael v UK* (1995) 20 EHRR 205

²³ *X, Y and Z v UK* (1997) 24 EHRR 143, para 35

²⁴ *Ibid.* para 56 (European Commission)

²⁵ *X v France* Application No.9993/82 (1982) DR 241

²⁶ *X v Switzerland* Application No.8257/78 (Dec) (10 July 1978) 13 DR 248; *Rieme v Sweden* (1992)

The European Commission's view is, however, that such relationships require a closer investigation into the degree of dependency.

There are other relationships which either have currently been excluded from "family life" such as homosexual relationships³⁰ or remain to be considered in the future, such as the relationships between the children of first and second families or between a child and a natural parent who has donated an egg or sperm for artificial insemination³¹.

As to homosexuality, in *Kerkhoven v The Netherlands*, which concerned a stable lesbian relationship, the European Commission held that the partner of the mother could not rely on either the family life provisions or the private life provisions of Article 8 to claim parental authority over a child born to the mother by artificial insemination. The Commission stated

"...despite the evolution of attitudes towards homosexuality, a stable homosexual relationship between two women does not fall within the scope of the right to respect for family life ensured by Article 8".

In *Salgueiro de Silva Mouta v Portugal*³², however, the European Court recently went some way to relaxing its approach to homosexuality, where the applicant father, who was living in a homosexual relationship, complained that the grant of parental authority over his daughter to his ex- wife rather than to himself on the basis of his sexual orientation was a violation of Article 8 combined with Article 14. As the natural father of his daughter, the applicant enjoyed "family life" with her, as he was related to her by blood and the facts, therefore, fell within the scope of Article 8.

The European Court concluded that there had been unequal treatment between the applicant and the child's mother arising from the applicant's sexual orientation, which was discriminatory within the meaning of Article 14. The decision did not, however, mark a departure from the *Kerkhoven* line of cases in the sense that it did not give any recognition to the homosexual relationship, in which the applicant father was living, as constituting "family life" in Article 8.

16 EHRR 155

²⁷ *Marckx v Belgium* (1979) 2 EHRR 330, para 45

²⁸ *Moustaquim v Belgium* (1991) 13 EHRR 802, para 36

²⁹ *Boyle v UK* (1994) 19 EHRR 179, paras 41-46

³⁰ *Kerkhoven v The Netherlands* Application No. 15666/89 (19 May 1992); *X v UK* (1983) 32 DR 220 *S v UK* Application N11716/85 (1986) 47 DR 272, para 2; *B v UK* Application No 16106/90 (1990) 64 DR 278, para 2; see also *Grant v South Western Trains* (1998) 3 BHRC 578 (a decision of the European Court of Justice, which rejected an allegation that concessionary fares granted to heterosexual couples was discriminatory against homosexual couples on the ground that the relationships were not equivalent).

³¹ *G v The Netherlands* Application No. 16944/90 16 EHRR CD 38

³² Application No 33290/96 (21st December 1999); see also the recent admissibility case *Frette v*

Over the last 10 months there has been a growing body of English decisions on the ambit of ‘family life’³³. In *Re B (Adoption by one Natural Parent to the Exclusion of Other)*³⁴ Hale LJ, after citing *Marckx v Belgium* ‘...respect for family life implies, in particular, in the Court’s view, the existence in domestic law of legal safeguards that render possible, as from the moment of birth, the child’s integration in its family’ said:

‘In my view, the relationship of mother and child is in itself sufficient to establish ‘family life’ even if they are separated at birth. The carrying and giving birth to a child brings with it a relationship between them both which is entitled to respect. Were it otherwise, the state could always interfere without fear of contravening Art 8 by removing children the moment they were born. This only needs stating for it to be recognised how wrong that would be.’

In contrast, in *Re H; Re G (Adoption: Consultation of Unmarried Fathers)*³⁵ Dame Elizabeth Butler-Sloss P, in determining whether the father was entitled to respect for his family life, after rehearsing the Convention jurisprudence on ‘family life,’³⁶ held on the facts that:

‘He is of course the biological father and he has the right to make Children Act 1989 applications. But in his case, the facts are far less strong...These parents never cohabited and that factor was seen as very significant in the case of *Keegan v Ireland* (1994) 18 EHRR 342. They knew each other for over seven years and had a relationship, short of cohabitation, which developed into a decision to become engaged to be married. (Reliance was placed) upon the length of her relationship as evidence of constancy. It might have been but in my view, despite discussions over having children, the commitment to each other was not strong. The engagement did not appear to move the relationship forward into a stronger commitment, but, on the contrary, the relationship faded and died. They have lost touch with each other. There were no exceptional factors to show in the words of *Kroon and Others v The Netherlands* (1994) 17 EHRR 263, that the relationship had sufficient constancy to create de facto family ties...there is nothing substantial to show that the father... has a right to respect for his family life... In my judgment, this relationship is to be found on that part of the spectrum that does not come within the concept of family life within Art 8.’

Importantly in *Re F (Adult: Court’s Jurisdiction)*³⁷ Sedley LJ, in considering the fair balance to be struck between the competing interests of the individual and of the community as a whole, described the scope of the positive obligation under Art 8 as follows:

France (Application No 36515/97)

³³ For example, *Re M (Adoption: Rights of Natural Father)* [2001] 1 FLR 745 at 752 G-753 A, per Bodey J; *Z v County Council v R* [2001] 1 FLR 365 at 372-373, per Holman J; *Re H; Re G (Adoption: Consultation of Unmarried Fathers)* [2001] 1 FLR 646 at 654 (37)-657 (41); 657-658 (44); 660 (51), per Dame Elizabeth Butler-Sloss P

³⁴ [2001] 1 FLR 589 at 599 (38)

³⁵ [2001] 1 FLR 646 at 660 (51)

³⁶ *Ibid.* 655 (37)-657 (41)

³⁷ [2000] 1 Fam 38 at 57

‘The family life for which Art 8 requires respect is not a proprietary right vested in either parent or child: it is as much an interest of society as of individual family members, and its principal purpose, at least where there are children, must be safety and welfare of the child. It needs to be remembered that the tabulated right is not to family life as such but respect for it. The purpose, in my view, is to assure within proper limits the entitlement of individuals to the benefit of what is benign and positive in family life. It is not to allow other individuals, however closely related or well intentioned, to create or perpetuate situations which jeopardise their welfare’.

After blazing a trail in such areas as illegitimacy, the pace of change in Strasbourg, however, has inevitably slowed down as the European Court has encountered the more contentious ethical issues, in respect of which there are widely diverse standards across Europe. For example, the position of transsexuals has thrown up particularly thorny issues both in Strasbourg, as evidenced in a quartet of cases, *Rees v UK*, *Cossey v UK*, *Sheffield and Horsham v UK*³⁸ and *X, Y and Z v UK*³⁹, and in the UK in the recent *Bellinger* case. In the *Bellinger* case Elisabeth Bellinger, who was born a male and underwent gender re-assignment surgery, went through a ceremony of marriage with Michael Bellinger and lived with him as his wife for 20 years. She sought a declaration that the marriage was valid, which was rejected by a majority of the Court of Appeal. All three Court of Appeal judges accepted that there was a momentum for change in legal attitudes towards the status of transsexuals and recognised the profoundly unsatisfactory nature of the present position. In *X, Y and Z v UK* the European Court was tackling the parental rights of transsexuals and had to restrict its view because

“There is no common European standard with regard to the granting of parental rights to transsexuals... Since the issues in the case... touch on areas where there is little common ground amongst the Member States of the Council of Europe, and, generally speaking, the law appears to be in a transitional stage, the respondent state must be afforded a wide margin of appreciation”.

We shall return to some of the more contentious issues which arose in *X Y and Z v UK*, where the child was conceived by AID, later in this paper.

ii. The Child

a. The child in the global community

In an ideal world, the various international human rights treaties such as the UN Convention on the Rights of the Child, which views human rights from the perspective of the child, would

³⁸ (1986) 9 EHRR 56; (1990) 13 EHRR 56, &(1998) 27 EHRR 163; three post-operative transsexual cases where the European court held there was no obligation on the state to change the birth certificates of transsexuals to reflect their new identities. Although rejecting their claims, the European court strongly criticised the UK for taking no steps to ‘keep the need for appropriate legal measures in this area under review, having regard to scientific and societal developments.’

fit neatly together and harmonise with the national law of the individual states. However, unlike the European Convention rights, the UN rights are not directly enforceable in England and Wales, though this is not to diminish their importance in setting internationally agreed standards against which national standards may be measured.

It is, however, not an ideal world and there are occasions when there is a crackle of disharmony between the international treaties and between the international treaties and national law. For example, Article 3(1) of the UN Convention on the Rights of the Child establishes as a fundamental principle of interpretation that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration”. Immediately striking for English family practitioners nurtured on the paramountcy principle under s1 (1) of the Children Act 1989 is that the best interests of the child are expressed to be ‘primary’ and not paramount and are only *a* primary consideration and not *the* primary consideration.

Article 21 of the UN Convention, on the other hand, provides that ‘State parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration’. Under English adoption law, welfare is the ‘first’ and not the ‘paramount’ consideration. It is, therefore, currently out of tune with the UN Convention. The Adoption Act 1976 is, however, twenty five years old and it is intended, as foreshadowed in the Adoption and Children Bill 2001, that our adoption law will be aligned with the Children Act 1989 and ‘welfare’ will become the paramount consideration. Thus, at least in the context of adoption, our national law and the UN Convention will be in harmony.

In *Johansen v Norway*⁴⁰ which dealt with the deprivation of parental rights in the context of a permanent placement of the child with foster parents with a view to adoption, the Norwegian Government argued before the European Court that in such cases, the necessity test to be applied under Art 8 of the European Convention, rather than attempting to strike a fair balance between the interests of the natural parent and those of the child, should attach paramount importance to the best interests of the child, a principle which was firmly rooted in the laws of the Council of Europe. They referred to Articles 3 *and* 21 of the 1989 UN Convention for support, though as we have seen both these Articles sound slight but audible discordant notes⁴¹. The European Court’s response was to strike a chord which avoided

³⁹ (1997) 24 EHRR 143, para 44

⁴⁰ (1996) 23 EHRR 33, para 76

⁴¹ Previously in *Hokkanen v Finland* (1995) 19 EHRR 139, para 55 the Finnish Government had

‘primary’ and ‘paramount’ notes. It stuck to the notion of a fair balance between the interests, as well as the rights and freedoms, of all concerned, but significantly ‘attached particular importance to the best interests of the child, which depending on their nature and seriousness, may override those of the parent’.

Notwithstanding the variations, it is possible, therefore, to discern a leitmotiv running through international and national law, one which firmly places the best interests of the child at the vital central core of the court’s consideration.

b. The child in Europe

The first striking feature for family lawyers in reading through the European Convention is the invisibility of the child. There is no reference in the Convention to the child or to the rights of the child.

The European Convention was, therefore, clearly drafted with adults in mind. However, it would be wrong to infer that children have the weakest voice under it⁴². Children have a right to respect for their private and family life in their own right and a child may have an even stronger claim than an adult arguing a similar case⁴³ and other family members’ rights and freedoms may find themselves protected vicariously by seeking to protect the child’s rights.

This is illustrated by *Berrehab v The Netherlands*⁴⁴ where the applicant father, a Moroccan citizen, was refused a residence permit after his divorce from his Dutch wife. His daughter, the second applicant, lived with her mother. They complained that the father’s deportation, which inhibited further contact between them, amounted to a violation of their right to family life. The European Court held that because of the daughter’s continuing ties with the father, which continued notwithstanding his divorce from her mother, it was a violation of Article 8 to refuse the father a residence permit and to expel him. It was the child’s entitlement to respect for her family life, which was the determinative factor.

prayed in aid Art 3 of the 1989 UN Convention and the European Court held that ‘the interests, as well as the rights and freedoms of all concerned must be taken into account, and *more particularly the best interests of the child and his or her rights under Art 8...*’

⁴² See: *Protecting Children’s Rights in Europe-A Test Case Strategy* by Geraldine Van Beuren [1996] EHRLR 171

⁴³ *Johnston v Ireland* (1987) 9 EHRR 203

⁴⁴ (1989) 11 EHRR 322

Furthermore, as we have already seen, the European Court has particularly emphasised that ‘the consideration of what is in the best interests of the child is in every case of crucial importance’⁴⁵ and the best interests of the child can be the ‘overriding requirement’⁴⁶.

In the context of the child in care, the European Court has supported the following important notions:

- The taking of a child into care should normally be regarded as a temporary measure to be continued as soon as circumstances permit⁴⁷
- Any measures of implementation of temporary care should be consistent with the ultimate aim of reuniting the natural parent with the child⁴⁸
- In this regard a fair balance has to be struck between the interests of the child in remaining in public care and those of the parent in being reunited with the child⁴⁹
- In carrying out this balancing exercise, the Court will attach particular importance to the best interests of the child, which depending on their nature and seriousness, may override those of the parent. In particular, the parent cannot be entitled to have such measures taken as would harm the child’s health and development⁵⁰
- There is an obligation on public authorities to take measures to facilitate the reunion or contact between parents and children⁵¹
- The obligation is not absolute and does not justify an extensive recourse to coercion⁵²
- There is a requirement that parents should be involved in the decision making process⁵³ and be in a position where they may obtain access to information which is being relied upon by the authorities in taking measures of protective care⁵⁴

⁴⁵ *L v Finland* [2000] 2 FLR 118 at 138E

⁴⁶ *Johansen v Norway* (1996) 23 EHRR 33

⁴⁷ *Johansen v Norway* (1996) 23 EHRR 33, para 78; *K and T v Finland* [2000] 2 FLR 79, para 156; *Lv Finland* [2000] 2 FLR 118, para 101 & 118

⁴⁸ *Johansen v Norway*, para 78

⁴⁹ *Ibid*

⁵⁰ *Ibid*

⁵¹ *Olsson v Sweden No 2* (1992) 17 EHRR 134, para 90; *Eriksson v Sweden* (1989) 12 EHRR, para 71; *Andersson v Sweden* (1992) 14 EHRR 615, para 91; *Hokkanen v Finland* (1994) 19 EHRR 139, paras 55-58

⁵² *Hokkanen v Finland*, para 55-58

⁵³ *W v UK* (1987) 10 EHRR 29; *McMichael v UK* (1995) 18 EHRR 513; *Elsholz v Germany* [2001] UKHRR 667

⁵⁴ *TP and KM v UK* (10 May 2001) where the Court found a breach of Art 8, concluding that the question whether to disclose the video of the interview of the 4 year old conducted by the psychiatrist should have been determined promptly to allow the applicant mother an effective opportunity to deal with the allegations that the child could not be returned to her care. The failure of the local authority to submit the issue to the court meant that the applicant was not adequately involved in the decision making process.

*c. The child in the UK: impact of Europe*⁵⁵

Over the last eleven months Convention rights, in particular Art 8, have begun to play an increasing role in shaping our domestic family jurisprudence. This is graphically illustrated by the ground-breaking case of *Re W and B; Re W (Care Plan)*⁵⁶ where the Court of Appeal used the Human Rights Act 1998 to address general concerns⁵⁷ that the Children Act 1989 had removed the power of the court, when a child was made the subject of a care order, to direct the local authority as to the exercise of their powers relating to the child's welfare. The Court of Appeal held that

- The care judge should have a wider discretion to make an interim care order or to defer making a care order where the care plan is inchoate or where there are uncertainties capable of resolution.⁵⁸
- Essential milestones in the care plan should be collaboratively assessed and elevated to starred status. A failure to achieve a starred milestone within a reasonable time of the date set at trial should be reactivate the interdisciplinary process. At a minimum, the local authority must inform Cafcass of the failure and then either Cafcass or the local authority have the right to apply to the court for further directions⁵⁹.
- These extended powers of the court would arise only where there was good reason to believe that Convention rights had been or were at real risk of being breached⁶⁰.

This ranks as the most important decision, thus far, on the impact of the Act on the Children Act 1989. It skilfully steers a 'compatible' course between, on the one hand, the 'Scylla' of the Children Act 1989 ie the statutory division of responsibility between the courts and local authorities and, on the other, the 'Charybdis' of the Convention ie actual and prospective interferences with Convention rights.

⁵⁵ This paper does not seek to deal with all the significant implications which flow from the recent European Court's decision in *Z v UK* (10 May 2001), many of which fall outside my remit and would merit a separate paper in their own right.

⁵⁶ [2001] EWCA Civ 757; August [2001] Fam Law 581

⁵⁷ The concerns were reflected in the discussions at the President's Interdisciplinary Conference on Family law in 1997, published in *Divided Duties* (1998, Family Law), which are Encapsulated in Wall J's comments at p 11: 'I recently put to a member of the Court of Appeal the dilemma: what do you do when a care order is inevitable because the parents are either abusive or hopeless and you feel that the local authority's plan for the child is a potential disaster but the local authority simply refuses to change it? The answer was "Go down fighting".'

⁵⁸ *Re W & B; Re W* (above) para (29), per Thorpe LJ

⁵⁹ *Ibid.* para (30), per Thorpe LJ

⁶⁰ *Ibid.* para (79), per Hale LJ

Hale LJ identified the judicial role as one of asking what might be necessary to secure compliance with the Convention rights, in particular ‘the right to respect for family life under Art 8. She went on to highlight:

- ‘Respect for family life is fundamental to the philosophy underpinning the European Convention...It is also fundamental to the philosophy underpinning the Children Act 1989...’⁶¹
- A care order is a serious interference with the right to respect for family life, not only for the parents, but also and more importantly of the child. It becomes more serious still if only minimal contact is permitted between them or if the local authority are given permission under s 34(4) of the 1989 Act⁶².
- The most serious interference is an adoption order, which finally and irrevocably brings to an end, not only the parents’ responsibility for the child but also the legal relationship between the child and the whole of his family of birth⁶³.
- On the other hand, not to interfere where interference is called for may also violate the child’s Convention rights: see *Z v UK*, European Court of Human Rights, 10 May 2001.
- These interferences are committed by two separate and independent public authorities: the court (which makes the orders) ... and the local authority which decides how to implement them... Such an interference can only be justified under Art 8.2 if three conditions are fulfilled (the three components referred to above)...⁶⁴
- In my view, there is another way in which a public authority may act incompatibly with the Convention rights in a care case. This is by failing to take adequate steps to secure for a child, who has been deprived of a life with his family of birth, a life with a new family who can become his new family for life...the notion ...can be readily inferred from the concept of positive obligations inherent in Art 8⁶⁵
- Where the elements of the care plan are so fundamental that there is a real risk of a breach of Convention rights if they are not fulfilled and where there is some reason to fear that they will not be fulfilled, it must be justifiable to read into the Children Act a power in the court to require a report on progress. In effect such vital elements in the care plan would be ‘starred’ and the court would require a report, either to the court or Cafcass, who could then decide whether it was appropriate to return the case to court⁶⁶
- There is nothing in the Children Act 1989 to prohibit this. Simply, there is nothing there to allow it. The courts have so far been true to the division of responsibility underlying the 1989 Act and declined to introduce it. But, when making a care order, the court is being asked to interfere in family life. If it perceives that the consequence of doing so will put at risk the Convention rights of either the parents or the child, the

⁶¹ Ibid. para (52)

⁶² Ibid para (52)

⁶³ Ibid para(52)

⁶⁴ Ibid para (53) & (54)

⁶⁵ Ibid para (55). See also paras (56-59)

⁶⁶ Ibid para (79)

court should be able to impose this very limited requirement as a condition of its own interference⁶⁷.

- If the care plan is ‘reunification’, then the court should be able to ask to be informed if this does not take within the timescale envisaged in the care plan...
- If the plan is ‘permanency’ outside the birth family, again the court should be able to ask to be informed if this has not happened within a reasonable timescale.
- The report should be addressed to whether there is such a good reason to believe that the Convention rights of the child or any other person are, or are proposed to be, broken that it is appropriate to invoke the powers of the court to remedy it⁶⁸,

The Court of Appeal has also shown a rigorous application of the principle of proportionality.

- In *Re C and B (Care Order :Future Harm)*⁶⁹ two older children had been taken into care under orders based on actual harm and subsequently two younger children were removed from the mother, the ten month child under an interim care order and the new born baby under an EPO. In respect of the younger children it was held although there was a real possibility of future harm, the action taken must be a proportionate response to the nature and gravity of the feared harm and as there were no long standing problems which would interfere with the capacity to provide adequate parenting, the local authority could have taken time to explore other options. Hale LJ said:

‘There is a long line of European Court of Human Rights jurisprudence on the third requirement (under Art 8 ie the interference must be ‘necessary in a democratic society’), which emphasises that the intervention has to be proportionate to the legitimate aim. Intervention in the family may be appropriate, but the aim should be to re-unite the family when the circumstances enable that, and the effort should be devoted towards that end. Cutting off all contact and relationship between the child or children and their family is only justified by the overriding necessity of the interests of the child’.

- In *Re O (Supervision Order)*⁷⁰ it was held that a supervision order was the proportionate solution rather than a care order. Hale LJ said⁷¹
‘Proportionality...is the key. It will be the duty of everyone to ensure, that in those cases where a supervision order is proportionate as a response to the risk presented, a supervision order can be made to work, as indeed the framers of the Children Act always hoped that it would be made to work...’⁷²

⁶⁷ Ibid. para (80)

⁶⁸ Ibid para (8)

⁶⁹ [2001] 1 FLR 611

⁷⁰ [2001] 1 FLR 923

⁷¹ At 929 (28)

⁷² This reflects the non-interventionist principle enshrined in s1(5) of the Children Act 1989: *Re O (Care or Supervision Order)* [1996] 2 FLR 755 at 759 H-760 B, per Hale J (as she then was)

The European Convention spotlight is now being turned upon our domestic law of adoption. Notwithstanding various attempts at encouraging more openness in adoption, closed adoptions, which represent the most complete severance of the family ties between a child and his parents, still remain the most usual form of adoption in England and Wales. As Hale LJ put it in *Re B (Adoption by One Natural Parent to Exclusion of Other)*⁷³

‘An adoption order is undoubtedly an interference by a public authority, in the shape of the court which makes it, with the exercise of the right to respect for family life, whether by the child herself or by anyone else with whom she enjoys ‘family life.’ Indeed it is the most drastic interference with that right which is permitted by law’.

Article 8, which guarantees the right to respect for family life, will be an imperative in moulding our future approach to adoption. In *Johansen v Norway*⁷⁴ the Norwegian court decided to take the child into care, to deprive the applicant mother of her parental responsibilities, to place the child in a foster home with a view to adoption, to refuse the mother contact as from the moment of the child’s placement in the foster home and to keep the foster placement confidential. All appeals failed.

The European Court held that the national authorities had overstepped their margin of appreciation, thereby violating the applicant’s rights under Article 8. It said:

“...the applicant had been deprived of her parental rights and access in the context of a permanent placement of her daughter in a foster home with a view to adoption by the foster parents. *These measures were particularly far-reaching in that they totally deprived the applicant of her family life with the child and were inconsistent with the aim of reuniting them. Such measures should only be applied in exceptional circumstances and could only be justified if they were motivated by an overriding requirement pertaining to the child’s best interests*” (emphasis added).

The Adoption and Children Bill 2001 awaits its re-introduction into the autumn session of Parliament. A notable ‘scalp’ for European Convention rights in the Bill (in its current form) is the demise of freeing for adoption orders under s 18 of the Adoption Act 1976. It was (rightly) recognised in the Performance and Innovation Unit Report on adoption (7th July 2000) that freeing orders were ‘flawed instruments.’ The Report encapsulated the flaws as follows:

‘They had originally been designed primarily as a means of allowing consenting parents to make their child available for adoption but were now also being used in

⁷³ [2001] 1 FLR 589 at 599 (37)

⁷⁴ (1996) 23 EHRR 33, para 78

conjunction with Children Act mechanisms to expedite adoption for looked after children in the absence of consent...In addition, they left freed children without a parent which was both generally unsatisfactory and *likely to be vulnerable to ECHR challenge*⁷⁵, (emphasis added)

A climate change towards involving unmarried fathers without parental responsibility in adoption proceedings has already gained momentum since 2nd October 2000⁷⁶:

- In *Re B (Adoption by One Natural Parent to Exclusion of Other)*⁷⁷ the Court of Appeal held that s 15 (3) of the Adoption Act 1976 must be read in a way which is compatible with the Convention
 - Even if separated at birth, the relationship of the mother and child was sufficient to establish family life for the purposes of Art 8
 - The state must always justify its actions under Art 8 (2), but it was difficult to argue that there was a pressing social need to deprive the child of all legal relationship with one half of the birth family and to do so would be a disproportionate response to her current needs
 - *Per curiam*, in principle, natural fathers should be joined as respondents to adoption applications, unless it would be entirely unsuitable to do so. Local authorities should be looking to inform fathers in the majority of cases.

- *In Re H; Re G (Adoption: Consultation of Unmarried Fathers)*⁷⁸ Dame Elizabeth Butler-Sloss P has taken the analysis further:
 - As a matter of general practice, judges giving directions in adoption applications would be expected to inform natural fathers of the proceedings unless for good reason it was inappropriate to do so. Although a mother's desire for confidentiality might carry more weight in some cases than others, it ought not to deprive the father of his right to be informed and consulted about his child
 - In the first case, the parents had cohabited and the father had shown commitment to the child. He was entitled, therefore, to respect for family life under Art 8. To place the child for adoption without notice to the father

⁷⁵ Para 3.66

⁷⁶ See also: *Re R (Adoption: Father's Involvement)* [2001] 1 FLR 320 and two first instance decisions where the Court found exceptional circumstances which did not require an attempt to inform the father: *Z County Council v R* [2001] 1 FLR 365 and *Re M(Adoption: Rights of Natural Father)* [2001] Fam Law 240

⁷⁷ Above; this decision is pending in the House of Lords.

⁷⁸ Above

would prima facie be in breach of this right and in accordance with Art 6(1) and under Art 15 (30 he should be given notice and made a respondent with opportunity to be heard

- In the second case, the parties had never cohabited and their relationship did not have sufficient constancy to show de facto ties. The relationship did not come within the concept of family life and therefore it was not necessary for the father to have notice or to be joined as a party.

iii. The new scientifically assisted family

There are a number of challenging issues, spawned by scientific advances, which will test the Courts, here and in Strasbourg. Such challenges are likely to include complex legal and medical care issues including issues relating to abortion, sterilisation, surrogacy and reproductive technology under Articles 2 (the right to life), 3 (protection from inhuman and degrading treatment), 8 (the right to respect for private and family life), 12 (the right to marry and found a family) and 14 (freedom from discrimination in the delivery of Convention rights).

An illustration of the medical challenges ahead is the case of *Re A (Conjoined Twins: Medical Treatment)*⁷⁹, which gripped the public interest and received world wide coverage in the media. The hospital had applied for a declaration as to whether an operation to separate conjoined twins would be in their best interests and lawful. Medical opinion advised an operation to separate the twins in the expectation of a normal life for J, albeit with some physical handicaps requiring reconstructive surgery, and certain death for M. After considering Art 2, 3 & 8 of the European Convention, the Court of Appeal held that the twins should be separated⁸⁰.

(a) Assisted reproduction

Assisted reproduction by artificial insemination is the placing in a woman of sperm, eggs or an embryo. Conception can be procured either by mixing sperms and eggs (conventional IVF) or by injecting a single sperm directly into the egg (ICSI: intracytoplasmic sperm injection). The sperm may be by the woman's husband (AIH) or by another man (AID).

⁷⁹ [2001] 1 FLR 1

⁸⁰ Art 2 & 3 also arose recently in *An NHS Trust v M; an NHS Trust v H* [2001] 2 FLR 367 where two hospital trusts made applications seeking a declaration that it was lawful to discontinue artificial nutrition to two patients both suffering from PVS. Dame Elizabeth Butler-Sloss P, after considering the relevant jurisprudence under both Articles in detail (at 372-381) concluded that a person in PVS was alive and therefore entitled to the protection of Art 2. A responsible decision by a medical team not to provide treatment, however, did not fall within the negative obligation

- Where a married woman gives birth to a child born as a result of either AIH or AID, her husband is treated in law as the father of the child⁸¹.
- Where an unmarried couple together seek licensed treatment services⁸² and the woman gives birth as a result of AID, it is again her male partner, rather than the donor of the sperm, who is treated for legal purposes as the father of the child⁸³.
- Where a child is born as a result of assisted reproduction without the consent of husband/partner, the child is treated in law as having no father.

IVF can also involve the donation of an egg or eggs by one woman (the donor) to another (the donee). In UK law section 27(1) of the Human Embryology and Fertilisation Act 1990 (“the HEF Act 1990”)⁸⁴ provides that where there is a donation of eggs and semen or embryo (ie where the fertilised egg is implanted in a woman), the donee who gives birth is to be treated as the child’s mother. Although the section does not deal with the position where only the eggs are donated, the assumption is that the donee who gives birth should be treated as the child’s mother.

The HEF Act 1990 prohibits the storage of eggs or sperm without the consent of the donor⁸⁵. In *R v Human Fertilisation and Embryology Authority ex parte Blood*⁸⁶, where the sperm was taken whilst the donor was in a coma and where no consent had previously been given by him for storage, the Authority was held to be correct in refusing a licence for treatment involving the use of his sperm.

(b) Surrogacy

Where a woman is unable to carry a child full term, surrogacy provides a method whereby she can have her own child. In UK law although the Surrogacy Arrangements Act 1985 makes those who make surrogacy arrangements on a commercial basis criminally liable, the Act does not forbid all surrogacy arrangements.

imposed by Art 2 to refrain from taking life intentionally.

⁸¹ HEF Act 1990, s 28(2); s 49(3) 7 (4)

⁸² *Ibid.* Schedule 2

⁸³ *Ibid.* ss 28(3) and 29(1); also *U v W (Attorney General Intervening)* [1997] 2 FLR 282

⁸⁴ See: the interesting discussion on the implications of HFE Act 1990 in ‘*Into the future and back to the basics-Human fertilisation and family structures*’ by Robert G Lee and Derek Morgan in ‘*Family Law Essays for the Millenium*’, Ed Dr Stephen Cretney (Family law)

⁸⁵ *Ibid.* Schedule 3 para 8

⁸⁶ [1997] 2 FLR 742

Partial surrogacy is where the surrogate mother (ie the mother who gives birth to the child) is the genetic mother in the sense that it is her egg which is fertilised by the semen of the commissioning father.

- The surrogate mother is the child's mother for all purposes and has parental responsibility.
- If she is married, the child is treated as the child of the surrogate mother and her husband, unless it is shown that he did not consent to the insemination.
- If she is not married, the commissioning and donating father is the genetic father and is entitled to seek a parental responsibility order.

Total surrogacy is either where the surrogate mother receives an egg from another woman, the commissioning mother, which has been fertilised by the commissioning father's semen or she receives an unfertilised egg which is then fertilised with the semen of the commissioning father.

- Although the genetic parents are the commissioning parents, under the HEF Act 1990 it will be the surrogate mother who is to be treated as the mother⁸⁷ and her husband who is to be treated as the father unless it is shown that he did not consent⁸⁸
- S 28(3) provides that if the couple who are not married are 'together treated' by a person to whom the licence applies and the creation of the embryo carried by the woman was not brought about by the sperm of that man, then that man shall be treated as the father of the child⁸⁹.

Section 30 of the HEF Act 1990 provides for a married couple as commissioning parents to apply for an order that they be treated in law as the parents of a child born to a woman by partial or total surrogacy.

- They may seek care and control under the inherent jurisdiction of the High Court⁹⁰ and thereafter apply for an adoption order or they may apply for a residence or

⁸⁷ HEF Act 1990 s 27(2)

⁸⁸ Ibid. s 28

⁸⁹ See: *Re D (Parental Responsibility: IVF Baby)* [2001] 1 FLR 972 which threw a jurisdictional question mark over whether under s 28(3) a man who had not in fact participated in the successful treatment was one of a couple 'together treated'.

⁹⁰ *Re C (A Minor) (Wardship: Surrogacy)* [1987] 2 FLR 421; but see *Re P (Minors) (Wardship: Surrogacy)* [1987] 2 FLR 421 which demonstrates the difficulties facing commissioning parents where the surrogate mother has appropriate parenting skills. See also: *Re M (Child Support Act: Parentage)* [1991] 2 FLR 90

contact order under the Children Act 1989 if they have the consent of the surrogate mother⁹¹ or have looked after the child for at least three years⁹² or with leave of the court⁹³.

- If the surrogate mother places the child with the commissioning parents for adoption, the placement is illegal unless pursuant to an order of the High Court or with “a relative”⁹⁴ which would only include a commissioning father where the surrogate mother is unmarried or, if married, her husband did not consent to the insemination.

The fact that it is necessary to invoke s 30 shows that there is a legislative bias against surrogacy arrangements.

(c) Cloning

In 1997 Dolly, the sheep, the first mammal cloned from the cell of an adult animal (a cell from the mammary gland of an adult ewe), attracted world wide attention and prompted international concern about cloning technology, particularly “human reproductive cloning.” Polly, born the year after Dolly, was possibly even more scientifically significant, as she was both cloned and genetically transformed by the addition of a human gene.

The birth of Dolly has forced us to contemplate the previously unthinkable, the shock of a new age of biological control where ‘human ambition will be bound only by the law of physics, the rules of logic and our descendants’ own sense of right and wrong.’⁹⁵

In January 1998 Dr Richard Seed launched a campaign to clone a human being. He is not alone in his enthusiasm. Professor Severino Antinori, who enabled a 62 year old woman to have a baby in 1994, has announced an intention to start a cloning programme in November of this year. Asked if there were limits beyond which he would not go in his drive to create life, he said ‘We have heard this word limit a lot of times in the history of humanity. Did Galileo have limits?’.

⁹¹ Children Act 1989 s 10(5)(c)(iii)

⁹² Ibid s 10(5)(b)

⁹³ Ibid s 10(2)(b)

⁹⁴ Adoption Act 1976 ss 11, 15-16; also *Re AB (Adoption: Joint Residence)* [1996] 1 FLR 27; *Re G (Adoption: Illegal Placement)* [1995] 1 FLR 403 (where an adoption placement was sanctioned by the Court retrospectively)

⁹⁵ *The Second Creation: The Age of Biological Control by the scientists who cloned Dolly* Ian Wilmut, Keith Campbell & Colin Tudge

Nor are there a lack of candidates. In the days following the birth of Dolly the Roslin Institute, where she was cloned, was flooded with telephone calls from bereaved families pleading for their dead relatives to be cloned. Desperate couples faced with infertility where assisted reproduction techniques have failed and homosexual couples where there can be no reproduction by sex have shown that they are not be far behind in joining the queue, notwithstanding the high risks of miscarriage, stillbirth and disability.

Coincidentally just after writing the last paragraph, on August 5 2001 the headline in The Sunday Times read 'British women join first human clone trial'. Eight British women had volunteered to be impregnated with cloned embryos in Professor Antinori's cloning programme. The candidates included a London investment banker incapable of producing any sperm and his wife and a Berkshire couple who had been unable to have a baby since their only child, a 12 year old boy, had died from bone cancer.

What is cloning

Cloning is a form of asexual reproduction. "Reproductive cloning" is where an entire animal is produced from a single cell by asexual reproduction. It is different from "therapeutic cloning" which involves cloning technology for medical purposes which does not result in the production of genetically identical fetuses.

Two distinct methods have been used to clone animals and thus, in theory, human beings:

- (i) "Embryo splitting": the artificial division of a single embryo which replicates the natural process giving rise to identical twins. Identical twins have identical nuclear DNA and identical cytoplasm.
- (ii) "Nuclear replacement": a process which involves transferring a nucleus from a cell (either an embryonic, fetal or an adult cell) into the cytoplasm of an egg cell from a different animal whose own genetic material (nucleus) has been removed. In this case the nuclear DNA would be identical, but the cytoplasm would be different. Dolly, therefore, is a DNA clone and not a 100% replica of the original ewe. DNA clones differ more, one from another, than conventional identical twins.

There is an important distinction to be made between current technologies such as AI and IVF which assist sexual reproduction and cloning which does not. Cloning by passes normal sexual reproduction and, though it creates a new individual, that individual is not genetically unique.

The HEF Authority's current policy is that it will not licence any research which has reproductive cloning as its aim. It will consider other types of research involving embryo splitting or nuclear replacement in eggs, but only provided it falls within one of the purposes below:

- To promote advances in the treatment of infertility
- To increase knowledge about the causes of congenital disease or about the causes of miscarriages
- To develop more effective techniques of contraception or methods for detecting the presence of gene or chromosome abnormalities in embryos before implantation.

For example, in January 2001 the British Government gave the 'go ahead' for the cloning of embryonic stem cells for medical research, as stem cell research may help patients with cancer, Alzheimer's and Parkinson's disease.

The future of 'family life'

Given the pace of scientific developments, family lawyers may find themselves having to hit the ground running. Yet we are barely aware of the starting blocks. The European Court has only taken a few hesitant steps towards exploring the implications for family life under Article 8 where a child is born as a result of standard assisted reproduction techniques, as seen in the case of *X Y and Z v UK*⁹⁶ (referred to in detail below).

Although a number of countries, including the UK, have set their faces firmly against human cloning, given increasing international mobility, the problems which are likely to be engendered by the new reproductive technology will inevitably cross frontiers, as treatment becomes available in other countries.

'All that is required to clone is a flask of cultured body cells... Once the culture is growing in a stable fashion, it can be frozen and transported anywhere in the world... The cultured cells could then be sent to a country where cloning is not illegal and... where local women may be willing to act as surrogate mothers... In short, a practice that is illegal in one country can become a minor industry in another'⁹⁷.

⁹⁶ (1997) 20 EHRR 143

⁹⁷ 'The Second Creation' (above) at p.328-329

We have had a brief glimpse into this future through *U v W (Attorney General Intervening)*⁹⁸, where the applicant and her partner, who were not married, went to Rome for fertility treatment. The treatment involved insemination by sperm from an anonymous donor. By the time the twin boys were born to the applicant, she had separated from her partner. She applied for a declaration of paternity under s 28(3) of the HFE Act 1990, which was dismissed by Wilson J on the basis that the treatment had taken place abroad and had not been administered by a licence holder under the HFE Act 1990. It was argued that s 28(3) contravened Art 8 of the European Convention on the basis that the twins had been denied the partner as a father. Wilson J took the view that the facts failed to give rise to ‘family life’ as between the partner and the twins:

‘There is no genetic link and there never has been any de facto relationship between the respondent and the boys...the applicant is seeking to have a deemed family relationship created between the respondent and the boys; and the fact that in the circumstances section 28 (3) has no such effect does not amount to any interference with a family life. I conclude therefore that article 8 does not apply. Had it applied I would have held that the exception in article 8(2) for provisions necessary for the protection of the rights and freedoms of others saved the restriction from being in breach of it; I have in mind... the rights and freedoms of men in the situation of the respondent’.

In *X Y and Z v UK* X, a female-to-male transsexual, had formed a permanent and stable relationship with Y, a woman, in 1979. That year he underwent gender re-assignment surgery. In 1990 X and Y applied through their general practitioner for AID and in 1991 the hospital ethics committee agreed to provide treatment and asked X to acknowledge himself to be the father of the child within the meaning of the HEF Act 1990. On 30 January 1992 Y was impregnated through AID treatment with sperm from an anonymous donor and Z was born on 13 October 1992. X was not permitted to be registered as Z’s father and X, Y and Z complained of a violation of Article 8. The Court held that, although Article 8 was applicable in the present case, there had been no violation of Article 8.

The European Commission acknowledged that it had yet to find in any case that “family life” exists where there is no blood link or legal nexus of marriage or adoption⁹⁹. However, in this case it did adopt a more robust approach and found that the relationships enjoyed by the applicants fulfilled both the appearance and substance of “family life” and observed that the only element which detracted from this was the fact that X was registered at birth as being of the female sex with the consequences that he was under a legal incapacity to marry the child’s

⁹⁸ [1998] Fam 29; see

⁹⁹ See e.g. *X v France* Application No 9993/82 5.10.82 D.R. 31 p.241; *S and S v UK* App. No. 10375/83 Dec 10.10.84 DR 40 at p.196; *Price v UK* App no 12402/86 Dec 9.3.88 DR 55 at p.224; *Boyle v UK* (1994) 19 EHRR 179

mother or register on the child's birth certificate as father: "this element, whether seen as biological or historical, cannot outweigh the reality of the applicants' situation which is otherwise indistinguishable from the traditional notion of family life".

It further noted that the UK, in the context of children born by artificial insemination by donor, has itself for the purposes of the HEF Act 1990 accepted that there are circumstances where a "father" need not be linked to a child either by blood or by marriage to its mother. The Commission went on to find that the applicants enjoyed "family life" within the meaning of Article 8(1) of the Convention.

The Commission considered that although there was the possibility of X obtaining a residence order in respect of Y, this could not be regarded as providing X with legal recognition of his role as father and parent¹⁰⁰. It concluded that

"having regard in particular to the welfare of Z and her security within her family unit... the absence of an appropriate legal regime reflecting the applicants' family ties discloses a failure to respect their family life¹⁰¹."

Whilst the European Court also considered that de facto family ties linked the three Applicants and that Article 8 was, therefore, applicable, it shied away from the more progressive view of the Commission. In considering the margin of appreciation, the Court said:

"It is true that the Court has held in the past that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his family¹⁰².

However, hitherto in this context it has been called upon to consider only family ties existing between biological parents and their offspring. The present case raises different issues, since Z was conceived by AID and is not related, in the biological sense, to X, who is a transsexual....it has not been established before the Court that there exists any generally shared approach among the High Contracting Parties with regard to the manner in which social relationships between a child conceived by AID and the person who performs the role of father should be reflected in law. Indeed, according to the information available to the Court, although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise, particularly with regard to the question of filiation, remain the subject of debate. For example, there is no consensus amongst the Member States of the Council of Europe on the question whether the interests of

¹⁰⁰ Ibid. para 65

¹⁰¹ Ibid. para 69

¹⁰² See eg *Marekx v Belgium* (1979) 2 EHRR 330; *Johnston v Ireland* (1986) 9 EHRR 203, para 72; *Keegan v Ireland* (1994) 18 EHRR 342 & *Kroon v The Netherlands* (1994) 19 EHRR 263, para 32

the child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity".

In an earlier Commission case, *G v Netherlands*¹⁰³ the applicant agreed to donate sperm to a lesbian couple who wanted to have a child by a known donor. On her birth the child's mother was her legal guardian and a court order later appointed the other partner as joint guardian. The applicant visited the couple regularly during the pregnancy and after the birth, even baby-sitting. The applicant wanted to establish a regular pattern of access, including staying access; whereupon the couple broke off all contact with him. Before the Commission he complained under Article 8 that the State had unjustly considered that there was no family life between him and his child.

The Commission held that "family life" in the sense of Article 8 implies "close personal ties in addition to parenthood" and that the situation in which a person donates sperm only to enable a woman to become pregnant through artificial insemination does not of itself give the donor a right to respect for family life with the child. It went on to hold that the applicant's contact with the child, both in itself and together with his donorship, formed an insufficient basis for the conclusion that as a result such a close personal tie had developed between them that their relationship fell within the scope of "family life". The complaint was therefore rejected.

To date surrogacy issues have not been considered either by the Commission or the Court.

The field of human fertilisation and embryology will clearly confront the European Court and national courts with novel questions relating to, for example, the treatment of children born by artificial reproduction techniques and their relationships with their non-biological "parents". The human rights' courts, by which I include the European court, the UK courts and other national courts who have incorporated human rights as part of their law, will have an important role to play in providing a dynamic interpretation of the rights guaranteed under the Convention and other international human rights treaties so as to meet these new challenges.

Some of the controversial issues

Assisted reproduction technology has already generated a number of controversial issues which have caused general disquiet:

- *Posthumous conception*, as already witnessed in the Blood case
- *Older mothers*, who wish to use the technology to have children beyond the conventional age for child-bearing. There have been a spate of recent cases:
 - Doctors in Los Angeles implanted an embryo in a 62 year old French woman, made in vitro from her brother's sperm and an egg from a Californian woman. The ensuing birth of her brother's child was condemned in France and led to France adopting a draft law banning human cloning in medical research.
 - A 51 year old woman, who had been in a lesbian relationship for 15 years, had IVF treatment in New York, which utilized her brother's sperm as 'she wanted to have a child that had some "genetic likeness" to herself and her family'. The woman's mother had been a Holocaust survivor and she and her brother were among the few remaining members of the family. The brother was not to be named on the birth certificate and the parties had agreed not to disclose the fact that he is the father. The child will be brought up by the woman and her lesbian partner.
 - In the UK the upper age limit for treating women with donated eggs is 55. If in the future women are denied access to the new technology simply on the grounds of age, it may be arguable that there has been a violation of Articles 8 and 12 in conjunction with Article 14.
- *Genetic diagnosis*. The technology is now available to undertake genetic/chromosome analysis for pre-conception diagnosis, for example, of such diseases as the onset of a future cancer and can also be used for gender selection. Questions which may arise would be whether the rights guaranteed under Articles 8 and 12 include a parental right of "embryo veto" where embryos free from disease or of the desired sex may be selected and compromised embryos aborted. In the future it may also be scientifically possible to choose the characteristics of a child. Such questions, however, will inevitably create a tension between the Article 8 and 12 rights and the right to life under Article 2.
- *Cloning by asexual reproduction*. This has the potential for raising a number of difficult issues of which the following examples are no more than a cross-section.
 - Whether the right to life for an individual under Article 2 should be interpreted to include a right to their own genetic identity and, if so, whether the existence of a clone, stripped of its uniqueness, would be regarded as

degrading under Article 3. Would, therefore, a distinction have to be made between different artificial technologies depending on whether they have natural counterparts or not; IVF, for example, has a natural counterpart whereas cloning by nuclear replacement does not? What would all this mean for genetically identical twins produced by natural process? If clones were perceived to be and in consequence treated as less than human, would this constitute an infringement of their Convention rights in conjunction with Article 14?

- The implications of single or multiple “copies” of a living or dead foetus, baby, child or adult. For example, parents may wish to “replace” a child killed in an accident. Another example may be where a child is terminally ill and requires an organ transplant and there are no compatible donors. The parents may wish to have a further child, produced by cloning, to be a compatible organ donor. For the cloned child, would this constitute a violation of Article 3 as being “inhuman or degrading treatment” in the sense that human dignity requires that human beings ought to be treated as an “end” in their own right and not merely as a “means”?
- As there are likely to be serious psychological consequences for the child of a dead foetus, should the child be denied access to his genetic history and if so would this constitute a violation of Articles 8 and 10 (right to freedom of expression including freedom to ...receive information and ideas without interference by public authority...) ¹⁰⁴?
- Where both individuals of a couple are infertile or where the prospective father has non-functional sperm, they may see one of the advantages of cloning as producing a child as closely related to oneself as possible without having to resort to the donated eggs and sperm of others.

- Another example would be where a lesbian couple wish to have a child. A cell nucleus from one woman could be inserted into the egg of the other and the resulting embryo implanted into the uterus of the woman who donated the egg. By such means a

¹⁰⁴ *Gaskin v UK* (1989) 12 EHRR 36; *Open Door and Dublin Well Women v Ireland* (1990) 15 EHRR 244

lesbian couple could only produce daughters; thus realising the dream of some extreme feminists of reproduction without males.

- A woman could clone herself precisely if one of her own nuclei were introduced into one of her own enucleated oocytes.

In the light of the hesitancy shown in *X, Y and Z* in deciding issues relating to standard assisted reproduction, techniques which have been around for some time, the pace of change will have to quicken considerably before issues relating to the cloned child are likely to be regarded as falling within Articles 8 and 12 and can be effectively tackled.

As to surrogacy, Articles 8 and 12 could be employed in the future to strengthen the position of the genetic commissioning parents in those cases where they are currently disadvantaged as against the surrogate mother.

Exciting and troubling times clearly lie ahead for family lawyers world wide, as we try and grapple with the complex legal questions of genetic status and personal identity to which the new scientifically reproduced families will give rise. Pandora has released from her box this new biotechnology, which can add to or alter genes in the germ line so as to change the very nature of future people. It cannot now be returned to the box. Thus we face an ever accelerating spiral of social, ethical, psychological, philosophical, cultural and legal issues as we take our first tentative steps into the first years of the new millennium.

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