IN THE COURT OF APPEAL

B E T W E E N :

THE QUEEN	Appellant /
(on the application of Terrence White and Benjamin Garrett)	(Claimant)
-and-	
Lord Chancellor, Secretary of State for Justice	Defendant

APPELLANT'S

SKELETON ARGUMENT

CONTINUED IN RESPECT TO APPEAL GROUND C

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1. References in {braces} are Bundle Reference pages.

2. This Skeleton continues the Combined Grounds and Skeleton for this appeal to the Court of Appeal {1-12 to 1-24}, in which the core facts of this matter are outlined; And provides further detail on the Appeal Ground C, concerning the declaration in the Final Report that: "There is no automatic right to contact between a child and parent", and the affirmation of that position by the Government Legal Department in the Defendant's Grounds of Resistance.

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3. Skeleton Highlights:

- The declaration disenfranchises all parents of a right to contact with their children, and all children of the right to contact with either parent, until the government grants such a right.

- A parent's right to contact with their child derives from the child's welfare need to have contact with them, and exists within their automatic right to control the location of their minor child.

- A child's right to contact with both her parents arises from her common law right to welfare as the beneficiary of her parent's care, as described in treaties. The right is automatically enforceable from birth (possibly before) by either parent on the child's behalf, even though the child is not legally competent to enforce directly themselves.

- Prior to the publication of the declaration, the government's position as represented to international human rights monitoring bodies was that these rights existed in the laws of England; At and after the publication, the government says these rights do not exist until the State grants permission, therefore there has been a purported change in the law.
- The declaration amounts to an unlawful pretended proclamation of false law, which is ultra vires and in violation of the Lord Chancellor's oath of office, the Constitutional Reform Act of 2005, and the Bill of Rights 1688. The declaration violates § 6 of the Human Rights Act 1998 and §42 of the United Nations Convention on the Rights of Children.

Further background description

4. The Final Report says, in the Introduction, about half-way through the third paragraph on page 13 {13-19}:

> "…the below findings should not be read as an indication of MoJ or wider government policy."

5. This is the only form of disclaimer or qualification in that document, which is published under the banner and insignia of the Ministry of Justice. The meaning of "finding" is formed earlier in the Executive Summary on page 3 of the same document {13-9} as follows:

> "1. This is the final report of the expert panel, which reflects the findings from the call for evidence
>
> …
>
> "3. It makes findings in relation to both the processes and the outcomes for parties and children involved in such proceedings, drawing conclusions from individual submissions from those with personal experience in private law children proceedings, including victims of domestic abuse."

6. At §3.1.3 of the Final Report {13-32}, the government says:

> "There is no automatic right to contact between a child and parent. However, section 1(2A) of the Children Act does require the court to presume that the

involvement of each parent in their child's life will further the child's welfare, unless there is evidence to suggest that the involvement of that parent in the child's life would put the child at risk of suffering harm. 'Involvement' is defined in section 1(2B) as "involvement of some kind, either direct or indirect, but not any particular division of a child's time." This presumption applies in certain private law children proceedings, including when the court is considering whether to make, vary or discharge a section 8 order. Before the statutory presumption was introduced in 2014, it was already well established in case law that the involvement of both parents in a child's life will usually further the child's welfare and that compelling reasons must be demonstrated for the court to suspend contact."

7. The Government Legal Department then said in §24 of its 'Grounds of Resistance' to this application {11-10} that:

"There is no automatic right to parental contact. A child's welfare is paramount under section 1 of the CA 1989; and in respect of family law proceedings involving contact matters, there is a presumption in section 1(2A) of the CA 1989 which directs the Court to presume that parental involvement, where that parent falls within section 1(6)(a), will further the child's welfare. A parent falls within section 1(6)(a) if that parent can be involved in the child's life in a way that does not put the child at risk of suffering harm. By section 1(6)(b), a parent falls within the section 1(6) (a) unless there is evidence that parental involvement would put the child at risk. These provisions are consistent with the qualified right to family life afforded by Article 8 of the European Convention on Human Rights."

<u>Efficacy of the Disclaimer</u>

8. As described in the Combined Grounds and Skeleton, the disclaimer contained in the Final Report does not apply to the declaration of law in §3.1.3 because that declaration is not a finding. It is not a conclusion by examination of evidence, or of law, nor does it derive from the 'call for evidence', but is a statement of fact, a declaration of the state of the law at and from that time.

9. Further, the declaration has been adopted and is recognised by the Government Legal Department as the law of the UK, making the disclaimer otiose (and as described in {12-51 to 12-54}).

10. If it is held that the offending declaration was a "finding" of the Defendant's Panel, to which the disclaimer might apply, since the declaration has been adopted by the State as law, the State did not comply with Article 6 (fair trial) of the Human Rights Act 1998 to permit those disenfranchised of this fundamental human right to contact with their children, a fair trial in the determination of their civil rights.

"Automatic Right"

11. There is no definition of the term "automatic right" in the Report or, it seems, in legislation or case law, and so the plain meaning of the words is appropriate. Helpfully, the Cambridge English Dictionary provides a definition of "automatic" that uses an example of the phrase "automatic right":

> "happening as a usual result, without the need for extra permission, approval, proof, etc.:
>
> *EU nationals have the automatic right to apply for jobs in other countries within the European Union*."

12. The existence of a right is binary: one can no more have half a right than dig half a hole. The nature and extent of that right (or hole, to continue the analogy), or whether a right is qualified, shared or indeed revocable, is a separate consideration. For instance, in respect to Article 8 of the Human Rights Act 1989, the qualification therein is to permit interference with "the exercise of this right", not to prevent or revoke the existence of the right.

13. The government's claim that there is "no *automatic* right" necessarily means that there is "no right" without extra permission or approval (leaving aside 'proof', as that would be addressed in the recognition of 'parent'), so that the qualified right to parental contact does not exist until and unless that permission is granted.

14. However, the Children's Act 1989 automatically conveys 'parental responsibility' to most species of parent by virtue of §§ 2 (1)-(3):

"(1) Where a child's father and mother were married to, or civil partners of, each other at the time of his birth, they shall each have parental responsibility for the child

….

(2) Where a child's father and mother were not married to, or civil partners of, each other at the time of his birth—

(a) the mother shall have parental responsibility for the child;

(b) the father shall have parental responsibility for the child if he has acquired it (and has not ceased to have it) in accordance with the provisions of this Act."

15. The 1989 Act defines who has parental rights and duties, and how the court should address them, but refers to external sources of law in respect to what those rights and duties actually are, in § 3 (1):

"In this Act "parental responsibility" means all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property."

Noting, as affirmed in *Re D (A Child) [2019] UKSC 42* at §20 in relation to that clause, that:

""By law" obviously refers to the common law, but also includes those statutory provisions which give rights etc to parents"

And also noting, as defined in §8 (1) of the 1989 Act, that a ""child arrangements order" means an order regulating arrangements", rather than creating or revoking rights to contact. A parent cannot enforce a child arrangements order, but only apply to the court to enforce as a contempt of court.

16. Because parental responsibility is conveyed automatically to parents and includes the rights, powers and authority of a parent in the common law and statutory provisions, the government's position that there is "no automatic right to parental contact" necessarily means that the rights to contact between parents and their children at common law or in statute do not, or no longer, exist without the government granting of some sort of permission.

17. When drafting the Report, and its Grounds of Resistance, the government had a choice of terminology and used legal experts. It chose not to use the phrase “no absolute right”, which would accord with the existing case law on human rights, but wilfully used the term “automatic right” and confirmed the intentional use of that term. There can therefore be no mistaking the government’s intended meaning.

Presumption of parental involvement

18. The presumption of parental involvement in §1.2A of the 1989 Act, introduced by the Children and Families Act 2014, neither creates or eliminates any right to parental contact. It effectively serves merely as an addendum to the welfare checklist in the specific areas of *regulating* contact pursuant to §8, or in the consideration of whether an unmarried father should acquire/maintain parental responsibility – effectively whether he is a ‘parent’ for the purposes of the Act. The Explanatory Note to the 2014 Act is explicit at §105 that:

> “The purpose of this amendment to section 1 of the Children Act 1989 is to reinforce the importance of children having an ongoing relationship with both parents after family separation, where that is safe and in the child's best interests”.

19. The Appellants concur, and have never argued against, the government’s claim that the provision is consistent with Article 8, but also submit that as such it is relatively irrelevant to the consideration of whether or not there is an automatic right to parental contact. It only reinforces existing rights (and usefully provides a basis for the application of indirect contact in difficult circumstances).

20. The presumption of parental involvement is applicable only in the making of certain determinations by the court. It has no relevance to parents who are not seeking a §8 order or considering whether the father has parental responsibility. Happily-stable, married parents can be granted no rights or protection by the provision and, the government argues, have no rights to contact with their children, either.

Implications of the government’s position

21. The government's position that there is "no automatic right to contact between a parent and a child" disenfranchises both the parent and the child of any right to contact with the other, until some permission of the State is obtained. As no other automatic rights to contact exist until an intervention occurs, most children would be born bereft of any right to contact with any carer (unless the Local Authority has already commenced care proceedings during pregnancy).

22. The government's position applies to both parents whether or not their adult relationship is intact and they are living together, so that even married parents have no right of contact with their children. It also applies after separation to the child's relationship with the resident parent as much as to her relationship with a non-resident parent.

23. As described above, the 1989 Act does not create the rights of either parents or children. The nature of Children's Act private proceedings is that (in most cases) competing and equal automatic rights of the child to contact with each parent (and theirs with her) are adjudicated by the judge with the paramount consideration being the child's welfare. The court's intervention is only at the behest of one of the parents (unless permission to apply is granted to another person or to a Local Authority where there is a significant risk of harm), and further the parents may jointly choose to simply ignore or vary any child arrangements ordered.

24. Nonetheless, a child's right of contact with her parents against the State is made explicit in §34 (1) of the 1989 Act, which reads:

> "Where a child is in the care of a local authority, the authority shall (subject to the provisions of this section) and their duty under section 22(3)(a) … allow the child reasonable contact with (a) his parents…"

so the Defendants declaration is falsified within the 1989 Act.

25. Further, the common law right to parent-child contact is embedded in a parent's "lawful control" of a child in §2 of the Child Abduction Act 1984, and in the crime of a parent for child cruelty for neglect or abandonment of their child pursuant to §1 (1) of the Children and Young Persons Act 1933.

26. If, as the Defendant argues, that until the State grants some permit a mother has no right to contact with her child, on what grounds might she enlist the 1984 Act to demand the return of her baby from a maternity ward nurse who decides to raise the child as her own (considering the nurse is likely a more qualified carer than the mother)? And if, as the State believes, the child has no right to demand contact with her parent, on what basis could the State hold a parent accountable pursuant to the 1933 Act for keeping an infant with no affection (in the manner of a Romanian orphanage of the Ceausescu era), or abandoning her altogether?

27. The government's position most probably means that every single mother and father, whether or not the adult relationship is intact, would have to apply for Children's Act proceedings in order to have a right to contact with their child. Such a strategy would be frustrated by §5 of the Children's Act 1989, which says no order should be made unless it creates a benefit for the child. But even if the parents could obtain such an order, it ceases to have effect if they live together for six months, so an intact family would be returning to court twice a year to renew their permit. That would hardly alleviate the administrative burden on the Family Court

<u>Context of the mutual rights to parent-child contact in the common law.</u>

28. The right to parent-child contact is as natural and intrinsic part of the human condition as one's right to access the atmosphere around him. The right is assumed at birth (if not before) in common law and has only been contended in equity where there were exceptions such as divorce or separation, inheritance in death or abuse.

29. But even more ancient than equity, the common law or the Roman law that preceded it, is the instinct that drives a father penguin to starve in the dark terror of Antarctica's frozen winter to keep his egg safe, or causes an infant macaque to cling to a wooled surrogate mother without food rather than a metal one with food, or that "shrinks" the brains of Romanian orphans by .27% for every month (month!) they were deprived of ordinary parental affection. The mutual rights of parents and children to contact with each-other is founded in our neurobiology

more than any law of the land, just as Sir William Blackstone described it as "most universal relation in nature" in 1765[1].

30. The historical meanderings of English law over time has variously conscripted the natural rights exclusively to fathers in Roman law, and then from the commencement of the Enlightenment, welfare considerations about inheritance allowed for the increasing intervention of the State, which became the foundation of public-law proceedings. Meanwhile, a series of legislative acts in the nineteenth and early twentieth century equalised the parental rights of fathers and mothers, giving rise to the court's commonplace interventions in private proceedings to settle disputes between parents.

31. Throughout all of this, the rights of the child as the "beneficiary" of guardianship has become increasingly prominent, even as parental rights as "trustee" dwindled. The Children Act of 1989 codified a welfare checklist (§1 (3)) and the paramountcy principle (§ 1(1) - evolved from the 1925 Act) and re-framed parental rights as "parental responsibility" (§2 (1)).

32. This trend towards a child-welfare focus has coincided since the middle of the last century with ever-more sophisticated scientific understanding of the psychology, neuroscience and biology of parental attachments[2], giving a new impetus and urgency to the "welfare interests" of the child in contact disputes. (However, a more recent period has also seen a retrogression in the humanities and social sciences in Anglosphere academia from feminist theory and other critical-theory movements, which de-emphasises "science, reason, and the pillars of post-Enlightenment Western Democracy" in fear of "mysterious

[1] Blackstone, William. *Commentaries on the Laws of England, Vol. 1 - Rights of Persons* (1765), Ch 16-17.

[2] For instance, summaries in Feldman, R '*What is resilience: an affiliative neuroscience approach'*, World Psychiatry, Volume19, Issue2 June 2020 pg 132-150; and Lamb M & Kelly, J '*Improving the Quality of Parent-Child Contact in Separating Families with Infants and Young Children: Empirical Research Foundations*', The scientific basis of child custody decisions, (Second edition). Hoboken, NJ: Wiley. (2009) (pp. 187-214)

worldly forces of prejudice and privilege"[3]. A proponent of such ideology is the author of the Literature Review in this matter.[4])

Parent's right to contact with their child

33. A parent's right to contact derives from the welfare of the child and is empowered by their right to control the whereabouts of the child: if they have a right to control where the child is located, they have a right to ensure the child is located with them.

34. The proviso always being that the welfare of the child is paramount. The right for contact for contact's sake derives from the common law duty to raise the child, corroborated by §24.3 of the Charter of Fundamental Rights (CFR) and Articles 7-9 of the UN Convention of Rights of the Child (UNCRC), describing the rights of the child to have contact with each of her parents and to be cared for by her parents "as far as possible".

35. The parent's right to contact is not absolute, nor expressed explicitly in legislation, but it does exist, is automatic[5] and enforceable.

36. The recent case law concerning parental rights over the physical location of the child has arisen where such rights challenge the child's Article 5 right against deprivation of liberty. In the 2019 Supreme Court case *Re D* (supra), concerning the rights of persons with parental responsibility to place a child in institutionalised care, Ladies Hale and Black provide a comprehensive summation of the common law regarding parental rights to control the whereabouts of their child. Informative excerpts include (with our emphasis in italics):

[3] Pluckrose, Helen; Lindsay, James A. (2020). *Cynical Theories: How Activist Scholarship Made Everything about Race, Gender, and Identity – And Why This Harms Everybody*

[4] See Barnett, A. (2017) *Knowledge and Power – Feminism(s) and Research,* speech accessed at https://www.youtube.com/watch?v=y1Yj3sN8dPw, and Barnett, A. (2014) 'Contact at all costs? Domestic violence and children's welfare'. Child and Family Law Quarterly, 26 (4). pp. 439 - 462. ISSN: 1358-8184

[5] It is not automatically conferred on a father who was not married at the time of birth or named on the birth certificate, but this is a very old element in law evolving from the inheritance rights of illegitimate children, and once recognised as a parent, the rights of such a father are automatic.

"2. At the same time, the *common law and equity have long recognised the authority of parents over their minor children, now encapsulated in the concept of "parental responsibility" in the Children Act 1989*. Likewise, article 8 of the European Convention on Human Rights begins "Everyone has the right to respect for his private and family life, his home and his correspondence"; and, as this court recognised in Christian Institute v Lord Advocate [2016] UKSC 51; 2017 SC (UKSC) 29, paras 71 to 74, *the responsibility of parents to bring up their children as they see fit, within limits, is an essential part of respect for family life in a western democracy*.

…

"38. …."*normal parental control over the movements of a child* may be exercised by the local authority over a child in its care…" (quoting Judge L J in respect to a LA with parental responsibility)

"55. I draw attention to that aspect of "custody" variously described as *"the power physically to control the infant's movements"*, the "ability to restrict the liberty of the person" and, more generally, as "physical control" or "physical possession", and referred to as a "personal power" which "in practice" ceases upon the infant reaching "the years of discretion" or "the personal power physically to control the infant until the years of discretion."

…

"125. "In my judgment, on the facts of this case, it would be wholly disproportionate, and *fly in the face of common sense, to rule that the decision of the parents to place D at Hospital B was not well within the zone of parental responsibility*." (favourably quoting Sir James Munby P in the preliminary Court of Appeal as "the good sense of that appraisal", despite later overturning his decision due to the specificity of the Mental Health Act 2005 and the subject child attaining the stipulated age of 16 years.)

…

"131. There is no dispute about the importance of the principle of parental responsibility in the common law. As Sir James Munby P said in In Re H-B (Contact) [2015] EWCA Civ 389; [2015] 2 FCR 581, para 72:

> "… parental responsibility is more, much more than a mere lawyer's concept or a principle of law. It is a fundamentally important reflection of the realities of the human condition, of the very essence of the relationship of parent and child. Parental responsibility exists outside and anterior to the law. Parental responsibility involves duties owed by the parent not just to the court. First and foremost, and even more importantly, parental responsibility involves duties owed by each parent to the child."

"132. Not surprisingly a corresponding principle is recognised under the European Convention on Human Rights. As the Strasbourg court said in Nielsen v Denmark (1988) 11 EHRR 175, "family life" in the Contracting States -

> "… encompasses a broad range of parental rights and responsibilities in regard to care and custody of minor children. *The care and upbringing of children normally and necessarily require that the parents or an only parent decide where the child must reside* and also impose, or authorize others to impose, various restrictions on the child's liberty. … Family life in this sense, and especially *the rights of parents to exercise parental authority over their children, having due regard to their corresponding parental responsibilities, is recognized and protected by the Convention*, in particular by article 8. Indeed the exercise of parental rights constitutes a fundamental element of family life …"

"133. *The common law principle is given specific statutory recognition in section 3 of the Children Act 1989*, which defines parental responsibility as encompassing -

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

37. Additionally, Article 9 of the UNCRC states that "States Parties shall ensure that a child shall not be separated from his or her parents against their will"[6].

[6] 'their' being the parents, or the parents and children together, as the pronoun for the child in the document is 'his or her'

This firmly places in the parents' hands the discretion over the child's contact with them, with the State obliged to ensure that not only its own authorities, but other private citizens and entities comply with that discretion. Thereby the right of parents to control their contact with their child is made explicit and as mentioned above, this is reflected in and enforced in legislation such as the Child Abduction Act 1984 as well enforceable within other domestic laws such as the Human Rights Act 1998.

Child's right to contact with her parents

38. Although, due to the legal capacity of the child, contact is almost always litigated between the parents, it is actually the child's right that is now most explicit, being described in both the UNCRC and CFA. These rights arise from the common law of the UK and also form part of the Article 8 rights in the Human Rights Act 1998 (the right to respect for family life), whilst §6 of that Act makes it "unlawful for a public authority [including a civil court] to act in a way which is incompatible with a Convention right". Although a child will need permission of the court to litigate on their own behalf, either parent could (and mostly do) litigate for them vicariously without such permission.

39. The UK government ratified the UNCRC in 1991 and it came into force in 1992. This included several rights relevant to the issue of parental contact:

"*Article 7*

1. The child shall have… as far as possible, the right to know and be cared for by his or her parents.

2. States Parties shall ensure the implementation of these rights in accordance with their national law...

Article 8

1. States Parties undertake to respect the right of the child to preserve his or her identity, including … family relations as recognized by law without unlawful interference.

2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

…

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests"

40. Although the UNCRC has not been directly incorporated into the domestic law, the UK government has repeatedly claimed that such incorporation is not required because it was already embodied domestically in common law and legislation. This is reflected in the government's 2008 UN Human Rights Council submission[7], which says at §18 (with our emphasis in italics):

> "International treaties ratified by the United Kingdom are not automatically incorporated directly into UK law. Instead, if any change in domestic law is needed to enable the United Kingdom to comply with a treaty obligation, the Government makes that change, following normal parliamentary procedures, before it becomes a party to the treaty. ***The***

[7] National Report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council Resolution 5/1 - United Kingdom of Great Britain and Northern Ireland. 06/06/08. A/HRC/WG.6/1/GBR/1

United Kingdom will not ratify a treaty unless the Government is satisfied that domestic law and practice enable it to comply."

41. In its first UNCRC report to the United Nations in 1994[8], the UK government said at §15 "Ratification of the Convention did not require any amendment to United Kingdom legislation", and made no mention of any deficiency in any aspect of UNCRC Article 7-9 rights, and therefore the government's view was that those rights already existed in English law, either by existing statutory provisions or the common law, at ratification in 1991 - nine years before the Human Rights Act 1998 came into force.

42. Accordingly, in the 1995 United Nations' Concluding Observations[9], the first following ratification, the UN made no indication that the UNCRC Article 7-9 rights were not already in existence in the UK. Concerns raised about incorporation of the UNCRC were focussed on Articles 3 and 12, and parental contact was not mentioned at all.

43. The latest Concluding Observations in 2016[10] still raised no issue with existence and enforceability of the UNCRC Article 7-9 rights in UK law, but raised non-legal practical concern over the geography of public-law care placements to accommodate the child's right to parental contact. The next review is in 2021.

44. In 2008 the government also ratified the Lisbon Treaty which brought into being the Charter of Fundamental Rights, which closely mirrors the text of the UNCRC Art 9.3 when it says at §24 (3):

"Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests."

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[8] Initial reports of States parties due in 1994: United Kingdom of Great Britain and Northern Ireland. 28/03/94.
CRC/C/11/Add.1. (State Party Report)

[9] Concluding observations of the Committee on the Rights of the Child: United Kingdom of Great Britain and Northern Ireland. 15/02/95.CRC/C/15/Add.34. (Concluding Observations/Comments)

[10] Concluding observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland. 12.07.16. CRC/C/GBR/CO/5

45. The UK has been legally obliged to implement certain EU directives that require its compliance with §24 of the CFR. The UK would have violated EU law if it did not implement those directives within a specific timeframe. The UK did not make new domestic laws or regulations concerning parental contact in order to implement the EU directives and therefore the CFR § 24 rights had to already exist in common law or statutory provisions.

46. The Commons debate on 5 February 2008 concerning the Lisbon Treaty and Protocol 30 thereto (often referred to as the "opt-out"), made clear that parliament's view was that the CFR merely affirmed existing rights already in English law. Per the then-Lord Chancellor and Secretary of State, Jack Straw:

> "We have made it clear that the charter does not create new rights, but simply records existing rights. It is an amalgamation of existing rights from different sources …
>
> …the protocol does not operate like an opt-out, but the broad purpose is similar: opt-outs and protocols are there to provide safeguards for the UK. It does not disapply rights to UK citizens; given that the United Kingdom fully accepts the rights reaffirmed in the charter, there would be no need to do so."

47. The UNCRC / CFR child's rights of contact are effectively recognised in Article 8 of the Human Rights Act 1998, as affirmed in *Pisica v. The Republic of Moldova -23641/17 (Judgment : Article 8 - Right to respect for private and family life : Second Section) [2019] ECHR 779* at §63:

"The Court reiterates that although the primary object of Article 8 is to protect the individual against arbitrary action by public authorities, there are, in addition, positive obligations inherent in effective "respect" for family life (see, amongst other authorities, Glaser v. the United Kingdom, no. 32346/96, § 63). The Court has repeatedly held that in cases concerning parental contact rights, the State has in principle an obligation to take measures with a view to reuniting parents with their children, and an obligation to facilitate such reunions, in so far as the interests of the child dictate that everything must be done to preserve personal relations (see, among other authorities, Hokkanen v. Finland, no. 19823/92, § 55, 23

September 1994, Ignaccolo-Zenide v. Romania, no. 31679/96, § 94, ECHR 2000-I, and A.V. v. Slovenia, no. 878/13, § 73, 9 April 2019)."

48. Furthermore, as affirmed in *Re K [2016] EWCA Civ 99* at §32:

"Contact between parent and child is to be terminated only in exceptional circumstances, where there are cogent reasons for doing so and when there is no alternative. Contact is to be terminated only if it will be detrimental to the child´s welfare.

"There is a positive obligation on the State, and therefore on the [court], to take measures to maintain and to reconstitute the relationship between parent and child, in short, to maintain or restore contact. The [court] has a positive duty to attempt to promote contact."

49. Whether or not either the CFR and UNCRC were directly incorporated in domestic legislation, the government has affirmed time and again that the relevant rights already exist in English law without the need for special legislation, and the enforceability of Article 8 of the Human Rights Act 1998 against the State and its mandatory consideration in the court's determinations in private proceedings by virtue of §6(1) of the 1998 Act, means that the relevant rights of the child contained within those treaties are automatic and enforceable.

The Lord Chancellor's proclamation:

50. Prior to the publication of the Report, the UK has reported to the United Nations' Human Rights Commission that the domestic law complies with the UNCRC in respect to Articles 7-9 concerning the rights of the child to contact with her parents, and has represented to the EU Commission that certain EU directives[11] requiring domestic legal compliance with §24 of the Charter of Fundamental Rights (concerning similar rights of the child to contact with her parents) have been implemented. This necessarily means that these rights existed in English law prior to the Lord Chancellor's publication of the declaration.

[11] Claimants Statement of Facts, at §64

a) The Government Legal Department now confirms in the Defendant's Grounds for Resistance that the government's position is that there is no automatic right of contact between parents and children.

b) This new legal stance of the government must necessarily be the result of a change, or purported change, to English law.

c) The only intervening event is the publication of the Report by the Lord Chancellor that includes the offending declaration of law.

d) Therefore and thereby, the State has recognised in practice that the Lord Chancellor has changed the law, or is purporting that the Lord Chancellor has changed the law.

51. The Lord Chancellor has publicly declared as fact, under his authority and under the insignia of the Crown (the same insignia that appears on orders of the court), and without effective disclaimer, that "there is no automatic right to contact between a parent and a child"; and he refuses to correct the statement.

52. Furthermore, the Lord Chancellor has set about implementing a plan that is expressly aimed to affect the outcomes of judicial decisions, founded in part on this declared law.

53. The Lord Chancellor's declared law contradicts existing common and statute law and the laws of international treaties, as well as rendering some domestic legislation functionally ineffective, such that English citizens are disenfranchised of their existing fundamental rights.

54. Like all Minister of the Crown, pursuant to § 3(1) of the Constitutional Reform Act 2005, the Lord Chancellor is required to "uphold the continued independence of the judiciary".

55. However, the Lord Chancellor is also in a special position, not merely in possession of the Great Seal, having also undertaken an oath to respect the 'rule of law'. The 'rule of law' of law is not a defined term:

a) A.V Dicey conceptualised the 'rule of law' in three elements: Supremacy of the Law, Equality before the Law, and Predominance of the Legal Spirit. This last element- that the rights of private persons are derived

from successive judicial precedents, and that legislation conferring rights overlays the precedents so that a withdrawal or suspension of that legislation does not withdraw or suspend the rights derived by precedent[12] – bears on the current situation. The Lord Chancellor did not respect the rule of law when he made a declaration of the rights of private persons without any judicial precedent or parliamentary act to substantiate it. Further, the statement itself does not respect this aspect of the rule of law, as it seems to have ignored the rights that have been derived by judicial precedent, inferring instead that the absence of specific legislation means the private rights to parent-child contact do not exist.

b) The Rt. Hon Lord Bingham of Cornhill KG, in his address to the House of Lords, on 16th November 2006, identified 8 elements to the 'rule of law' as follows with our comments in italics:

c) The law must be accessible so far as possible, intelligible, clear and predictable. *The Lord Chancellor's public statement has made the status of the law uncertain*

d) Questions of legal right and liability should generally be decided by application of the law and not the exercise of the discretion. *The Lord Chancellor's declaration made no reference to any judicial precedent or legislation and would be a purely discretionary and arbitrary act that dispenses of rights of private persons.*

e) The law must apply equally to everyone, unless differences can be justified.

f) The law must provide appropriate protection of essential and basic human rights. *The Lord Chancellor is repudiating a fundamental human right and implementing policy partly on that basis*

g) The parties in civil disputes must be able to resolve disputes without facing a huge legal cost or excessive delays.

[12] Dicey, AV *Introduction to the Study of the Law of the Constitution*. 1885, 8th edition 1915, pp 191-195

h) The executive must use the powers given to them reasonably, in good faith, for the proper purpose and must not exceed the limits of these powers. *The Lord Chancellor's change of law exceeds his powers*

i) There must be adjudicative procedural fairness. *This is addressed at length in the main application*

j) The state must comply with the obligations of international law which, whether deriving from treaty or international custom and practice, governs the conduct of nations. *The Lord Chancellor repudiates parts of the UNCRC and the Lisbon Treaty*

56. Altogether, it was a violation of his oath to 'respect the rule of law' for the Lord Chancellor to publish a declaration of false law which contradicted judicial determinations of the rights of private persons. The Lord Chancellor's act was therefore unlawful.

57. The declaration of law was outside the remit of the Lord Chancellor's powers as they have been defined in the Constitutional Reform Act of 2005 and was therefore ultra vires.

58. Making such public declarations that contradict the common law, within the context of implementing policy to change the outcomes of judicial decisions {13-413}, also violates his legislative duty to uphold the independence of the judiciary. The act was therefore unlawful.

59. Further, given the special position of the Lord Chancellor, and that the declaration of law was made without any supporting act of parliament or supporting judicial precedent, but has nonetheless been adopted by the government, the conduct violates the Bill of Rights 1688 which says:

"**Dispensing Power.** That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authority without Consent of Parlyament is illegall. **Late dispensing Power.** That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it hath beene assumed and exercised of late is illegall."[13]

[13] Bill of Rights [1688] 1688 CHAPTER 2 1 Will and Mar Sess 2

60. The Appellants submit that the Lord Chancellor's conduct amounts to a public repudiation of the rights to parental contact, protected by Article 8 of the Human Rights Act 1998. Public repudiation of the right of parental contact is the opposite of "respect" for family life.

61. In his arguments that the publication would not have legal affect the Defendant admits that changing the law is beyond his powers, but he has anyway already done the public act that would purport to change the law, as evidenced by the Government Legal Department affirming the position, so the Report needs to be removed from the public sphere and a notifying correction circulated as soon as possible.

62. The Lord Chancellor is not just some random person who can publicly make incorrect statements of what the law is. The historic and current status of the title places an especial duty that his public statements must not contradict or undermine the law or the judiciary and he must act promptly to publicly correct any public statements that do so. When he publicly declared that there is "no automatic right to contact between parents and children", he undermined a number of standing decisions of the Court of Appeal, Supreme Court and ECtHR, rendered several acts of parliament functionally ineffective, and repudiated at least two standing international treaties.

63. The State is obliged by Article 42 of the UNCRC to "make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike", but instead the Lord Chancellor is publicly renouncing core articles in violation of the treaty.

Prepared by Terrence White on behalf of both Appellants

Attachments:

- Judgement in Re K (2016)
- Judgement in Re D (2019)
- Judgement in Pisica v Moldova (2019)
- Freedom of Information Extract, Appointment of Literature Review author