CHILDREN'S RIGHTS: A EUROPEAN PERSPECTIVE

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I. INTRODUCTION

The European Convention on Human Rights Bill, 2001 is intended to give the force of domestic law to the rights set out in the European Convention on Human Rights (ECHR) and to make Convention rights enforceable in Irish courts. The impact which this is likely to have on the Irish legal system will vary depending on the area of Convention rights under scrutiny and in this regard, it is relevant that Ireland's record before the European Court of Human Rights in family law cases is poor.[1] At the same time, a large degree of uncertainty surrounds the impact on child and family law of incorporation of Convention rights into Irish law. Evidence from the UK, where the Human Rights Act 1998 has been in force for over a year, suggests that its effect may not be dramatic – particularly when it is taking place at sub-Constitutional level - but that reference to the jurisprudence of the European Court of Human Rights may nonetheless make a positive contribution to the process of decision making in this area.[2] As the Bill passes through the Dáil, it is timely, therefore, to consider what the Convention and the case law of the European Commission and Court of Human Rights says about children. That is the aim of this article, which will address, in particular, the case law relevant to family law, the protection of children from abuse and issues of youth justice, detention and identity.

II. FAMILY LAW

The wide scope of Article 8 has meant that the case law of the Court touches on a great variety of family and child law areas. While the vast majority of this case law has concerned children in state care, the Court has also considered the obligations of the State in private law cases, particularly with regard to access and custody

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[1] The State has lost all the family law cases it has defended before the court. See *Airey v. Ireland*, Series A, No. 32, 2 E.H.R.R. 305; *Johnston v. Ireland*, Series A, No. 112, (1987) 9 E.H.R.R. 203 and *Keegan v. Ireland*, Series A, No. 290, (1994) 18 E.H.R.R. 342.

[2] See Kilkelly, U., "The Impact of the Human Rights Act 1998 on Children During its First Year of Application" (2001) 182 *ChildRight* 9.

disputes between parents and the enforcement of court orders in this area.[3]

Article 8 ECHR provides:

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

The first part of this provision guarantees the right to be protected – and in this regard the existence of private or family life determines the applicability of Article 8 - while the second part sets out the limits of permissible interference with that right by the State, thereby governing whether or not a violation of the right has occurred.

A. Definition of Family Life

The definition of family life under Article 8 ECHR has evolved considerably due to the flexible approach which the European Court of Human Rights has taken to its interpretation. In theory, the existence of family life depends on the existence of close personal ties between the parties, which is determined on a case by case basis. In practice, however, an increasing number of family relationships enjoy automatic protection under paragraph. 1 meaning that this part of the test has become largely academic.[4] Significantly, the Court

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[4] Liddy, J., "The Concept of Family Life under the ECHR" (1998) 1 *European Human Rights Law Review*, 15.

has moved to adopt the position that family life exists in all but very exceptional cases between parents and their children regardless of the parents' marital status,[5] the family's living arrangements,[6] or their apparent lack of commitment to their children.[7] This means that in addition to family members separated by divorce or immigration laws, an unmarried father who has failed to take steps to have paternity of his child recognised, who has not paid maintenance to the child's mother or who has failed hitherto to pursue meaningful contact with the child will, in principle, be able to rely on Article 8 in order to challenge his current lack of access or contact with the child, for example.[8]

Moreover, the question of whether family life can exist between parties who do not enjoy a blood tie was answered in the affirmative by the Court in 1997. In *X. Y. & Z. v. United Kingdom*[9] it found that the relationship between a female-to-male transsexual and his child born to his female partner by artificial insemination by donor (AID) amounted to family life within the meaning of Article 8. In reaching this conclusion, it was significant that their relationship was otherwise indistinguishable from that enjoyed by the traditional family and also that the transsexual had participated in the AID process as the child's father.

The Court has not yet considered whether same sex relationships constitute family life. In *Kerkhoven v. Netherlands*[10] the Commission failed to find that a stable relationship between two women and the child born to one of them by artificial insemination by donor amounted to family life. Notwithstanding that they lived together as a family and shared parental tasks in relation to the child, their claim for legal recognition was deemed to relate only to private life. However, the Court may prefer to follow its own precedent in *X. Y.*

[5] *Marckx v. Belgium*, Series A, No. 31, (1979) 2 E.H.R.R. 330 (unmarried mother and her child); *Johnston v. Ireland* (unmarried parents and their child), Series A, No. 112, (1987) 9 E.H.R.R. 203.

[6] *Berrehab v. Netherlands*, Series A, No. 138, (1989) 11 E.H.R.R. 322.

[7] See *C. v. Belgium*, Reports 1996-III, no. 12 at para. 915, [1996] I.I.H.R.L. 50 and *Ahmut v. Netherlands*, Reports 1996-VI, no. 24, p. 2017, (1997) 24 E.H.R.R. 62. See also *Söderbäck* v. *Sweden*, [1999] 1 FLR 250; Reports 1998-VII, no. 94.

[8] However, purely genetic relationships – such as the relationship between a sperm donor and the child born to the donee – are unlikely to constitute family life. See *G. v. The Netherlands*, (1993) 16 E.H.R.R. 38.

[9] *X., Y. & Z. v. United Kingdom*, Reports 1997-II no. 35 at para. 619, (1997) 24 E.H.R.R. 143.

[10] *Kerkhoven, Hinke & Hinke v. The Netherlands*, European Court of Human Rights, unreported, 19 December 1992.

& Z. in any future determination of this issue, meaning that family life would include same-sex relationships, despite the absence of a blood tie.

Where other relationships are concerned, the Court determines the existence of family life on the facts of each case. In the past, family life has been found to exist between children and their grandparents; between siblings; between an uncle and his nephew and between parents and children born into second relationships. It is similarly likely to exist between adoptive parents and children although whether ties between a child and his/her foster parents will amount to family life will depend on the circumstances, particularly the length and nature of the placement.[16]

Overall, it is apparent that the European Court's approach to the definition of family life under Article 8 ECHR is more generous than the Irish courts' interpretation of the Family under Article 41 of the Constitution.[17] While this is not decisive for the protection which either provision offers the family in fact – the question of whether family life has been violated falls to be considered under para. 2 of Article 8 - nonetheless it is significant that the ECHR provision offers greater potential to protect family members, including children.

B. Compatibility With Article 8

Under Article 8 para. 2, any interference with family life such as taking a child into care or restricting contact between parents and their children, must satisfy three conditions. It must be in accordance with law, pursue a legitimate aim and be necessary in a democratic society.[18]

According to the Court's well-established guidelines, the phrase 'in accordance with law' refers not only to domestic law, but also to the rule of law meaning that the law which provides for the interference must contain a measure of protection against arbitrariness by public authorities.[19] Thus, while it is possible to

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[16] *X. v. Switzerland*, Judgment of 10th July 1978, D.R. 13 at para. 248. 8257/78. For criticism of the lack of stability which foster families enjoy, see Shannon, G., "Living in the Twilight Zone" (May 2001) *Law Society Gazette*, 6.

[17] See for example *Murray v. Ireland* [1985] I.R. 532 (H.C.) and *W. O'R. v. E. H. and The Adoption Board* [1996] 2 I.R. 248 at 270 (S.C.) where Hamilton C.J. stated that: "… the concept of a 'de facto' family is unknown to the Irish Constitution".

[18] For further detail on this test see Kilkelly, U., *The Child and the European Convention on Human Rights* (Dartmouth Publishing Company, Aldershot, 1999), pp. 197-206.

[19] *Olsson v. Sweden*, Series A, No. 130, (1989) 11 E.H.R.R. 259 at para. 61, and *Johansen v. Norway*, Reports-III, p. 979, 23 E.H.R.R. 33 at para. 53-59.

complain that the measure creating the interference does not have a legislative basis,[20] it is also a source of common complaint that the law, which is in place, is too broad or vague. Thus, the scope of any discretion which the law confers - on health boards for example – and the manner of its exercise must be set out with sufficient clarity and give adequate protection against arbitrary interference.[21] At the same time, the Court has taken into account that absolute legislative precision is unattainable in the area of child care and that the need to avoid excessive rigidity and keep pace with changing circumstances means that many laws are inevitably couched in vague terms.

The offending measure must also seek to achieve a legitimate aim under Article 8 para. 2 and 'protection of health or morals' and 'protection of the rights and freedoms of others' are most commonly invoked in family cases. This is an area of considerable state discretion, however, and in cases involving children, the best interests test is now the accepted principle by which the consistency with Article 8 para. 2 of state interference with family life is determined.[22]

The substantive issue in this context, however, is whether the measure, which interferes with family life, is proportionate to the aim of protecting the best interests of the children involved. Essentially, the test here is whether the State had 'relevant and sufficient reasons' for taking the offending measure or, in other words, whether the appropriate balance was achieved between the need to protect the rights and interests of the child on the one hand, and the right to respect for family life of the parents on the other. In undertake this balancing exercise the Court has recognised that it lacks direct contact with the persons concerned and it has distinguished its position from that of the national authorities, which benefit from such contact at the very stage when care measures are being envisaged or immediately after their implementation.[23] The sensitivities and complexities in such cases, and the position of the European Court as one of supervisory rather than appeal

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[20] See *Olsson (No. 2) v. Sweden* Series A, No. 250, (1994) 17 E.H.R.R. 134 at para. 67.
[21] *Olsson v. Sweden*, Series A, No. 130, (1989) 11 E.H.R.R. 259 at para. 62.
[22] The only reference to this principle in the Convention is in Article 5 of Protocol no.7 which provides that equality of rights and responsibilities between spouses and in relation to their children shall not prevent States from taking such measures as are necessary in the interests of the children.
[23] *Olsson (No. 2) v. Sweden* Series A, No. 250, (1994) 17 E.H.R.R. 134.

jurisdiction, mean therefore that it offers a relatively wide margin of appreciation, or discretion, to States in this area.[24]

C. Taking Children in Care

The impact of the margin of appreciation is arguably most pronounced in care cases where it is particularly apparent that the Court is unwilling to second guess the merits of a care order. The Court's task here is to consider whether the reasons used to justify the measure in question were 'relevant and sufficient'.[25] The emphasis here is on the 'sufficiency' or proportionality of the measure in question and case law shows the Court's overwhelming preference of deferring to the domestic authorities the sensitive issue of whether a care order achieved the correct balance between protecting the child's best interests and respecting family life.[26] In practice, therefore, the margin of appreciation enjoyed by state authorities means that only in exceptional circumstances will the Court find that a care order does not meet these criteria. In fact, it has reached this conclusion just once in its history in the case of *K and T. v. Finland* in July 2001.[27] The case concerned the removal into care of a new-born baby at the moment of its birth, a measure which the Court considered to be extremely harsh and not justified by any extraordinarily compelling reasons in the case. Thus, the decision to take the baby into care, was based on relevant reasons such as the clear need to protect the baby from harm, but not sufficient reasons and it thus had a disproportionate effect on the parents' potential for enjoying a family life with their new-born child as and from her birth giving rise to a violation of Article 8.

In contrast, the Court has chosen to impose stricter standards of scrutiny with regard to the implementation of the care order at domestic level – in particular issues of contact, placement and reunification - and procedural aspects of the case, especially the extent to which the parents have been involved in the decision making process.

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[24] See further Lavender, N., "The Problem of the Margin of Appreciation" (1997) 4 *European Human Rights Law Review*, 380 and Kilkelly, U., *The Child and the European Convention on Human Rights* (Dartmouth Publishing Company, Aldershot, 1999), pp. 6-8 on the application of the doctrine in children's cases.

[25] *Olsson v. Sweden*, Series A, No. 130, (1989) 11 E.H.R.R. 259.

[26] See, for example, *Olsson v. Sweden*; *Johansen v. Norway*; *L. v. Finland*, judgment of 27 April 2000; and further Kilkelly, U., *The Child and the European Convention on Human Rights* (Dartmouth Publishing Company, Aldershot, 1999), pp 204-206.

[27] *K. and T. v. Finland*, judgment of 27 April 2000 (Chamber) and judgment of 12 July 2001 (Grand Chamber).

D. Implementation of Care Orders – Placement, Contact and Reunification

The Court has, through its case law, set out the principles, which should govern the implementation of a care order under Article 8 with the starting point being the fundamental nature of the family life relationship between parents and their children. According to the Court, a care order is intended to be temporary in nature and as a consequence, its implementation must be guided by the ultimate aim of family reunion.[28] Only in exceptional cases, then, can it be justified to act as if a care order should never be lifted and even if it is necessary for the child to spend a long period of time in care, the aim of lifting the order must inform all arrangements made during that time. The Court's approach, therefore, is to emphasise the vital nature of contact between parents and children in care in order to maintain the family life relationship in accordance with Article 8. This has implications for the way in which the care order is implemented, for restrictions on contact *per se*, and the process of reuniting parents and their children.

1. Implementation

The way in which the care order is implemented will be decisive in many cases. This is illustrated by the *Olsson* case, where the three children were placed with separate foster families, hundreds of kilometres from each other and their parents. This made it very difficult for them to maintain contact with each other, a situation which the Court found to violate Article 8. In reaching this decision, the Court noted that although the authorities had acted in good faith in implementing the care decision in this manner, it was unacceptable that administrative difficulties, such as a lack of appropriate foster families or placements, should determine where the children would be placed.[29] According to the Court, such problems could play no more than a secondary role in the implementation of a care order and thus, despite the parents' uncooperative behaviour, the fact that the measures taken by the authorities were not supported by sufficient reasons meant that they were disproportionate to the aim

[28] *Olsson v. Sweden*, Series A, No. 130, (1989) 11 E.H.R.R. 259 at para. 81.
[29] *Olsson v. Sweden*, Series A, No. 130, (1989) 11 E.H.R.R. 259 at para. 82.

pursued.

As the distances between the family members in this case were large the case offers little guidance as to what is an acceptable distance by which siblings and parents can be separated. What is clear, however, is that Article 8 places a direct obligation on the authorities to fulfil children's needs for alternative care in a manner which allows them to maintain direct and frequent contact with other family members.[30] Whether the contact is possible and indeed adequate will depend on the facts of the case, and factors such as distance, transport costs and other logistical difficulties may be taken into account in reaching this conclusion.

2. Contact

The Court scrutinises very closely the compatibility with Article 8 of any restriction or prohibition on contact between parents and their children in care. The fact that the possibility of reunification will be diminished progressively and eventually destroyed if the parents are not allowed sufficient contact with their children means that interferences with family life of this kind are particularly difficult to justify. The more severe the interference with family life, the greater the justification required to ensure its compatibility with Article 8. In *Andersson v. Sweden*[31] for example, a mother and her son complained that the decision to severely curtail their right to see and communicate with each other over an 18 month period violated their right to respect for family life. While the reasons advanced by the authorities in support of these measures were relevant – there was a danger that his mother would help him abscond from the security facility where he was receiving medical treatment - the Court was not convinced that the circumstances necessitated the severe measures imposed, nor that they supported the aim of reuniting the family.

3. Reunification

The issue of contact between family members is inherently

[30] This principle is also contained in Article 24 of the E.U. Charter of Fundamental Rights.
[31] *Andersson v. Sweden*, Series A, No 226, (1992) 14 E.H.R.R. 615.

linked to the possibility of reuniting the family at some future point and this is the context in which the Court determines the compatibility with Article 8 of restrictions on contact. There is thus a positive obligation on the authorities to respond to changes in circumstances which might lead to the termination of the care order and the Convention requires the authorities to undertake regular reviews of the family's situation to see whether there has been any improvement and if so, to take reasonable action directed at reuniting the family.[32] Failure to make a serious or sustained effort directed at facilitating family reunification when an improvement in the family's situation requires it will constitute a violation of Article 8, therefore. Indeed, the Court has been critical of domestic authorities which failed to act upon improvements in the parents' circumstances and evidence of increased ability to cope with their children. It has frequently found that a violation of Article 8 occurred where no or few preparatory measures were taken to return the children to the family home despite the fact that the care order was no longer considered necessary.[33]

That is not to say that restrictions on contact will never be compatible with Article 8 however and in considering whether such restrictions are justified, the Court attaches 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 under Article 8 to have such measures taken as would harm the child's health and development.[34] However, it is insufficient to argue, for example, that contact might disturb the calm and stable foster-home environment when access arrangements can be implemented outside the foster home.[35] The measure restricting contact must thus be necessary in all the circumstances.

E. Procedural Safeguards Implicit in Respect for Family Life

Consistent with the purpose of Article 8 to protect family life from unlawful and arbitrary state interference the Court has found certain procedural safeguards to be implicit in respect for family life. Thus, even though the provision contains no explicit procedural

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[32] *K and T v. Finland* (2003) 36 E.H.R.R. 255 at para. 179.
[33] See for example *Olsson (No. 2) v. Sweden* (1994) 17 E.H.R.R.; *Johansen v. Norway* (1997) 23 E.H.R.R.33; and *Eriksson v. Sweden* (1989) 12 E.H.R.R. 183.
[34] *Johansen* v. *Norway*, Reports-III, p. 979, (1997) 23 E.H.R.R. 33 at para. 78.
[35] *Johansen* v. *Norway*, Reports-III, p. 979, (1997) 23 E.H.R.R. 33 at para. 74.

requirements, the whole decision-making process (administrative and judicial proceedings) leading to measures of interference must be fair and afford due respect to the interests protected by Article 8. What falls to be considered under Article 8,[36] therefore, is whether "the parents have been involved in the decision-making process to a degree sufficient to provide them with a requisite protection of their interests".[37]

The Court has recognised that regular contact between social workers and parents provides an appropriate channel for the communication of the parents' views and appears to accept, therefore, that parental involvement at this level may be sufficient to satisfy the procedural requirement under Article 8. Regular parental involvement in the decision-making process is essential, however, given that decisions as to the child's welfare may evolve from a continuous process of monitoring on the part of the domestic authority. The requirement of parental involvement under Article 8 is not absolute, however, and authorities are entitled to a degree of discretion as to whether their participation in the decision making process, or a particular stage of it, is meaningful or possible. Failure to consult or provide a parent with adequate information during the decision-making process will thus constitute an interference with respect for family life, which requires justification under Article 8 para. 2 in the normal way. Accordingly, where the decisions from which the parent is excluded are particularly serious and are decisive not only for immediate contact between parent and child, but also for their long term relationship, strong and weighty reasons relevant to the interests of the child will be required in order to justify the interference with family life which this causes.[38]

In the *McMichael* case, the Court recognised the importance of ensuring parental access to relevant documentation as a precondition to their effective participation in decisions concerning their children.[39] The parent in this case was an unmarried father who had recognised paternity of the children and lived together with them. It is clear, therefore, that once family life is found to exist between the parties

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[36] *McMichael v. United Kingdom*, Series A, No.307-B, (1995) 20 E.H.R.R. 205 at para. 87.
[37] *W v. United Kingdom*, Comm. Rep., 15 October 1985, Series A, No.121 at para. 64, (1987) 10 E.H.R.R. 29. The judgment was implemented by s. 22 of the Children Act, 1989, which places a duty on local authorities to consult parents before making any decision with respect to a child in their care. There is no equivalent provision contained in the Child Care Act, 1991.
[38] *W. v. United Kingdom*, Comm. Rep., 15 October 1985, Series A, No.121 at paras. 105-111, (1987) 10 E.H.R.R. 29.
[39] *McMichael v. United Kingdom,* Series A, No.307-B, (1995) 20 E.H.R.R. 205 at para. 92.

(note the expansive interpretation above), compliance with Article 8 will require their effective involvement in the administrative and judicial proceedings concerning the care of their children, including their access to all relevant documentation.[40]

The application of this right in the context of allegations of abuse was questioned by the Court in the recent case of *T.P. & K.M.*[41] According to the facts, the local authority had suspicions over some time that the child at the centre of the case was being sexually abused. When she was interviewed, the child made statements which gave strong indications that this was the case and her statements led the professionals involved to identify her mother's boyfriend as the abuser. The child was removed immediately from the family home under an emergency measure, which the Court held to be justified under Article 8 given the concerns about the mother's inability to protect her daughter. The mother who had resisted this measure took immediate steps to secure her daughter's return and when this failed, she sought access to the video of the interviews conducted by the medical professionals. The local authority refused, forcing the mother eventually to apply to the High Court for disclosure. Once the transcript of the video was disclosed to the applicant's solicitor, it became apparent that the local authority had mistakenly identified the mother's partner as the abuser. A chain of events were then put in motion which led to the child being returned home.

Considering the matter under Article 8, the Court held that the question of whether to disclose the video of the interview and its transcript should have been determined promptly to allow the mother an effective opportunity to deal with the allegations that her daughter could not be returned safely to her care. While there can be no absolute right by a parent to view such evidence, the potential importance of its contents renders it necessary for careful consideration to be given to whether they should be disclosed to the parents. Moreover, the fact that the local authority may not reasonably be regarded by the parents as being able to approach the

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[40] The right to disclosure of relevant documentation is also required under Article 6 and indeed the Court found a violation of this provision in the *McMichael* case also. For application of this law in the United Kingdom see *Re B. (Disclosure to Other Parties*) [2001] 2 F.L.R. 1017 where Munby J. held that the party was entitled to the disclosure of all the materials that may be taken into account by the court when reaching a decision adverse to him although due respect must be afforded to the Article 8 rights of all others involved in the trial process (and not just the children whose rights were to be protected).

[41] *T.P. & K.M. v. United Kingdom,* European Court of Human Rights, unreported, 10 May 2001.

issue with objectivity means that the question of disclosure should not be determined by the local authority, or the health authority responsible for the medical professional who conducted the interview. Nor should it be the sole responsibility of the parent, or lie at his/her initiative, to obtain the evidence on which a decision to remove their child is based. In this regard, the Court held that the:

> … positive obligation on the State to protect the interests of the family requires that this material be made available to the parent concerned, even in the absence of any request by the parent. If there were doubts as to whether this posed a risk to the welfare of the child, the matters should have been submitted to the court by the local authority at the earliest stage in the proceedings possible for it to resolve the issues involved.[42]

The Court also concluded that there had been a violation of Article 13 of the Convention, which sets out the right to an effective domestic remedy where there is an arguable breach of a Convention right. According to the Court, where one or more of the rights under the Convention is at issue, there should be available to the victim a mechanism for establishing any liability of state officials or bodies for that breach and making appropriate remedies available where that is proven. In this case, the House of Lords had found that the local authority could not be held vicariously liable for any alleged negligence of the doctor and social worker, and the alternative of complaining to the Local Authority Ombudsman was inadequate because it did not provide the applicants with any enforceable right to compensation. As a result, the Court concluded that the applicants did not have available to them an appropriate means for obtaining a determination of their claim that the local authority's handling of the procedures was responsible for the damage that they suffered and obtaining compensation for that damage.[43]

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[42] *T.P. & K.M. v. United Kingdom*, European Court of Human Rights, unreported, 10 May 2001, at para. 82.
[43] *T.P. & K.M. v. United Kingdom*, European Court of Human Rights, unreported, 10 May 2001, at paras. 104-110.

The judgment in this case establishes clearly that parents are entitled to be informed of the nature and extent of any allegation of abuse made regarding their children, although that right is not absolute and must be balanced with the right of the child to protection. According to the Court, the parent's interest in being informed relates not only to his/her ability to put forward those matters militating in favour of his/her capability in providing the child with proper care and protection, but also to help the parent to understand and come to terms with traumatic events which affect the family as a whole.

F. Procedural Protection of Children's Rights

It is arguable that the procedural rights implicit in Article 8 apply also to children although the Court has yet to make this observation explicitly. However, it is clearly arguable that children and young people, who wish to do so, should have the opportunity to be directly involved in the decision making process regarding their future care. Applying Article 8, this would require providing them with the opportunity to be heard and the right to be present at case conferences and other meetings where crucial decisions about their future are made. Like the parent's right to be involved, this right would not be absolute under Article 8, but would apply to the extent that it was meaningful or useful. The concept of indirect participation, or representation, is more important perhaps. Thus, where a child is not old or mature enough to participate directly, it is at best arguable that their interests under the Convention – that is their right to be protected from ill-treatment under Article 3; their right to remain with or at least have contact with parents, siblings and friends under Article 8 – require some form of independent and separate representation. This issue has not been unremarked upon in Strasbourg. The Commission has referred in its case law to the 'growing recognition of the vulnerability of children and the need to provide them with specific protection of their interests'.[44] More recently, it suggested that individual social work assistance or representation for the children's interests should be provided at the

[44] *S.P., D.P. & T. v. U*nited Kingdom (1996) 22 E.H.R.R. 148.

beginning of the care process rather than at the institution of the care proceedings in order to ensure that any risk which they face is effectively taken into account.[45]

The Court of Human Rights has considered indirectly the representation and participation of children in private law proceedings. In particular, it has been critical of domestic proceedings determining custody and access between unmarried parents which appeared to ignore the view of the child and in a series of applications against Germany, it found that the failure that the German courts' failure either to hear the child at the centre of the access proceedings or to consider expert evidence in order to evaluate the child's wishes revealed that the applicant father was not sufficiently involved to protect his interests under Article 8.[46] Although it is open to the German government to appeal these judgments under Article 44 para. 2 of the Convention, as they stand, however, they reflect clearly the influence of Article 12 of the Convention on the Rights of the Child, which sets out clear guidance as to the extent to which children should be heard and their views considered in all matters concerning them. Moreover, a strong line of case law from the Court emphasising the child's right to participate and be heard in private as well as public family law proceedings has the potential to impact heavily on Irish law in this area.[47]

G. Protection offered by Article 6

Article 6 of the Convention, which guarantees the right to a fair trial, affords basic procedural safeguards in the form of the 'right of access to a court'. Although absolute in nature, this protection is limited in scope as it applies only to legal proceedings determining civil rights and obligations such as those concerning the right to contact, custody or guardianship.[48] Explicit in Article 6 are the procedural safeguards of equality of arms; the right to an independent and impartial tribunal; to have rights determined within a reasonable time; the right to a public hearing and the right to a public pronouncement of judgment.[49] Although recent case law on

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[45] *Z. and Others v. United Kingdom* (2002) 34 E.H.R.R. 97 at paras. 97-98.
[46] See *Elsholz v. Germany* (2002) 34 E.H.R.R. 1412; *Sahin v. Germany*; No. 31871/96 *Sommerfeld v. Germany*, and No. 34045/96 *Hoffmann v. Germany*, all judgments OF (2003) 36 E.H.R.R. 565.
[47] See further Martin, F., *The Politics of Children's Rights* (Cork University Press, Cork, 2000), pp. 49-57.
[48] *W. v. United Kingdom*, Series A, No. 120, (1988) 10 E.H.R.R. 95.
[49] See further Kilkelly, U., "Child Protection and the European Convention on Human Rights" (2000) 2 I.J.F.L. 12 at 18-19.

the latter two issues is discussed below, attention is drawn to the reasonable time requirement in the context of legal aid provision in family law cases here.[50]

1. Right to a Public Hearing

The right to a public hearing is fundamental because it allows for public scrutiny of the judicial process necessary to maintain confidence in its administration. That this right is not absolute is evident from Article 6 para. 1, which permits the exclusion of the press and public from all or part of a trial in the interests of children or in order to protect the privacy of the parties. The question arises, therefore, as to the circumstances in which a family law hearing may be held in private.

In 1996, the Court of Appeal concluded that *in camera* hearings were compatible with the spirit of the Convention[51] and this was confirmed by the European Court of Human Rights in 2001. In the cases of *B* and *P*, the Court rejected that the presumption that all proceedings under the Children Act 1989 should take place in private was contrary to the Convention.[52] According to the Court, the position under English procedural law was a specific reflection of the general exception referred to in Article 6 para. 1 and in this regard, it had no difficulty with the designation of an entire class of case as an exception to the general rule under that provision. In consideration of the issue, the Court highlighted the importance of creating the conditions in which parents and other witnesses feel able to express themselves candidly on highly personal issues without fear or public curiosity or comment in order to enable the deciding judge to gain as full and accurate a picture of the situation as possible. The Court also noted the discretion enjoyed by English courts to hold Children Act proceedings in public if merited by the special features of the case, and that the judge must consider whether or not to exercise his or her discretion in this respect if requested by one of the parties. Nevertheless, it is arguable that the Court, in considering the proportionality of the restriction on the right of a public hearing, did not pay sufficient attention to the importance of that right for the

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[50] See Browne, D., "The European Convention on Human Rights: The Interface Between Domestic Family Law Practice and the Rights Enshrined in the Convention" (2001) 1 I.J.F.L. 2 at 3.

[51] In *Re P.B. (Hearings in Open Court)* [1996] 2 F.L.R. 765.

[52] *B. v. United Kingdom* and *P. v. United Kingdom* (2002) 34 E.H.R.R. 529.

individuals concerned and in this regard, at least, it may be accused of failing to follow the principles it lays down for domestic courts. It is also arguable that in failing to accept that a reversal of the presumption was required by Article 6, i.e. proceedings should be held in public unless the circumstances demand privacy, the Court misapplied the exception to the fair trial provision. The fact that two dissenting judges believed that a presumption in favour of a private rather than a public hearing was incompatible with the word and spirit of Article 6 adds some weight to this view.[53] Moreover, the Court's insistence that its conclusions are limited to the circumstances in this case are unconvincing, even though the lack of mitigating factors in the application of the *in camera* rule by the Irish courts would suggest a possible incompatibility here.[54]

2. Public Pronouncement of Judgment

The second complaint advanced by applicants *B* and *P* was that their right to a public pronouncement of judgment guaranteed by Article 6 had been violated.[55] According to the Court, this requirement is satisfied by the arrangement which permits anyone who can establish an interest to consult or obtain a copy of the full text of the judgment. Such access was possible under English law with respect to the orders and/or judgments of first instance courts in child residence cases and in addition, the judgments of the Court of Appeal and of first instance courts in cases of special interest are routinely published, thereby enabling the public to study the manner in which the courts generally approach such cases and the principles applied in deciding them. This was sufficient to discharge the obligation under Article 6 and thus no violation of the provision occurred. Two judges were unable to accept this conclusion, however, and they reiterated the view expressed by judges of the Court in an earlier decision that:

> … if the basic underlying concept of public scrutability is to be a reality, a restricted access to judgments such as existed in the present case, i.e. restricted only to

[53] See the dissenting opinion of Judge Loucaiades and Judge Tulkens.
[54] See for example, *M.P. v. A.P.* [1996] 1 I.R. 144 (H.C.) and *R.M. v. D.M.* [2000] 3 I.R. 373 (H.C.).
[55] *B. v. United Kingdom* and *P. v. United Kingdom* (2002) 34 E.H.R.R. 529 at paras. 42-49.

> persons who could establish an interest to the satisfaction of a court official, falls short of what is required by that provision of the Convention. Public knowledge of court decisions cannot be secured by confining the knowledge to a limited class of persons.[56]

In any event, the Court's conclusion that Article 6 was not breached related to the circumstances that a judgment or order of a court of first instance is available on request and that the judgments in cases of special interest of senior courts are routinely published. It is questionable, therefore, whether the current Irish approach would even satisfy the minimalist approach enshrined in the *B.* and *P.* judgment.

III. THE CHILD'S RIGHT TO PROTECTION

The fact that the vast majority of challenges in the area of family law are brought by parents has meant that Article 8 provides the framework within which these cases are normally decided by the European Court. However, Convention jurisprudence on the right of the child to be protected from harm has been developing at steady pace under Article 3 of the Convention, which prohibits absolutely inhuman and degrading treatment. According to the Court, only ill-treatment which reaches a minimum level of severity will fall within the scope of the provision, but this is a relative assessment which depends:

> … on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim.[57]

The application of this relative standard to children's cases with reference to Article 19 of the Convention on the Rights of the Child,

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[56] See the dissenting opinion of Judges Cremona, Ganshof Van Der Meersch, Walsh and Macdonald in *Sutter v. Switzerland*, European Court of Human Rights, unreported, 22 February 1984, Series A, No. 74.

[57] *Ireland v. United Kingdom* Series A, No.25, (1979-80) 2 E.H.R.R. 25 at para. 162.

which is the widely accepted standard for the child's right to protection,[58] means that the Convention can offer a remedy to children subjected to various forms of abuse and ill-treatment. In the 1980s, for example, in a series of cases taken against the UK, the Commission and Court held that certain forms of physical punishment, usually involving a cane, constituted inhuman and degrading treatment contrary to Article 3. In the *Warwick* case, for example, the Commission found that one stroke of a cane given to a 16 year old girl constituted degrading punishment, in violation of Article 3.[59] However, there appears to be a clear distinction between caning, which will fall within the scope of Article 3, and other milder forms of punishment. For example, in *Costello-Roberts v. U.K.* a 7 year old boy was given three 'whacks' on the bottom with a gym shoe by his headmaster, but this treatment was not found to be severe enough to violate Article 3 although the Court's decision, supported by only five out of nine judges, expressed reservations about the appropriateness of its use.[60]

Physical punishment had the U.K. in the Strasbourg dock again in 1999, this time in a case involving its use within the family. In *A. v. United Kingdom*[61] the treatment, which was the caning of a nine year old boy by his stepfather was found to be severe enough to constitute degrading treatment within the meaning of Article 3. In particular, the injuries were considered to be sufficiently serious to merit the initiation of criminal proceedings against the boy's stepfather. His acquittal, despite the severity of the injury, led the Court to find that the law was inadequate to protect him from ill-treatment contrary to the Convention giving rise to a violation of Article 3.

Although considered a victory for children's rights, the *A* case reinforces that only physical punishment which causes physical injury or humiliation of a particular severity will fall within the scope of Article 3. Moreover, comments made by the Court suggest that there is as yet no support for the view that punishment of a mild

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[58] Doek, "Child Abuse and Neglect: Article 19 CRC" (1994) 2 *The International Journal of Children's Rights*, 88.

[59] *Warwick v. United Kingdom*, Comm Rep, 18 July 1986, D.R. 60, p. 5, at 86-88. See also *Y. v. United Kingdom*, Series A no. 247, (1994) 17 E.H.R.R. 240.

[60] *Costello-Roberts v. United Kingdom*, European Court of Human Rights, unreported, 25 March 1993, Series A no.247-C, (1995) 19 E.H.R.R. 112. See further Kilkelly, U., *The Child and the European Convention on Human Rights* (Dartmouth Publishing Company, Aldershot, 1999), pp 160-170.

[61] *A v. United Kingdom*, (1999) 27 E.H.R.R. 959 at para. 21.

nature, such as slapping, will reach the level required to breach that provision. That is not an immutable position, however, and it is certainly arguable that the fact that an increasing number of Council of Europe States have now banned all forms of physical punishment will be persuasive in future cases; so too will the view of the UN Committee on the Rights of the Child which took the opportunity when examining the Irish Report on implementation of the Convention to reiterate their view that physical punishment is itself contrary to Article 19 of that Convention.[62]

A. The State's Obligation to Protect Children

Notwithstanding that Article 3 only prohibits ill-treatment of a serious nature, the provision has been shown to have clear potential to protect children from abuse. In particular, the Court has held that the State has the responsibility to protect all children from all abuse which falls within the scope of Article 3, inevitably bringing the Convention into the private sphere. In the educational context, the Court established in *Costello-Roberts* that the State is obliged to protect all children from ill-treatment, regardless of whether they attend public or private schools.[63] Moreover, the Court expanded the obligation further in *A. v. United Kingdom* by finding that Article 3 requires the taking of measures designed to ensure that everyone is free from ill-treatment, even where it is administered by private individuals. According to the Court, the particular vulnerability of children means that they must have state protection against any treatment which constitutes a serious breach of personal integrity and so a legal system which acquits those who have inflicted ill-treatment contrary to Article 3 will be found to have failed to provide adequate protection as required by that provision.

The core conclusion in *A* was that the obligation on States under Article 1 of the Convention to secure to everyone within their jurisdiction Convention rights, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subject to torture and inhuman or degrading treatment, including such ill-treatment administered by

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[62] UN Doc CRC/C/15/Add.85. See also Kilkelly, U., "In the Best Interests of the Child? An Evaluation of Ireland's Performance before the UN Committee on the Rights of the Child" (1998) 19 I.L.T. 293.

[63] *Costello-Roberts v. United Kingdom*, Series A, No.247-C, (1995) 19 E.H.R.R. 112.

private individuals. According to the Court, these measures should provide effective protection to children in particular and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have knowledge.[64]

The scope of this obligation was clarified further by the Court in *Z. and Others v. United Kingdom* in 2001.[65] The applicants in this case were four children who suffered appalling abuse and neglect at the hands of their parents over a period of several years. Their claim under the Convention was that the local authority, which was aware of their situation, had failed to take effective steps to bring it to an end, giving rise to a violation of their right to protection under Article 3. The Court had no difficulty finding that the appalling neglect, physical and psychological injury suffered by the children reached the level of severity required to bring it inside the scope of Article 3. Indeed, this was undisputed by the Government before the Court. The Court then went on to note that the local authority was aware of this treatment and had both a statutory duty and a range of powers available to them to protect the children. Despite the sensitive and difficult decisions facing social services and the important countervailing principle of respecting and preserving family life, therefore, the Court had no doubt that the system had failed to protect the children from serious, long-term neglect and abuse. It concluded unanimously that Article 3 had been violated.[66]

The Court also considered that the children had been denied an effective remedy with respect to the breach of their Article 3 rights, contrary to Article 13. In particular, the Court noted that where a right as fundamentally important as the prohibition on torture, inhuman and degrading treatment is at stake, Article 13 requires, in addition to the payment of compensation, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to an investigation procedure. Where alleged failure by the authorities to protect persons from the acts of others is concerned, Article 13 may not always require that the authorities undertake the responsibility for investigating the allegations. There should however

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[64] See further *Osman v. United Kingdom*, (1998) 29 E.H.R.R. 245, Reports 1998-VIII, at para. 116.

[65] *Z & Ors v. United Kingdom* (2002) 34 E.H.R.R. 97. See further Miles, Case Commentary, "*Z and Others v. United Kingdom*; *T.P. and K.M. v. United Kingdom*: Human Rights and Child Protection" (2001) 13(4) *Child and Family Law Quarterly*, 431.

[66] *Z. & Ors v. United Kingdom* (2002) 34 E.H.R.R. 97 at paras. 69-75

be available to the victim or the victim's family a mechanism for establishing any liability of state officials or bodies for acts or omissions involving the breach of their rights under the Convention. Furthermore, in the case of a breach of Article 3, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of redress. As such a mechanism was not available in this case[67] a violation of Article 13 had occurred as a result.

While an extreme and rare case, the circumstances of *Z.* are not unfamiliar in the Irish context. This is clear from the Commission's assessment of the case, which noted that the authority's approach of:

> … monitoring the family with occasional periods of respite care over a period of more than four years appeared to have overlooked the signs that children were suffering physical and psychological damage which, with the lapse of time, would be likely to cause long-term, even permanent problems.[68]

Thus, although the local authority was initially justified in taking steps to maintain the family as a unit by giving support to the parents, the gravity of the conditions and problems suffered by the children required that effective and practical steps be taken to safeguard their welfare when the situation at home failed to show a significant and timely improvement.

While the Court's judgment in *Z* provided financial compensation for the victims more importantly, it offered them a remedy of last resort albeit at European level. Clearly it is at domestic level that the remedy is needed in such cases, however, and in this regard it is important that following incorporation of the Convention the judgment will provide the basis for a specific legal challenge to health board or local authority decision-making where the welfare of children is believed to be at risk. The question of who will bring this challenge is an important one and in this case, the

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[67] The Court (at para. 10) did not consider it necessary to make any findings as to whether only court proceedings could furnish effective redress, although it did acknowledge that judicial remedies furnish strong guarantees of independence, access for the victim and family and enforceability of awards.

[68] *Z & Ors v. United Kingdom* (2002) 34 E.H.R.R. 97 at para. 97.

Official Solicitor instituted the proceedings. The significance of appointing a Guardian *ad litem* at the earliest stage in the care process is thus brought into sharp focus in this context.[69]

IV. DETENTION OF CHILDREN

A. The Protection of Article 5

Article 5 of the Convention provides for the right to liberty and the first paragraph specifies the limited circumstances in which detention is permitted. They include the usual grounds – following conviction by a court under article 5 para. 1(a) for contempt under article 5 para. 1(b) and on remand under article 5 para. 1(c). Para. 1(d) is dedicated to minors, however, and permits their detention "for the purpose of educational supervision" and "for the purpose of bringing him before the competent legal authority". The meaning of these terms is still unclear but must, it is submitted, be guided by the principles and provisions of the UN Convention on the Rights of the Child, the most relevant of which guarantees detention as a measure of last resort and for the shortest appropriate period of time.[70]

Although there is little case law defining the protection which Article 5 offers young people in this area, it is significant that, as the source of para. 1(d), is an awareness of the need to divert young suspects and offenders from the criminal process. In this regard, the provision has been interpreted dynamically by the Court, which has found that, in certain circumstances, it may place a strict positive obligation on States to put in place appropriate facilities, which ensure the education and rehabilitation of young people in conflict with the law.[71]

B. Detaining Children for their own Safety

It is clear from Article 5 that the Convention permits the detention of people outside the criminal context[72] and thus, as long as it

[69] See section 28 of the Children Act, 1997 and further Martin, F., *The Politics of Children's Rights* (Cork University Press, Cork, 2000), pp. 49-57.
[70] Article 37 U.N. Convention on the Rights of the Child.
[71] *Bouamar v. Belgium*, European Court of Human Rights, unreported, 29 February 1988, Series A, No. 129, (1989) 11 E.H.R.R. 1. See further Kilkelly, U., "The Human Rights Act 1998: Implications for the Detention and Trial of Young People" (2000) 51(3) N.I.L.Q. 466.
[72] For example, Article 5 (1)(e) permits the detention of persons of unsound mind. On the application of the Convention to criminal proceedings see Starmer, K., *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights* (Legal Action Group, London, 1999), pp. 213-382.

satisfies the requirements of legality, it is compatible with the Convention to detain a young person for their own safety. In *Koniarska v. United Kingdom*[73] the applicant who had been the subject of a secure accommodation order under section 25 of the Children Act, 1989 argued before the Court that her placement did not constitute "educational supervision" within the meaning of Article 5 para. 1 (d) and was thus illegal under the Convention. On the facts, the Court noted that the detention order was made in the context of a long history of effort to ensure the best up-bringing for the applicant and that both the care order and the application for a secure accommodation order were intended to keep her in safe surroundings which appeared necessary given her mental condition. As to whether this was compatible with Article 5 para. 1(d), the Court noted that 'educational supervision' should not be equated rigidly with notions of classroom teaching and in the context of a young person in local authority care it must "embrace many aspects of the exercise by the local authorities of parental rights for the benefit and protection of the person concerned".

The institution where the applicant in this case was sent was a specialised residential facility for seriously disturbed children. She attended classes there and took part in life and social skills programmes and as a result, the Court concluded that her detention was 'for the purpose of educational supervision' and thus compatible with Article 5.

What is clear from the *Koniarska* case and subsequent application of it by the Court of Appeal[74] is that placing a young person in secure accommodation to address their need for pastoral and protective care is not contrary to the Convention in principle. That is not to say, however, that placing a young person in an inappropriate facility where these needs are not being met will be similarly compatible with the Convention. A decisive determination of this issue is awaited in *D.G. v. Ireland* [75] which the Court found admissible in 2000.[76] In this case, the applicant complains that as a minor in need of special care who had not been convicted of any criminal offence his detention in a penal institution was contrary to

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[73] *Koniarska v. United Kingdom*, Application No. 33670/96, European Court of Human Rights, unreported, 12 October 2000.
[74] *Borough Council v. D.K. & Others*, Unreported, Court of Appeal, 16 November 2000.
[75] (2002) 35 E.H.R.R. 1153.
[76] *D.G. v. Ireland* (2002) 35 E.H.R.R. 1153. See the decision of the Supreme Court in *D.G. v. Eastern Health Board and the Attorney General* [1998] 1 I.L.R.M. 241 (S.C.).

his rights under Articles 3, 5, 8 and 14. The judgment is expected to be delivered in April 2002.

V. A FAIR TRIAL FOR CHILDREN?

The Court has produced volumes of case law on the application of the right to a fair trial under Article 6 of the Convention. However, although it has considered that special arrangements designed to protect young people in the criminal process may be compatible with the provision[77] it has only recently been called upon to examine what constitutes a fair trial for children. In the cases of *T.* and *V. v. United Kingdom*[78] the eleven applicants claimed that their trial for murder in an adult court in circumstances of overwhelming publicity violated their rights under Article 6.[79] According to the Court, what is fundamental in such circumstances is that:

> … a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings.[80]

This strongly worded principle requires that the ability of children to understand and participate in their own criminal proceedings be facilitated by the authorities. Moreover, its application is not confined to children charged with murder or serious crime, but is intended to govern in a general way how the criminal justice system deals with all child offenders.

On the specific circumstances of the trial of *T.* and *V.*, the Court noted that where a child is charged with a grave offence which attracts high levels of media and public interest, it is necessary to conduct the hearing in a way that reduces his/her feelings of

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[77] *Nortier v. Netherlands*, European Court of Human Rights, unreported, 24 Aug 1993, Series A, no. 267, (1994) 17 E.H.R.R. 273.
[78] (2000) 30 E.H.R.R. 121.
[79] *T.* v. *United Kingdom* (2000) 30 E.H.R.R. 121 and *V. v. United Kingdom* (2000) 30 E.H.R.R. 121.
[80] *T. v. United Kingdom* (2000) 30 E.H.R.R. 121 at para. 84.

intimidation and inhibition as far as possible. According to the facts, the proceedings took place over three weeks in public in the Crown Court where some measures were taken in view of the defendants' young age and to promote their understanding of the proceedings. For example, the hearing times were shortened and the procedures were explained to the children in advance. Nevertheless, the Court observed that the formality and ritual of the Crown Court must, at times, have seemed incomprehensible to a child of eleven. There was also evidence that certain modifications to the courtroom – such as the raised dock which was designed to enable them to see what was going on – had the effect of increasing their sense of discomfort during the trial and their sense of exposure to the scrutiny of the press and the public. There was also considerable psychiatric evidence to show that the boys suffered from post-traumatic stress disorder which made it difficult, if not impossible, for them to instruct their lawyers and follow the trial. In the circumstances, the Court held that it was insufficient for the purposes of Article 6 that the applicants were represented by skilled and experienced lawyers because it was highly unlikely that they would have felt sufficiently uninhibited, in the tense courtroom and in the glare of public scrutiny, to have consulted with them during the trial. Indeed, given their immaturity and disturbed emotional state, it considered it unlikely that they were capable of cooperating with their lawyers even outside the courtroom in order to give them information for their defence. These factors, the Court concluded, meant that neither applicant was able to participate effectively in the criminal proceedings against him and both boys were, as a consequence, denied a fair hearing.

It is clear that the circumstances combined to produce a trial process which was unfair to the young accused in this case. However, apart from the highly significant factors of publicity and formality, it is difficult to identify what else might have been done differently to enhance the children's participation in their trial, particularly when the Court refused to consider that the age of criminal responsibility, which allowed them to be tried in the first place, was incompatible with the Convention.[81] The Practice Direction on child defendants

[81] *T. v. United Kingdom* (2000) 30 E.H.R.R. 121 at paras. 68-78. In this regard the Court's conclusion that setting 10 as the age of criminal responsibility was not inconsistent with European wide practice is questionable.

issued by the Lord Chief Justice following the decision of the Court in *T.* and *V.* is directed at complying with the Court's (and the UN Convention's) principle that child defendants be treated in a manner consistent with their age, maturity and development.[82] It is arguable that this will minimise, as far as possible, the risk of Article 6 violations occurring in children's cases in the British courts. However, the reality may be that such violations are inevitable when children so young are put in the dock. In the Irish context, therefore, it is significant that the Children Act, 2001 raises the age of criminal responsibility to twelve and fourteen for those who do not have sufficient understanding that their actions were wrong.[83] In the end, however, the diversion of young accused from the criminal process altogether may be the only way of providing satisfactory protection of their rights.[84]

VI. THE CHILD'S RIGHT TO IDENTITY

Advances in reproductive medicine have clear legal and ethical implications for children and their rights,[85] some of which have ended up before the Commission and Court of Human Rights. The absence from the Convention of express provision for the child's right to identity[86] has made it difficult for the Court to put the child's interests at the centre of such disputes and in the absence of a European wide consensus of the issue, the Court is reluctant to set standards in this area. That is not to say that such case law does not have consequences for the child's right to identity. Indeed, cases involving the right to institute paternity proceedings and procedures for recognising family ties impact directly on the child's ability to discover his/her origins.[87] Moreover, the Court has shown an

[82] Practice Direction (Crown Court: Trial of children and young persons) 16 February 2000.
[83] Section 52 of the Children Act, 2001. See also McDiarmid, "Age of Criminal Responsibility: Raise it or Remove it?" (2001) *The Juridical Review*, 243.
[84] See also the judgment of Dame Butler-Sloss, President, in *Venables & Thompson v. News Group Newspapers and Others*, 8 January 2001, where the High Court granted an injunction restraining the media from disclosing information about the identity, appearance or addresses of the claimants when they were released from detention in order to protect their rights under Article 2 (right to life) of the Convention.
[85] See further Madden, D., "Recent Developments in Assisted Human Reproduction: Legal and Ethical Issues" (2001) 7(2) *Medico-Legal Journal of Ireland*, 53.
[86] In contrast, Article 7 of the Convention on the Rights of the Child recognises the right of the child to know and be cared for by his/her parents and Article 8 guarantees the child's right to preserve his/her identity, the components of which include name and family relations.
[87] See Kilkelly, U., *The Child and the European Convention on Human Rights* (Dartmouth Publishing Company, Aldershot, 1999), pp. 88-101.

awareness of the importance of this right for children in at least two contexts. In the case of *X. Y. and Z. v. United Kingdom*, the Court referred indirectly to the possible impact which permitting X, a female-to-male transsexual, to register as Z's father would have on the child's development knowing he could not be her birth father as she was born by artificial insemination by donor.[88] It thus preferred to leave open whether the child had a right to access birth information which would be violated if her social father was registered as her birth father.

Moreover, in the *Gaskin* case in 1989 the Court recognised expressly the importance for everyone of being able to establish details of their identity as human beings.[89] Gaskin had spent his childhood in care and on turning 18 sought access to the confidential records held by social services that had been denied to him. Weighing up whether this refusal violated his right to respect for his private life, the Court acknowledged the importance of receiving information 'necessary to know and understand ... childhood and early development' and it noted that persons who have spent the majority of their lives in care have a vital interest, protected by the Convention, in receiving that information.[90] On the other hand, the Court recognised the contribution which the policy of confidentiality makes to the overall effectiveness of the child care system. It concluded, therefore, that it was not the confidential nature of social services records that violated Article 8, but the lack of independent procedures for determining the merits of individual applications for access to such information.[91]

In *Gaskin*, therefore, the Court stopped short of finding a general right of access to information about family ties or personal background. What is clear, however, is that respect for private life under Article 8 requires the state to put in place a system which administers independently access to confidential data. Systems of blanket anonymity which operate in the area of adoption law or the law governing artificial reproduction, therefore, will only be

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[88] *X. Y. and Z. v. United Kingdom* (1997) 24 E.H.R.R. 143 at para. 51.
[89] *Gaskin v. United Kingdom*, judgment of 7 July 1989, Series A, No. 160, (1990) 12 E.H.R.R. 36.
[90] *Gaskin v. United Kingdom,* judgment of 7 July 1989, Series A, No. 160, (1990) 12 E.H.R.R. 36, at para. 49.
[91] A further challenge to the lack of unimpeded access to social service records held by the local authority was found admissible by the Court last year. See *M.G. v. United Kingdom*, Admissibility Decision of 3 July 2001 E.C.H.R.

Convention compliant where requests for information vital to a person's private life can be determined by an independent procedure.[92]

VII. CONCLUSION

It is impossible to predict what impact the E.C.H.R. Bill 2001 will have on Irish child law when it is brought into force despite the possible inconsistencies highlighted above. Much will depend on the willingness of the legal profession to draw on relevant cases on Convention case law, the direction of which is itself unpredictable. Overall, it is apparent that Convention law offers much in the way of good practice in relation to the treatment of children in need of protection, whether in the family, or the care or justice systems. It may also offer a framework within which disputes governing the child's identity and a variety of other sensitive and difficult issues may be resolved. In this regard, at the very least, it is to be welcomed.

[92] On deficiencies in Irish adoption law see McIntyre, O., "Adoption Law: the Case for Reform" (2001) 1 I.J.F.L. 6.