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## **MJur Thesis**

An Analysis of the Legal Position of Unmarried Fathers in the  
Context of the Acquisition of Parental Responsibility in the  
UK

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Word Count: 51,327

Date of Completion: 28 May 2024

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## Table of Abbreviations

European Convention of Human Rights	The Convention
European Court of Human Rights	The Strasbourg Court
Parental Responsibility	PR
Married or those in civil partnerships	Married parents
Unmarried and not in civil partnerships	Unmarried parents
Parental Responsibility Order	PRO
Child Arrangement Order	CAO

## Introduction

Parental Responsibility, henceforth referred to as 'PR', forms the bedrock of parenting in the UK. Whilst some countries, such as Scotland, have sought to set out detailed rights and responsibilities encompassed by PR in statute,<sup>1</sup> Bainham accurately describes England and Wales as having left 'things rather vague'.<sup>2</sup> Indeed, PR is merely described in legislation as encompassing 'all the rights, duties, powers, responsibility and authority that, by law, a parent has in relation to their child and their child's property'.<sup>3</sup> Nevertheless, the content of PR has gradually become more explicit through caselaw and statute. For example, it has been determined to encompass *duties* such as ensuring the child receives full time education whilst within compulsory school ages<sup>4</sup> and to obtain the child's required medication<sup>5</sup> as well as the *rights* to give the child a religious upbringing,<sup>6</sup> to consent or refuse consent to some medical treatment,<sup>7</sup> and to put the child up for adoption or prevent another with PR from doing so. All biological parents, regardless of whether they have PR, have a duty to maintain the child.<sup>8</sup>

It is clear from this list that having PR is extremely important should one wish to be involved in major decisions concerning their child's upbringing.<sup>9</sup> Indeed, the Law Commission have listed several liberties that a parent *cannot* perform without PR: <sup>10</sup> no automatic right to 'live with' or 'spend time with' the child;<sup>11</sup> no authority to prevent the adoption of the child should

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\* All sources last accessed 31<sup>st</sup> December 2023

<sup>1</sup> Children (Scotland) Act 1995 c 36.

<sup>2</sup> Andrew Bainham, 'Parentage, parenthood and parental responsibility: subtle, elusive yet important distinctions' in Andrew Bainham, Shelley Day Sclater and Martin Richards (eds), *What is a parent? A socio-legal analysis* (Hart Publishing 1999) 35.

<sup>3</sup> Children Act 1989 (CA 1989) s 3(1).

<sup>4</sup> Education Act 1996 s 7.

<sup>5</sup> John Eekelaar, 'Rethinking Parental Responsibility' (2001) 31 Family Law 426.

<sup>6</sup> *Re N (a child) (religion: Jehovah's witness)* [2012] All ER (D) 165.

<sup>7</sup> *F v F (Welfare of Children: Immunisation)* [2013] EWHC 2683 (Fam).

<sup>8</sup> Child Support Act 1991.

<sup>9</sup> In regard to the limits of discretion parents have in this context see: Stephen Gilmore, 'A Black Cloud over the Age of Discretion and the Scope of Parental Responsibility?' in Jens M Scherpe and Stephen Gilmore (eds) *Family Matters, Essays in Honour of John Eekelaar* (Cambridge University Press 2023).

<sup>10</sup> Law Commission, *Family Law: Illegitimacy Final Report* (Law Com No 118, 1982) 15-16; for further information regarding the scope of parental responsibility see Stephen Gilmore, 'The Limits of Parental Responsibility' in Rebecca Probert, Stephen Gilmore and Jonathan Herring (eds) *Responsible Parents & Parental Responsibility* (Hart Publishing 2009) 63.

<sup>11</sup> Children Act 1975 s 85(7).

this be the wishes of those holding PR;<sup>12</sup> no ability to remove or challenge the child's care by a local authority;<sup>13</sup> and no power to prevent a change in the child's name.<sup>14</sup> It is, therefore, no surprise that Sir James Munby has described PR as 'the very essence of the relationship of parent and child'.<sup>15</sup>

However, a key issue, and the core focus of this thesis, is that whilst married parents, civil partners<sup>16</sup> and unmarried mothers acquire PR automatically on the birth of their child, *unmarried* fathers do not.<sup>17</sup> Instead, unmarried fathers must take deliberate legal steps to acquire PR. Many issues emerge here, most obviously because some unmarried fathers wrongly believe they have automatic PR, later finding themselves powerless in matters concerning their children. In fact, in 1999 Ros Pickford studied a group of 219 fathers and found that three-quarters of them were not aware of the different legal positions of unmarried fathers and married fathers respectively.<sup>18</sup> The 1984 case of *Re L* provides a poignant example of the difficulties this can pose for unmarried fathers.<sup>19</sup> Here, the unmarried father lost access to his child despite having independently cared for him for the majority of his first year of life because the mother, who had been absent from the child's life thus far, initiated proceedings for the child to be taken into the care of the state. Essentially, owing to an ignorance that active steps must be taken for an unmarried father to acquire PR, the father had no legal rights to oppose his child's removal. Indeed, Sheldon, Dey and Wasoff argue that, although 'it makes little practical difference to the day-to-day lives of the vast majority',<sup>20</sup> some unmarried fathers wrongly assume they have acquired PR automatically and therefore have a shock when disputes arise and they find themselves 'powerless'.<sup>21</sup> Clifton concurs and, writing in the context of adoption, adds that fathers often feel

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<sup>12</sup> Adoption and Children Act 2002 s52(1), (6).

<sup>13</sup> Child Care Act 1980 s 3(1), (2).

<sup>14</sup> Children Act 1989 s 13(1).

<sup>15</sup> *Re H-B (Children) (Contact)* [2015] EWCA Civ 389.

<sup>16</sup> The Civil Partnership (Opposite-sex Couples) Regulations 2019, SI2019/1458 regs 1(2) and 15(2).

<sup>17</sup> CA 1989 s 2(2).

<sup>18</sup> Pickford R, *Fathers, Marriage and the Law* (Cambridge: Family Policy Studies Centre 1999).

<sup>19</sup> *Re L (A Minor)* (EWCA, 1984).

<sup>20</sup> Sally Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (2001) 9 *Feminist Legal Studies* 93, 104.

<sup>21</sup> Ian Dey and Fran Wasoff, 'Mixed Messages: Parental Responsibilities, Public Opinion and the Reforms of Family Law' (2006) 20 *International Journal of Law, Policy and the Family* 228, 228; also see John Eekelaar, 'Rethinking Parental Responsibility' (n 5).



‘complicated grief, guilt and shame’, and that when they tried to challenge proceedings they felt ‘intimidated’ and ‘disempowered’.<sup>22</sup>

The UK Government has historically justified this difference in treatment by reference to a need to protect mothers and children from what they term ‘unmeritorious fathers’.<sup>23</sup> Whilst no definition exists to distinguish the ‘meritorious’ from the ‘unmeritorious’, it is generally understood that the latter category includes ‘rapist’ fathers,<sup>24</sup> those whose child was born through a ‘casual encounter’,<sup>25</sup> those who may subject the mother to ‘harassment’<sup>26</sup> and those whose parenting would not be in the ‘child’s interests’.<sup>27</sup> Accordingly, the Government has constructed a unique legal framework to govern unmarried fathers comprising of six routes to acquisition which collectively aim to facilitate the acquisition of PR by ‘meritorious’ fathers whilst denying acquisition by the ‘unmeritorious’. However, as will be demonstrated throughout this thesis, this legal framework is far from perfect with some routes to acquisition proving completely inaccessible to fathers from low-income backgrounds.

These issues have led to growing concerns over this area of law within the general public. Over the last few decades emotive stories such as the case of *Re L* have prompted societal debate and the formation of campaign groups such as Fathers4Justice who exist to advocate for the equal rights of all fathers. One front in the battle for equal treatment of fathers regarding PR has emerged in the context of litigation, with cases arising in UK courts as recently as April and June 2023.<sup>28</sup> Some have also reached international courts, such as the 1995 landmark case of *McMichael v UK*.<sup>29</sup> This case is particularly relevant to this thesis since it concerned an unmarried father who attempted to demonstrate that the denial of automatic PR to unmarried fathers in the UK was a violation of Articles 8 and 14 of the European Convention of Human Rights (henceforth referred to as ‘the Convention’). In this case, although an interference was found, the Strasbourg Court judged there to be no violation and

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<sup>22</sup> Clifton J, ‘Birth fathers and their adopted children: Fighting, withdrawing or connecting’ (2012) 36(2) *Adoption and Fostering* 43.

<sup>23</sup> Law Commission, *Working Paper No 74: Illegitimacy* (Law Com No 74, 1979) 26.

<sup>24</sup> *Family Law: Illegitimacy Final Report* (n 10) para 4.30.

<sup>25</sup> *Ibid* para 4.30.

<sup>26</sup> *Ibid* para 4.39.

<sup>27</sup> *Ibid* para 4.38.

<sup>28</sup> *F v M* [2023] All ER 42; *Re A (Parental Responsibility)* [2023] EWCA Civ 689.

<sup>29</sup> *McMichael v the United Kingdom* (1995) Series A no 307- B.

accepted the Government's aforementioned justification. Nevertheless, societal and judicial views may have evolved since this case, potentially to the extent that a different judgment may emerge should a similar case arise in 2024. Thus, the focus of this thesis can be neatly summarised as: an assessment of the compatibility of UK law concerning acquisition of PR vis à vis unmarried fathers with Articles 8 and 14 of the Convention in the context of 2024. This analysis will be undertaken in four substantive chapters.

Chapter One will outline and critique the relevant domestic law, that is, the six means through which unmarried fathers can acquire PR in England and Wales. The Government's justification for denying unmarried fathers' automatic acquisition will also be discussed as well as an assessment of how this framework aligns with modern perspectives. All such discussion will be crucial to an assessment of this framework's compatibility with Articles 8 and 14 of the Convention in Chapter Three. Chapter Two will then set out the legal framework through which a claim under Articles 8 and 14 of the Convention would proceed. The context of UK domestic courts will be discussed first, as well as the possible outcomes of such a case, before considering the potential treatment by the Strasbourg Court.

Chapter Three will apply the insights obtained in Chapter One to the framework described in Chapter Two, analysing whether UK law concerning acquisition of PR vis à vis unmarried fathers would prove compatible with Articles 8 and 14 of the Convention should a case arise in 2024. It will be argued that, although it is unlikely that a finding of incompatibility would result in 2024, political and legislative bodies at the European level are shifting towards the favouring of 'New Fatherhood', which is a modern understanding of fatherhood presenting fatherhood as separate to a particular marital status.<sup>30</sup> It will be predicted that, due to the Convention's role as a 'living instrument', the Strasbourg Court will eventually be required to shift their approach accordingly and that a differentiation of fathers on the basis of marital status will ultimately become incompatible with Articles 8 and 14 of the Convention.

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<sup>30</sup> Alice Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (Cambridge University Press 2019), 15.

Due to this prediction, Chapter Four will argue that the Government should design a framework through which PR would be automatically acquired by all fathers, regardless of marital status. Although such legislation could be introduced reactively, in response to future litigation at the Strasbourg Court or even an adverse ruling, this thesis will recommend that the Government act *proactively*, introducing legislation before such litigation arises. Two original models for such a legislative reform will be discussed, ultimately recommending the adoption of the 'Equality Model'. This is a framework whereby *all parents* would acquire PR automatically regardless of gender or marital status. By opting for such a framework, the UK could be protecting themselves from a future challenge should the Strasbourg Court find UK law concerning acquisition of PR vis à vis unmarried fathers to be incompatible with the Convention in future litigation. This model would also remedy several issues within the current UK framework, as raised in Chapter One, and align more effectively with the challenges posed by modern scientific developments such as surrogacy. Owing to space limitations, both models will, however, only be outlined in a broad-brush manner. The intention of this Chapter is to demonstrate the possibility of a future framework which functions more effectively and more compatibly with the Convention in the long term thus setting the scene for possible further research.

Before proceeding to Chapter One it is important to note a key terminology change in the law. The phrases 'custody' and 'access' were repealed in the Children Act 1989 and replaced with the phrases 'residence' and 'contact'.<sup>31</sup> Subsequently, these terms were replaced by Child Arrangements Orders (CAOs) through the Children and Families Act 2014.<sup>32</sup> Hence, the new language of 'live with' and 'spend time with' orders will be referred to in the majority of this thesis. The old phrases will, however, be occasionally referred to where quoting or discussing past caselaw that adopted such terminology. Additionally, whilst a claim under the Convention would concern the 'UK', it is important to note that the Children Act 1998 only applies to England and Wales. Hence, whilst this thesis will refer to 'UK Law' since this is how the Strasbourg Court would define this jurisdiction, it is appreciated that Scotland has their own legislative framework and thus is excluded from analysis.

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<sup>31</sup> CA 1989 s 8.

<sup>32</sup> Children and Families Act 2014 sch 2 para 3.

## Chapter One: Domestic Law

The focus of this chapter is to analyse the current state and evolution of the law concerning acquisition of PR vis à vis unmarried fathers, setting the scene for an investigation into its compatibility with the Convention in Chapter Three. This chapter will tackle three issues. Most importantly, the Government's justification for denying unmarried fathers' *automatic* acquisition of PR, as stated in their 1979 'Illegitimacy Report', will be discussed.<sup>33</sup> As a result of this standpoint, six methods have developed through which unmarried fathers may acquire PR in England and Wales. These will be outlined in section 1.2 alongside a consideration of their compatibility with the Government's aforementioned justification. Finally, an evaluation of the evolution of relevant opinions and demographics over the last few decades will be considered in section 1.3.

### **1.1 Justification for the Denial of Automatic Parental Responsibility to Unmarried Fathers**

The Government's justification for the denial of automatic PR to unmarried fathers can be traced to the 1979 Law Commission of England and Wales (henceforth referred to as the 'Law Commission') working paper on the subject of removing the status of 'illegitimacy' from children born outside of marriage.<sup>34</sup> In that paper, the Law Commission concluded that, due to the diverse spectrum of men included within the category 'unmarried fathers', it was safer for mothers and children if the entirety of this group was denied automatic PR. Specifically, this paper forged a distinction between 'meritorious' and 'unmeritorious' unmarried fathers.<sup>35</sup> Although no definitions were given for these terms, 'unmeritorious' was interpreted to encompass those who are abusive or have no desire to care for the child.<sup>36</sup> This was contrasted to 'other fathers who have lived with the mothers for perhaps many years', described as 'meritorious'.<sup>37</sup>

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<sup>33</sup> *Working Paper No 74: Illegitimacy* (n 23).

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid* paras 3.12-3.13.

<sup>36</sup> *Ibid* paras 4.3, 4.38 and 4.39.

<sup>37</sup> *Ibid* para 2.11.

The working paper opened the forum for public discussion upon the proposal that legislation be reformed to allow *all* unmarried fathers automatic PR. The responses to this proposal were published in 1982, with an overwhelming majority opposing such a reform though expressing favour towards awarding automatic PR to 'meritorious' fathers only.<sup>38</sup> In response, the Law Commission outlined three methods through which this result could hypothetically be achieved, eventually concluding that none were realistic.<sup>39</sup>

First, it was suggested that, through defining what qualified as an 'unmeritorious father', it may be possible to simply avoid awarding automatic PR to those who fit this archetype. However, the Law Commission pointed out that 'to seek to exclude such fathers by a sufficiently clearly drawn statutory formula would be virtually impossible'.<sup>40</sup> Defining those who are 'meritorious' was found to present the same issue. It was acknowledged that in New Zealand, 'meritorious' fathers are defined as those who live with the mother as 'husband and wife' when their child is born.<sup>41</sup> However, the Law Commission pointed out that ambiguity could result concerning the definition of categories, for example, there is no clear-cut definition of 'living together' or what living together 'as husband or wife' entails.<sup>42</sup> Additionally, it would be difficult to identify factors which would *always* indicate merit, the Law Commission remarking upon the fact that cohabitation with the mother does not necessarily always correlate with a suitability for fatherhood.<sup>43</sup>

The second proposed solution was that only fathers who acknowledge paternity would acquire PR.<sup>44</sup> However, the Law Commission pointed out that simply because a father has accepted paternity does not mean they are 'meritorious'.<sup>45</sup> An alternative suggestion was that this acknowledgement should be accompanied by the consent of the mother which would act as proof of their 'merit'.<sup>46</sup> This was also rejected by the Law Commission as it was predicted

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<sup>38</sup> *Family Law: Illegitimacy Final Report* (n 10) para 4.27.

<sup>39</sup> *Ibid* para 4.8.

<sup>40</sup> *Ibid* 35.

<sup>41</sup> *Ibid* para 4.32.

<sup>42</sup> *Ibid* para 4.34.

<sup>43</sup> *Ibid* para 4.35.

<sup>44</sup> *Ibid* para 4.38.

<sup>45</sup> *Ibid*.

<sup>46</sup> *Ibid* para 4.39.

that some ‘unmeritorious’ fathers would be able to manipulate such a system, gaining the mother’s consent by exposing her to pressure and harassment.<sup>47</sup>

Finally, it was proposed that PR be given automatically to all parents regardless of marital status, but that, in certain circumstances, this PR could be restricted. For example, if a married father has not had contact with their child for a long time, they should need the permission of the other holders of PR in order to exercise their rights.<sup>48</sup> Unsurprisingly, this was also rejected, the Law Commission feeling that it interfered too much with the family unit.<sup>49</sup>

Ultimately, the Law Commission concluded that there was no appropriate means through which PR could be bestowed solely upon ‘meritorious’ men and thus, the denial of automatic PR to *all* unmarried fathers must be maintained in order to protect mothers and children from the ‘unmeritorious’. This justification has been relied upon by the Government since these reports, most notably in the cases of *McMichael v UK* and *B v UK*, which will be discussed in more detail in Chapter Two.<sup>50</sup> Instead, the Government has developed six methods through which unmarried fathers can acquire PR. Together, these methods attempt to create a system which would facilitate the access of ‘meritorious’ fathers at the same time as filtering out ‘unmeritorious’ applicants. The following section will outline and critique these methods, assessing how closely they truly reflect the Government’s aim.

## 1.2 The Six Methods of Acquisition

Of the six methods available for unmarried fathers to acquire PR, four are only viable if the father has the mother’s consent: ascertaining a formal PR agreement with the mother, being registered on the child’s birth certificate, being appointed as the child’s guardian or marrying the mother.<sup>51</sup> These will be discussed first, before the options for those who do not have the

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<sup>47</sup> Ibid.

<sup>48</sup> Ibid para 4.41.

<sup>49</sup> Ibid 41.

<sup>50</sup> *McMichael* (n 29); *B v the United Kingdom* (2000) 1 FCR 289 (ECtHR); see also *Re Z (Children)* [2008] EWCA Civ 1556 which confirmed the latter case at a domestic level.

<sup>51</sup> CA 1998 s 2(2)(1)-(5); s 4(1) and (1A).

mother's consent are outlined: Parental Responsibility Orders (PROs) and Child Arrangements Orders (CAOs).

In addition, two further issues will be focused upon throughout the following analysis. Firstly, it will be considered how easy this system, and each method individually, are to navigate for fathers. Secondly, how well this system meets the dual aims of the Government to facilitate the access of the 'meritorious' whilst preventing the access of the 'unmeritorious' will be assessed.

### **a) Agreement from the Mother**

According to section 4(1)(b) of the CA, unmarried fathers can acquire PR through a statutory agreement with the mother.<sup>52</sup> Both the unmarried father and mother must complete the C(PRA1) HM Courts and Tribunal Service Form<sup>53</sup> compliant with the Parental Responsibility Agreement Regulations 1991.<sup>54</sup> Once finalized, the parties must take the form to either the local office of the Family Court or the Central Family Court where they are to present the child's birth certificate along with evidence of each party's identity.<sup>55</sup> Following this, a Justice of the Peace, Justices' Clerk, assistant to a Justices' Clerk or an officer of the court authorised by the judge to administer oaths, will witness the signing of the forms by the parties and subsequently sign the witness certificate.<sup>56</sup> These forms will then be sent to the Central Family Court which, after recording the form, will send a stamped copy to the address of each party.<sup>57</sup>

This process is fairly straightforward and cost-effective, requiring a single visit to court and no legal representation costs. For these reasons, many unmarried fathers may favour this method of acquisition. However, an obvious issue exists: it relies entirely upon the mother's

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<sup>52</sup> CA 1998 s 4(1)(b).

<sup>53</sup> 'Parental Responsibility Agreement' (HM Courts and Tribunal Service, form C(PRA1)) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/961321/c-pra1-eng.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/961321/c-pra1-eng.pdf).

<sup>54</sup> Parental Responsibility Agreement Regulations 1991, SI1991/1478.

<sup>55</sup> 'Parental Responsibility Agreement' (n 53) 2.

<sup>56</sup> Ibid.

<sup>57</sup> Ibid.

consent, assuming that this decision will genuinely reflect the father's merit and suitability for fatherhood. Indeed, perhaps, due to the mother's personal knowledge of the father, their opinion vis à vis the father's suitability should be trusted. Sheldon supports this argument, placing emphasis on the mother's inherent biological and social orientation towards care in order to defend their monopoly over consent in this context.<sup>58</sup>

However, since there is neither an objective assessment of the mother's decision nor a requirement for her to provide her reasons, the mother can essentially permit, or prevent, an unmarried father from acquiring PR for *any* reason. There may be defensible reasons for this; the Department for Work and Pensions argued that forcing mothers to explain their decisions is 'intrusive for vulnerable mothers' who may struggle to articulate their reasons for denying PR to manipulative, controlling or otherwise abusive men.<sup>59</sup> But not all mothers will fall into this category. A mother's permission or refusal for a father's acquisition of PR can in reality be motivated by a multitude of factors, not all of them based on the best interests of the child or a genuine judgement upon the father's merit.

Firstly, there exist cases where mothers have granted permission to fathers who may be described by the Government as 'unmeritorious'. The first way in which this could occur is through coercion from manipulative, controlling or abusive fathers. Indeed, for some, the very nature of this method of acquisition facilitates this problematic behaviour. This was a concern articulated by the Law Commission in their 1982 'Illegitimacy' report<sup>60</sup> and highlighted in the recent case of *D v E*:<sup>61</sup> despite having previously consented to his acquisition of PR, the mother later described the father as 'coercive and controlling' during legal proceedings which ultimately removed his PR due to convictions of sexual abuse.<sup>62</sup>

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<sup>58</sup> Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (n 20); Sally Sheldon, 'From "absent objects of blame" to "fathers who want to take responsibility": Reforming birth registration law' (2009) 31(4) *Journal of Social Welfare and Family Law* 373, 382.

<sup>59</sup> Department for Work and Pensions, *Joint birth registration: recording responsibility* (Cm 7293, 2008) 24.

<sup>60</sup> *Family Law: Illegitimacy Final Report* (n 10) para 4.39.

<sup>61</sup> *D v E (termination of parental responsibility)* [2021] EWFC 37.

<sup>62</sup> *Ibid* [9].



Aside from coercion, mothers may inadvertently grant access to the ‘unmeritorious’ due to other motivations and concerns. For example, in *CW v SG* the mother consented to the father’s acquisition because she required help with childcare, already supporting five other children whilst suffering from depression.<sup>63</sup> Although it is easy to have sympathy for this mother’s decision, it is unlikely to have been based on the child’s best interests since the father was a regular user of recreational drugs and eventually had his PR terminated due to convictions of sexual assault against two of his step daughters. Essentially, ‘mothers’ are not one homogenous group who will all make decisions in their child’s best interests or upon a genuine assessment of the father’s merit.<sup>64</sup>

Despite the potential access of ‘unmeritorious’ fathers, social contract theory could be used to argue that such fathers may nevertheless become more motivated to care for their child appropriately since they have freely entered into accepting PR. Social contract theory interprets social order as created through freely entering into contracts.<sup>65</sup> In the context of PR, Vopat writes that there exists a social contract between the state and parents which carries a responsibility for caring for one’s offspring. One way in which Vopat suggests this happens is through the signing of the birth certificate: ‘When a woman...places her name on the birth certificate...she implicitly agrees to take responsibility for the child’.<sup>66</sup> When this event happens, ‘normative devices’ are theorised to begin acting upon the mother, encouraging her to care for the child in a manner which is socially and legally expected of her.<sup>67</sup> Based on this theory, it could be argued that the signing of a statutory agreement with the mother could result in the same outcome since it involves freely entering into a ‘contract’ which would award them with PR. Although Gilmore and Glennon have also raised this as a potential outcome, it is merely a *theory* and so may prove inaccurate in practice.<sup>68</sup>

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<sup>63</sup> *CW v SG (Parental Responsibility: Consequential Orders)* [2013] EWHC 854 (Fam).

<sup>64</sup> Sheldon, ‘Unmarried Fathers and Parental Responsibility: A Case for Reform?’ (n 20) 112; Jens M Scherpe, ‘Establishing and Ending Parental Responsibility: A Comparative View’ in Rebecca Probert, Stephen Gilmore and Jonathan Herring (eds) *Responsible Parents & Parental Responsibility* (Hart Publishing 2009) 56.

<sup>65</sup> Celeste Friend, ‘Social Contract Theory’ (Internet Encyclopaedia of Philosophy) <https://iep.utm.edu/soc-cont/>.

<sup>66</sup> Mark Vopat, ‘Contractarianism and Children’ (2003) 17(1) *Public Affairs Quarterly* 49, pp 58-59.

<sup>67</sup> *Ibid* 59.

<sup>68</sup> Stephen Gilmore and Lisa Glennon, ‘A child’s parents: parentage, parenthood and parental responsibility’ in *Hayes and Williams’ Family Law* (7th edn, Oxford University Press 2020) 453.

Simultaneous to the access of ‘unmeritorious’ fathers, some ‘meritorious’ fathers may be prevented from acquiring PR. One way in which this could happen is through mothers arbitrarily withholding consent. A range of motivations may exist here including personal dislike of the father. The previously mentioned case of *Re L* is significant on this point. Here, the mother, who had been absent since the birth of the child, denied the father’s paternity and put the child up for adoption in spite of the fact that the father had independently cared for, and built a positive relationship with, the child for the last year.<sup>69</sup>

Furthermore, sometimes the mother may deny a father consent because *she* displays ‘unmeritorious’ behaviour: in *Re M and R*, an interim care order was made by the court following evidence of emotional abuse at the hands of the mother.<sup>70</sup> Indeed, in 2016 the UK Office for National Statistics reported that mothers were the main perpetrators of psychological abuse of children, which represents the most common form of child abuse. This abuse encompassed those who stated they ‘were told that they should have never been born’; ‘were repeatedly belittled to the extent that they felt worthless’; and ‘were physically threatened or someone close to them physically threatened’.<sup>71</sup> Mothers also made up over a quarter of the perpetrators of physical abuse of children (29%), second only to biological fathers (39%).<sup>72</sup> Hence, it is possible that some mothers make decisions in spite of their child’s best interests, denying ‘meritorious’ fathers PR for no good reason.

Overall, although this method may function appropriately at times, it can also conflict with the Government’s dual aims: not all ‘unmeritorious’ fathers will be prevented from accessing PR; not all ‘meritorious’ fathers will be facilitated access.

## **b) Registration on the Birth Certificate**

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<sup>69</sup> *Re L* (n 19).

<sup>70</sup> *Re M and R (Child abuse: Expert Evidence)* [1996] EWCA Civ 1317; see also Jonathan Herring, Rebecca Probert and Stephen Gilmore, *Great Debates in Family Law* (Red Globe Press 2015) 68.

<sup>71</sup> John Flatley, ‘Abuse during childhood: Findings from the Crime Survey for England and Wales, year ending March 2016’ (*Office for National Statistics*, 4 August 2016)

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/abuseduringchildhood/findingsfromtheyearendingmarch2016crimesurveyforenglandandwales>.

<sup>72</sup> *Ibid.*

Section 4(1A) of the Children Act 1989, as amended through the Adoption and Children Act 2002, stipulates that an unmarried father will acquire PR if he becomes 'registered as the child's father' on either the Births and Deaths Registration Act 1953, the Registration of Births, Deaths and Marriages (Scotland) Act 1965 or the Births and Deaths Registration (Northern Ireland) Order 1976.<sup>73</sup> The father can sign the certificate upon the birth of the child or, if the father wishes to do so at a later date, the certificate can be re-registered. This is done by providing the General Register Office (GRO) with evidence of paternity such as a statutory declaration from the mother confirming this.

This method provides an administratively straightforward and cost-effective method of acquisition for fathers, particularly if they sign the certificate immediately after the birth of the child. However, consent of the mother is essential to acquire PR through this method; without such consent the father can still apply to be on the birth certificate, however, he will not subsequently acquire PR. Accordingly, the same issues concerning reliance upon the consent of the mother, described above, apply to this method.<sup>74</sup> In fact, Wallbank argues that this method accentuates the incidental issues identified above even more than the previous method: 'unmeritorious' fathers may take advantage of the more vulnerable state of the mothers immediately after childbirth, coercing her consent and signing the birth certificate there and then.<sup>75</sup>

Another issue with this method is that some mothers and fathers may be unaware of the significance of signing the birth certificate, merely believing that it confirms biological parentage. Indeed, the Department for Work and Pensions (DWP) have noted that most people are ignorant of the law concerning acquisition of PR, hence, some mothers may unknowingly consent to an 'unmeritorious' father's acquisition through this method.<sup>76</sup> However, as mentioned previously, some social contract theorists argue that acquisition of PR through the signing of the birth certificate may lead to a higher likelihood that the parent will take their ability to exercise PR more seriously. Even if the unmarried father was unaware

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<sup>73</sup> Children Act s 4(1) and (1A); Adoption and Children Act 2002 s 111.

<sup>74</sup> Gilmore and Glennon (n 68) 436.

<sup>75</sup> Julie Wallbank, 'Clause 106 of the Adoption and Children Bill: legislation for the "good" father?' (2002) 22(2) *Legal Studies* 276, 280.

<sup>76</sup> Department for Work and Pensions (n 59) 7.

that signing the birth certificate would lead to the acquisition of PR, Vopat has suggested that the mere act of registering can lead to the impact of 'normative devices' upon the parent, which encourage socially and legally appropriate care of the child.<sup>77</sup> Again, whether this would indeed occur in practice is uncertain.

Drawing this analysis together, despite offering fathers who have the consent of the mother with a straightforward, cost-effective acquisition of PR, three significant issues remain: this method is not viable for those without the mother's consent; all issues regarding reliance on the mother's consent, raised above, apply here too; some may misunderstand the law and inadvertently allow 'unmeritorious' fathers to acquire PR.

### **c) Becoming a Legal Guardian**

The third method of acquisition is through being appointed as a legal guardian for the child by an individual who already has PR.<sup>78</sup> Usually this will happen through a testamentary will dictating that, when the parent with PR has died, a named individual will become legal guardian for the child.<sup>79</sup> Per section 14A of the CA one can apply for 'Special Guardianship' of a child, however a parent of the child is excluded from making such an application.<sup>80</sup>

Again, although proving fairly straightforward and cost-effective, it relies upon the mother's consent and, as such, the same issues described above apply here. But the more obvious issue with this method of acquisition is that the acquisition of PR is delayed. Hence, it would not be a method appropriate for a father who wishes to exercise PR immediately.

### **d) Marriage to the Mother**

The last method reliant upon the mother's consent is marriage to the mother.<sup>81</sup> However, alike being appointed as a legal guardian, this is not usually a desired route. Clearly, this is

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<sup>77</sup> Vopat (n 66) 59.

<sup>78</sup> CA 1998 s 5.

<sup>79</sup> Ibid s 5(3).

<sup>80</sup> Ibid s 14A(2)(b).

<sup>81</sup> Ibid s 2(1).

only appropriate for unmarried fathers who desire to be in a formalised relationship with the mother and she agrees to the marriage. Those who do not wish for a relationship with the mother, or simply do not wish for it to be formalised, would not benefit from this method. Furthermore, since it relies on the consent of the mother, the same issues connected with this arise again here, making this method's compatibility with the Government's dual aim, dubious.

#### **e) Parental Responsibility Order**

For those who do not have the mother's consent, UK law allows an opportunity for fathers to prove their merit in court. The first method is the launching of an application for a PRO.<sup>82</sup> The father must complete forms C1 and FM1 and attend a Mediation Information & Assessment Meeting (MIAM) before a court hearing is organised. The process through which a court decides whether a PRO may be granted can be summarised in three steps: paternity must be proven;<sup>83</sup> the applicant's 'merit' as a father is determined; the relevant people are informed of the outcome. A presumption that involvement of the father will further the child's welfare overlays this process.<sup>84</sup>

The first stage, proving paternity, can be simply achieved through agreement with the mother that the applicant is the child's father. Where agreement is not possible, paternity tests may be arranged. Hence, this stage is often surpassed without difficulty, the court even previously entertaining an application for a child they were not even sure existed.<sup>85</sup> The second stage is where issues may arise.

Relying upon the judgment of *Re H*,<sup>86</sup> the court will consider the following factors in order to determine the 'merit' of the father: '(1) the degree of commitment which the father has shown towards the child; (2) the degree of attachment which exists between the father and

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<sup>82</sup> Ibid s 4(1)(a).

<sup>83</sup> *R v Secretary of State for Social Security ex parte W* [1999] 2 FLR 604 [607-D].

<sup>84</sup> CA 1998 s 1(2A).

<sup>85</sup> *Re S (Parental Responsibility: Jurisdiction)* [1998] EWCA Civ J0428-6.

<sup>86</sup> *Re H (Minors) (Local Authority: Parental Rights) (No 3)*3 [1991] Fam 151.

the child; and (3) the reasons of the father for applying for the order'.<sup>87</sup> The ways in which one can satisfy each factor could be considered somewhat flexible. For example, commitment can be shown in several ways, such as, through regular contact,<sup>88</sup> persistent applications to court or payment of child maintenance.<sup>89</sup> Equally, in regard to the father's reasons, the court must simply ensure the father is not motivated by reasons unconnected to a desire to care for the child. An example of an inappropriate motive would be to seek a PRO in order to further harass and interfere with the mother's exercise of PR.<sup>90</sup> Whether the paramountcy principle has an overarching influence upon this framework is debatable, Douglas and Gilmore noting that, although the Court of Appeal has held that it does apply in several cases, this does not appear to be based upon the wording of statute.<sup>91</sup> The last stage of the test is straightforward, merely requiring those with PR to be informed of the outcome.

Statistically, the likelihood of success in acquiring PR through a PRO appears to be high, perhaps indicating an ease in navigating this process. The Ministry of Justice recorded 1,057 applications in 2019, 548 by fathers. Of these 548, 239 were granted and only 1 was refused.<sup>92</sup> This correlates with the opinion of solicitor Philip Hunter who, in 2020, stated that, 'Generally speaking, the courts are receptive to applications by fathers for parental responsibility, unless it is apparent that the father poses a risk of harm to the child or mother'.<sup>93</sup> However, the number of applications that were refused from this data set could be higher than reported: since PRO proceedings often take longer than a year before concluding, the results of over half of this data set (308 applications) would be included in the data set for 2020 which has not been published. Hence, conclusions based on statistics alone may prove unreliable.

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<sup>87</sup> Ibid [158-D]; Gilmore and Glennon (n 68) pp 439-441.

<sup>88</sup> *Re J (Parental Responsibility)* [1999] 1 FLR 784.

<sup>89</sup> *Re M (Contact: Family Assistance: McKenzie Friend)* [1999] 1 FLR 75 (EWCA) [80-E].

<sup>90</sup> *Re M (Contact: Parental Responsibility)* [2001] 2 FLR 342 (F) [365].

<sup>91</sup> Gillian Douglas and Stephen Gilmore, 'The (Il)legitimacy of Guideline Judgements in Family Law: The Case for Foundational Principles' (2020) 31 King's Law Journal 88, 109.

<sup>92</sup> WhatDoTheyKnow, 'Statistics on father's applications for parental responsibility orders' (11 January 2021) [https://www.whatdotheyknow.com/request/statistics\\_on\\_fathers\\_applicatio](https://www.whatdotheyknow.com/request/statistics_on_fathers_applicatio).

<sup>93</sup> Phillip Hunter, 'Parental Responsibility' (Hawkins Family Law, 28 Jan 2020) <https://hawkinsfamilylaw.co.uk/family-law-advice/parental-responsibility/>.

How effectively this framework filters the 'meritorious' from the 'unmeritorious' also proves debatable. In fact, the very existence of the three-stage *Re H* test is curious since the Law Commission had already admitted in their 1982 report that there was no straightforward way to differentiate the 'meritorious' from the 'unmeritorious'.<sup>94</sup> Since the dichotomy upon which this test is based is uncertain, the test is also unlikely to prove completely reliable. Hypothetically, 'meritorious' fathers should find it easy to demonstrate the required characteristics whilst benefitting from the presumption that their involvement will further the child's welfare, unless facts point otherwise.<sup>95</sup> Equally, those who are 'unmeritorious' should display welfare concerns which would prevent their fulfilment of the test. However, as will be shown, this is not always the case in practice.

Due to the complexity of this test, a more detailed assessment of its ease and accuracy will now be conducted by focusing separately on three categories of fathers: 'meritorious' fathers, 'unmeritorious' fathers and fathers of both category who are unable to afford a PRO at all.

### **'Meritorious' fathers**

Whilst many 'meritorious' fathers may be able to easily provide evidence to satisfy the *Re H* test, efforts of the mother may lead to the denial of his application. The mother has significant control over whether a father satisfies the *Re H* criteria, regardless of his merit.<sup>96</sup> For example, in *Re S*, the mother denied the existence of the child, preventing the father from contact and hence made it very difficult for him to demonstrate commitment and attachment.<sup>97</sup> Butler-Sloss LJ has articulated this issue stating that:

'There are many cases where a father, who shows potential commitment and has genuine motives but has not yet had an opportunity to know the child... does not necessarily obtain a parental responsibility order... This is not an unusual situation'.<sup>98</sup>

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<sup>94</sup> *Family Law: Illegitimacy Final Report* (n 10) 35.

<sup>95</sup> CA 1998 s 1(2A).

<sup>96</sup> *Re H (Minors) (Local Authority: Parental Rights) (No 3)*3 (n 86).

<sup>97</sup> *Re S (Parental Responsibility: Jurisdiction)* (n 85).

<sup>98</sup> *Re D (Parental Responsibility: IVF Baby)* [2001] EWCA Civ 230.

In fact, Gilmore argues that the very consideration of attachment with the child seems unfair: he points out that unmarried fathers who successfully acquire PR at the birth of the child need not, and indeed *cannot*, demonstrate long-standing attachment with the child. However, fathers who are not able to acquire PR through the mother's consent, even if they are 'meritorious', are held to this higher standard.<sup>99</sup> The power appears firmly placed with the mother who, should she wish to deny a 'meritorious' father PR, has the ability to block his attempts to prove commitment and attachment by withholding contact with the child. This makes the process of obtaining a PRO potentially off-putting for 'meritorious' unmarried fathers who face opposition from the mother: they will have their character and actions scrutinized, with the burden resting upon them to prove their worth. This can be traumatizing and potentially deter some fathers from applying for a PRO altogether.

Despite this, due to the presumption in favour of the involvement of the fathers, even the best efforts of a mother to block the father's application may prove unsuccessful.<sup>100</sup> It is likely that the cost and length of proceedings is a more considerable obstacle to 'meritorious' fathers, an issue which will be returned to shortly.

### **'Unmeritorious' fathers**

'Unmeritorious' fathers may be able to acquire PR through this method. One reason for this is the arguably low level of evidence required by the *Re H* test. For example, commitment can be proven simply by persistent applications to court or payment of child maintenance.<sup>101</sup> The former may be motivated by a desire to distress and manipulate the mother; the latter may be due to a commitment to fulfil legal obligations. Neither of these activities may have anything to do with a commitment to care for the child.

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<sup>99</sup> Stephen Gilmore, 'Parental Responsibility and the unmarried father – a new dimension to the debate' [2003] *Child and Family Law Quarterly* 21, 30.

<sup>100</sup> CA 1998 s 1(2A).

<sup>101</sup> *Re M (Contact: Family Assistance: McKenzie Friend)* (n 89) [80E].



An ‘unmeritorious’ father may also benefit from the presumption that involvement of the parent in the child’s life will further their welfare.<sup>102</sup> Indeed, the ability to override this presumption, should a welfare concern arise, may fail as an effective safeguard in two ways. Firstly, there may not exist any evidence for one’s ‘unmeritorious’ character, especially in the case of emotionally manipulative and abusive men. Secondly, where there is evidence of ‘unmeritorious’ behaviour, the threshold of evidence required to override the presumption is high.<sup>103</sup> Balcombe LJ stated that the court would ‘require to be convinced by cogent evidence that the child’s welfare would be adversely affected by the making of such an order’.<sup>104</sup> The following evidence has been found to meet this threshold: past refusal to give the child back to his mother after a contact visit,<sup>105</sup> sadistic abuse of a child<sup>106</sup> and having committed a crime whilst on home leave from prison.<sup>107</sup> However, other arguably serious welfare concerns have not met this threshold. For example, in *Re S* the father was granted PR despite being convicted of possession of obscene literature.<sup>108</sup> Accordingly, ‘unmeritorious’ fathers may benefit from this presumption even if they present welfare concerns.

Overall, the low level of evidence needed to fulfil the *Re H* criteria combined with a high burden of proof for overcoming the presumption in favour of parental involvement creates a system which may advantage the ‘unmeritorious’ father.

### **Fathers who cannot afford to apply for a PRO**

Finally, the nature of PRO proceedings is that they are expensive and time-consuming. Filing the C1 form to court incurs a charge of £215,<sup>109</sup> the MIAM costs £120 per person<sup>110</sup> and the

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<sup>102</sup> CA 1998 s 1(2A).

<sup>103</sup> *Re E (Parental Responsibility: Blood Tests)* [1995] 1 FLR 392 (EWCA Civ).

<sup>104</sup> *Ibid.*

<sup>105</sup> *Re T (A Minor) (Parental Responsibility: Contact)* [1993] 2 FLR 450 (EWCA Civ).

<sup>106</sup> *Re H (Parental Responsibility)* [1998] 1 FLR 855 (EWCA Civ).

<sup>107</sup> *Re P (Parental Responsibility)* [1998] 2 FLR 96 (EWCA Civ).

<sup>108</sup> *Re S (A Minor) (Parental Responsibility)* [1995] 2 FLR 648 (EWCA Civ) [652-B].

<sup>109</sup> ‘Application for an order’ (GOV.UK, Form C1)

[https://assets.publishing.service.gov.uk/media/64214db332a8e000cfa94d4/C1\\_0722\\_save.pdf](https://assets.publishing.service.gov.uk/media/64214db332a8e000cfa94d4/C1_0722_save.pdf).

<sup>110</sup> ‘What is a MIAM?’ (Family Mediation Council) <https://www.familymediationcouncil.org.uk/family-mediation/assessment-meeting-miam/>.

court order itself costs £232, directly payable to the court.<sup>111</sup> This is on top of legal representation fees. Rachel Lim from Weightmans solicitors has estimated that the entire process usually takes 6-12 months and will involve time off work to attend court hearings.<sup>112</sup> Accordingly, obtaining a PRO is a lengthy and costly process and thus one that not all unmarried fathers will be able to afford.

It is accepted that court fees for PRO applications can be waived if the applicant can demonstrate that they are on low income or benefits by applying through the EX160 form. But the requirements for this are restrictive, requiring that you have little or no savings and are receiving State benefits.<sup>113</sup> Therefore, although the most economically disadvantaged fathers may be able to receive financial support, those who do not and still cannot afford the process will be left without accessible legal recourse.

Overall, whilst statistics *may* indicate that most fathers are able to easily obtain PROs, this method of acquisition clearly falls short of the Government's dual aims. Specifically, in some cases 'meritorious' fathers may find the process extremely difficult should the mother attempt to block his efforts. Equally, some 'unmeritorious' fathers may easily manipulate the test, successfully acquiring PR. The key issue is the expense and length of proceedings, meaning that many fathers will not be able to afford to apply for a PRO at all.

#### **f) Child Arrangement Order**

The last option for unmarried fathers who do not have the consent of the mother is to apply for a CAO per sections 8 and 12(1) of the CA.<sup>114</sup> If successful, the Court will award him PR under section 4 of the Act.<sup>115</sup> The process involves: a legally required MIAM;<sup>116</sup> the filing of a

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<sup>111</sup> 'Parental Responsibilities' (GOV.UK) <https://www.gov.uk/parental-rights-responsibilities/apply-for-parental-responsibility>.

<sup>112</sup> Rachel Lim, 'Parental Orders Q&A' (*Weightmans*, 30 June 2022) <https://www.weightmans.com/insights/parental-orders-questions-and-answers/>.

<sup>113</sup> 'How to apply for help with fees (EX160A) – for applications made or fees paid before 27 November 2023' (GOV.UK) <https://www.gov.uk/government/publications/apply-for-help-with-court-and-tribunal-fees/how-to-apply-for-help-with-fees-ex160a>.

<sup>114</sup> CA 1998 ss 8 and s12(1).

<sup>115</sup> *Ibid* s 12(1).

<sup>116</sup> Children and Families Act 2014 s 10(1); 'What is a MIAM?' (n 110).

C1 form to court;<sup>117</sup> a First Hearing Dispute Resolution Appointment (FHDRA) involving the current individual with a 'live with' order for the child and a Children and Family Court Advisory and Support Service (CAFCASS) officer; If an agreement still cannot be reached, a second hearing may be organised with statements required from each party and the CAFCASS officer. The Judge will decide the case based on this information as well as being bound to the paramountcy principle and welfare checklist.<sup>118</sup>

Although some unmarried fathers may be successful through this method, there are several reasons why many will not. The main reason for this is that, per the no order principle contained in section 1(5) of the CA, the court must be convinced that making an order would be better for the child than making no order at all.<sup>119</sup> The consideration of status quo under the welfare checklist may pose problems too. This places a significant burden upon the unmarried father to provide convincing welfare reasons for why the child should be removed from their current living situation, such as that the child is at serious risk of harm in their current home. Hence, CAOs are only realistic options for unmarried fathers who have evidence to suggest that the child's current carer is inadequately meeting their needs *and* evidence that they could meet the child's welfare needs *better*.

Furthermore, as with PROs, this method is expensive and time consuming. In regard to costs, unless a specific exemption applies, the applicant must first attend a MIAM, costing around £120 per person.<sup>120</sup> If an agreement cannot be reached here, the unmarried father will then have to file a C1 form to the Court which incurs a charge of £215.<sup>121</sup> This is on top of charges for legal representation throughout the entire process, in some cases stretched over a second hearing as well as an FHDRA.

Legal aid could be claimed to cover the costs of CAOs. However, the first barrier to this is that, since changes made to legal aid in 2013, it is only available for CAOs should there be evidence

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<sup>117</sup>'Application for an order' (n 109).

<sup>118</sup> CA 1998 ss 1 and 1(3).

<sup>119</sup> Ibid s 1(5).

<sup>120</sup> 'What is a MIAM?' (n 110).

<sup>120</sup> 'Application for an order' (n109).

<sup>121</sup> Ibid.

of child abuse, domestic abuse or a *risk* of either.<sup>122</sup> Even if this stage is surpassed, the applicant must also pass the means test, that is, be within a certain bracket of financial income, as well as the merits test, requiring the applicant to provide good reason to predict that the case will be successful. In regard to the means test UK law stipulates that your gross monthly income be £2,657 or less, disposable income per month be £733 or less and disposable capital limit per month for civil legal services be £8,000 or less.<sup>123</sup> In addition, the applicant's partner's income, savings and assets will count towards this assessment too. Very few people would therefore be able to acquire legal aid under this framework, meaning that some unmarried fathers will simply not be able to afford CAO applications.

In terms of filtering the 'meritorious' from the 'unmeritorious', this method is also likely to be unsuccessful. Firstly, the high evidential burden under section 1(5) of the CA as well as the expense can result in unsuccessful applications from 'meritorious' fathers.<sup>124</sup> Equally, some 'unmeritorious' fathers may be able to acquire PR through this method should they have the funds and if they are able to expose issues with the mother's care of the child whilst minimising their own deficiencies as a carer. Hence, as well as proving inaccessible for some unmarried fathers, CAOs also fall short of the Government's aim to facilitate the access of 'meritorious' fathers whilst denying the access of 'unmeritorious' fathers to PR.

The next section will consider how demographics and perspectives have changed over the last few decades, exposing how well this legal framework, and the continued denial of automatic PR to unmarried fathers sits within the context of current position in the UK.

### **1.3 Modern Developments**

This section will assess three aspects of society in order to evaluate the context within which the above legal framework sits in 2024 in the UK: demographics; legal perspectives and public

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<sup>122</sup> 'Legal aid for family law matters' (*Child Law Advice*) <https://childlawadvice.org.uk/information-pages/legal-aid-for-family-law-matters/>; 'Legal Aid: What's in scope?' (Law Works) <https://www.lawworks.org.uk/sites/default/files/files/lw-cr-legal-aid-scope.pdf> 6.

<sup>123</sup> Legal Aid Agency, 'Civil legal aid: means testing' (GOV.UK, 1 June 2014) <https://www.gov.uk/guidance/civil-legal-aid-means-testing>.

<sup>124</sup> CA 1998 s 1(5).

opinion. This analysis will be crucial to an assessment of whether UK law operates within the relevant margin of appreciation in this area in Chapter Three.

## Demographics

Statistics demonstrate that current rates of the formalisation of relationships, as well as of births outside of marriage, are significantly different to those during the late 20<sup>th</sup> century. Firstly, rates of formalised relationships, that is, people getting married or forming a civil partnership, have declined fairly rapidly. In regard to marriage, statistics released in 2022 showed that the number of marriages decreased by 6.4% between 2018 and 2019, bringing the rates of marriage between opposite sex partners to the lowest it has been since 1862.<sup>125</sup> Another report, in 2021, found that rates of Civil Partnerships had also decreased, by 19.4% since 2020.<sup>126</sup> Dr James Tucker, the Head of Health and Life Events Analysis at the Office of National Statistics, stated that one explanation for the decrease in marriage rates is that couples are 'choosing to live together rather than marry'.<sup>127</sup> Indeed, in 2021, the Office of National Statistics found that, compared to a net increase of 3.7% in formalised relationships between 2011 and 2021, the number of couples choosing to cohabit increased by 22.9% in the same time period.<sup>128</sup> It is important to note that these statistics may have been impacted by the COVID pandemic and that fewer people formalised their relationships within this period owing to lockdown restrictions. However, should this have significantly affected the data, rates would have been expected to increase again post COVID. Since statistics have not shown this, it can be concluded that this data accurately points to an overall trend of fewer people choosing to formalise their relationships.

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<sup>125</sup> Faiza Mohammad, Nina Mill and Kanak Ghosh, 'Marriage in England and Wales: 2019' (*Office for National Statistics*, 19 May 2022)

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/marriagesinenglandandwalesprovisional/2019>.

<sup>126</sup> Amanda Sharfman and Pamela Cobb, 'Civil Partnerships in England and Wales: 2021' (*Office for National Statistics*, 9 December 2022)

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/marriagecohabitationandcivilpartnerships/bulletins/civilpartnershipsinenglandandwales/2021>.

<sup>127</sup> Faiza Mohammad, Nina Mill and Kanak Ghosh (n 125).

<sup>128</sup> Amanda Sharfman and Pamela Cobb, 'Families and households in the UK: 2021' (*Office for National Statistics*, 9 March 2022)

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2021>.

Whilst rates of formalised relationships have decreased, the Office for National Statistics have reported that the number of annual extramarital births has now tipped over 50%; for the first time, more children are being born outside of marriage than within.<sup>129</sup> This is an entirely different demographic makeup to the late 20<sup>th</sup> century. Indeed, in 1978 less than one out of ten children were recorded to have been born outside of marriage.<sup>130</sup> Interestingly, with the Law Commission reports concerning automatic PR being published in 1979 and 1982,<sup>131</sup> it is clear to see the different context within which this legal discussion was taking place. Similarly, at the time of the case of *B v UK* in 2000 approximately 40% of children were born outside of marriage,<sup>132</sup> rising to 44.3% by the judgment of *Re Z* (2008), a domestic case reaffirming the decision of *B v UK*; larger minorities, but a minorities nonetheless.<sup>133</sup> Ultimately, all previous discussions and debates concerning the denial of automatic PR to unmarried fathers took place in a context where fewer children were being born outside of marriage. This begs the question of whether legal assessment would proceed differently should similar cases arise in today's context.

With the increasing numbers of extramarital births, increasing numbers of unmarried fathers who do not have the consent of the mother to acquire PR, are potentially being placed in vulnerable positions. The extent of this issue is heightened when considering the DWP's research which demonstrated that most of these unmarried fathers have unknowingly put themselves in this position through wrongly presuming that they had acquired PR automatically.<sup>134</sup> For some of these fathers they may have an unpleasant surprise when disputes arise concerning their child's upbringing and they find themselves legally powerless.

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<sup>129</sup> Siân Bradford and Faiza Mohammad, 'Births in England and Wales: 2022' (*Office for National Statistics*, 17 August 2023)

<https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/livebirths/bulletins/birthsummarytablesenglandandwales/2022#:~:text=The%20number%20of%20live%20births%20outside%20of%20marriage%20or%20civil,or%20civil%20partnership%20in%202022>.

<sup>130</sup> Gavin Thompson, Oliver Hawkins, Aliyah Dar, Mark Taylor, *Olympic Britain: Social and Economic Change Since the 1908 and 1948 London Games* (vols 12-38, House of Commons Library 2012) 40.

<sup>131</sup> *Working Paper No 74: Illegitimacy* (n 23); Law Commission, *Family Law: Illegitimacy Final Report* (n 10).

<sup>132</sup> *B v the United Kingdom* (n 50); 'Correction Notice, Birth statistics: Births and patterns of family building England and Wales (FM1)' (FM1 No. 36 – 2007, *Office for National Statistics*, 15 December 2008)

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/228901/9787777148210.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228901/9787777148210.pdf) 32.

<sup>133</sup> *Re Z (Children)* [2008] EWCA Civ 1556; Mark Easton, 'Births outside marriage – a real cause for concern' (*BBC News*, 24 September 2008)

[https://www.bbc.co.uk/blogs/thereporters/markeaston/2008/09/births\\_outside\\_marriage\\_a\\_real.html](https://www.bbc.co.uk/blogs/thereporters/markeaston/2008/09/births_outside_marriage_a_real.html).

<sup>134</sup> Department for Work and Pensions (n 59) 7.

Data suggests that, whilst the number of fathers affected may have been insignificant in the past, it has certainly increased in recent years. This is a factor which must be considered should the reasonableness and compatibility of the denial of automatic PR to unmarried fathers be tested in court in 2024.

## Legal Perspectives

Despite the overwhelmingly strong rejection of automatic acquisition of PR for *all* parents in the 1979 Law Commission report, over the past few decades there have been several pushes for reform on this basis as well as reforms designed to expand the means through which PR can be acquired.<sup>135</sup> The first such instance occurred in 1998 with the Lord Chancellor's Department (LCD) announcing a proposal to amend the law so that unmarried fathers could acquire PR by signing their child's birth certificate.<sup>136</sup> This proposal was significant as it introduced a straightforward method of acquisition. Responses to this proposal were largely positive with Sheldon pointing out that over 70% were in favour of the proposal's enactment.<sup>137</sup> The limited opposition mainly concerned the definition of a 'father': Lisa Saffron proposed that PR should be awarded based on social parenting rather than genetics; she also pointed out that some couples, such as lesbian couples may wish to have the father on the birth certificate so that the child has knowledge of their biological background, but do not wish for them to acquire PR.<sup>138</sup> But this aside, responses to this consultation vastly contrasted with the disapproval present around the time of the 1979 Law Commission proposal, suggesting a shift towards a favouring of more equal rights of acquisition for unmarried fathers. Indeed, the LCD stated that, in comparison to the decades before, it 'is [now] clearly impossible to assume that most unmarried fathers are irresponsible or uninterested in their children, and do not deserve a legal role as parents'.<sup>139</sup>

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<sup>135</sup> *Family Law: Illegitimacy Final Report* (n 10).

<sup>136</sup> Lord Chancellor's Department (LCD), 'press notice 201/98' (1998).

<sup>137</sup> Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (n 20) 97.

<sup>138</sup> *Ibid* 99.

<sup>139</sup> 'press notice 201/98' (n 136) [51], *insertion added*.

Almost a decade later another proposal for reform arose: the 2007 Green Paper entitled 'Joint Birth Registration: Promoting Parental Responsibility'.<sup>140</sup> Motivated by a feeling that the above reform has not led to a significant increase in the number of fathers who had PR, this paper pushed for the introduction of mandatory joint registration by both mothers and fathers at the birth of the child. To justify this proposal, recent changes in demographics were referred to such as the decreasing number of couples choosing to marry, indicating a potential increase in the number of unmarried fathers without PR. This was viewed as an issue because evidence suggested that a correlation existed between sole registration, single motherhood and financial difficulties.<sup>141</sup> Furthermore, it was noted that without registration of the father, difficulties often arise concerning child support liability and the transference of nationality.<sup>142</sup> In contrast, the report argued that when unmarried fathers sign the birth certificate they are more likely to maintain contact with their child and support them through child maintenance.<sup>143</sup> Hence, by introducing mandatory joint registration, the green paper aimed to 'embed a new culture... which places much more equal weight on the relationship of both parents with their children'.<sup>144</sup>

Despite this assertion, Fortin and Wallbank doubt the veracity of the Government's expressed motivations, arguing that the Government was more driven by a desire to decrease the number of sole registrants reliant on state benefits by encouraging fathers to pay child maintenance.<sup>145</sup> Although this proposal, contained within the 2009 Welfare Reform Bill,<sup>146</sup> was not implemented in the eventual Act<sup>147</sup> due to concerns over the pressure this framework would exert upon mothers to provide sensitive information, Sheldon argues that this paper

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<sup>140</sup> Law Commission, *Joint Birth Registration: Promoting Parental Responsibility* (Green Paper Cm7160, 2007).

<sup>141</sup> *Ibid* 3.

<sup>142</sup> Sheldon, 'From "absent objects of blame" to "fathers who want to take responsibility": Reforming birth registration law' (n 58) 375.

<sup>143</sup> *Joint Birth Registration: Promoting Parental Responsibility* (n 140) 2; Irwin Garfinkle et al, 'In Hospital Paternity Establishment and Father Involvement in Fragile Families' (2005) 67(3) *Journal of Marriage and Family* 611.

<sup>144</sup> *Joint Birth Registration: Promoting Parental Responsibility* (n 140) 2.

<sup>145</sup> Jane Fortin, 'Children's right to know their origins – too far, too fast?' (2009) 21(3) *Child and Family Law Quarterly* 336, 352; Julie Wallbank, 'Bodies in the shadows: joint birth registration, parental responsibility and social class' (2009) 21(3) *Child and Family Law Quarterly* 267, 282.

<sup>146</sup> Welfare Reform HC Bill (session 2008-09), cl 2(D).

<sup>147</sup> Welfare Reform Act 2009.



demonstrated a 'shift in attitudes' with unmarried fathers becoming seen as a group who were *discriminated* against.<sup>148</sup>

A recent domestic case also suggested a change in opinion within some members of the judiciary. *F v M* concerned a married father who, despite making efforts to secure a Child Arrangement Order, was suspected of using litigation as a means to continue manipulating and controlling the mother.<sup>149</sup> Despite the fact that his behaviour was said to have warranted removal of PR in the case of an unmarried father, this applicant was married to the mother and so, per UK law, could not have PR removed. Hayden J expressed great discontent with this law, noting that there has been 'significant social change' since the Children Act, with far more couples cohabiting and having children outside of marriage, to the point that the law no longer aligned with the realities of societal views and demographics.<sup>150</sup> Indeed, he stated that he was 'uncomfortable' with the fact that, in 2023, a court can remove PR from some fathers and not others, entirely based on their marital status.<sup>151</sup> Although this case was concerned with the removal rather than acquisition of PR, it evidences the emergence of judicial voices in 2023 advocating against the unequal treatment of parents depending on marital status under the law. Whilst it is difficult to generalise from isolated examples, it can be stated with confidence that a proportion of the legal and political sector have, and are, pushing back against traditional preferences to maintain the unequal position of unmarried fathers in the context of PR.

## **Public Opinion**

A shift in public opinion towards equal rights for unmarried fathers vis à vis acquisition of PR has also emerged since the 1979 and 1982 Law Commission reports. Statistics demonstrate that a large proportion of the public supported a change in the law as early as 2012: in a YouGov Poll, 95% of respondents stated that they believed 'parents should share

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<sup>148</sup> Sheldon, 'From "absent objects of blame" to "fathers who want to take responsibility": Reforming birth registration law' (n 58) 381.

<sup>149</sup> *F v M* (n 28).

<sup>150</sup> *Ibid* [7].

<sup>151</sup> *Ibid*.

responsibility for bringing up their children'.<sup>152</sup> Research conducted by Barlow, Burgoyne and Smithson also found that 90% of respondents 'felt that cohabitants should have the same rights as married couples where they had a child together'.<sup>153</sup> This appears to be a wider societal opinion. 98% of respondents to the 2004 Scottish Social Attitudes survey agreed that a cohabiting unmarried father who had lived with his partner and child for 10 years should have the same rights as the mother in regard to making decisions about the child's medical treatment.<sup>154</sup>

Several groups have also been set up in the last few decades in order to advocate the rights of fathers with Families Need Fathers, set up in the 1970s, being the longest standing group. Most notably, Justice4fathers was set up in 2001, stating on their website that they 'look forward to the day when gender doesn't matter and all parents are treated equally'.<sup>155</sup> This group appears to have a large amount of support: a 2011 Conservative Party poll found Fathers4Justice to be Britain's third most supported campaign, behind Greenpeace and Amnesty International.<sup>156</sup> This support is reported to come from all sectors of society, with almost as many women supporting it as men.<sup>157</sup> This group is active, most recently campaigning for 'Archie's Law' in 2022 which aimed to make Parental Alienation and Contact Denial criminal offences as well as introduce a presumption of 50/50 shared parenting for separated fathers.<sup>158</sup> That said it should be acknowledged that this petition has only achieved around 5,900 signatures thereby undermining its perceived popularity.

For those who have not participated in the above polls and activist groups, a large portion of the population appear to be ignorant of the fact that unmarried fathers do not acquire PR automatically. Sheldon points out that there is a 'common assumption' among the general

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<sup>152</sup> Bonnie Gardiner, 'Equal Rights over Child custody' (*YouGov*, 13 June 2012)

<https://yougov.co.uk/topics/politics/articles-reports/2012/06/13/equal-rights-over-child-custody>.

<sup>153</sup> Anne Barlow, Carole Burgoyne and Janet Smithson, 'The Living Together Campaign – The Impact on Cohabitants' (2007) 37 *Family Law* 165, 166.

<sup>154</sup> Dey and Wasoff (n 21) pp 228-229.

<sup>155</sup> 'Our Campaigns' (*Fathers4Justice*) <https://www.fathers-4-justice.org/our-campaign/our-campaigns/>.

<sup>156</sup> 'Fact Sheet' (*Fathers4Justice*) <https://www.fathers-4-justice.org/about-f4j/fact-sheet/>.

<sup>157</sup> *Ibid*.

<sup>158</sup> 'Introduce Archie's Law and make Parental Alienation & Contact Denial Criminal Offences' (*Change.org*, 24 April 2022), [https://www.change.org/p/introduce-archie-s-law-make-parental-alienation-contact-denial-criminal-offences?utm\\_source=share\\_petition&utm\\_medium=custom\\_url&recruited\\_by\\_id=0c45fd69-dccd-42bb-a064-e0cbb99d7237](https://www.change.org/p/introduce-archie-s-law-make-parental-alienation-contact-denial-criminal-offences?utm_source=share_petition&utm_medium=custom_url&recruited_by_id=0c45fd69-dccd-42bb-a064-e0cbb99d7237).

public that ‘an unmarried father has the same legal rights and obligations as the mother’.<sup>159</sup> Other academics have also pointed out that such confusion is sometimes based on the fact that, despite not having PR, unmarried fathers are automatically liable to financially support their child under the Child Support Act 1991.<sup>160</sup> It, perhaps, appears counterintuitive to the uninformed public that an unmarried father should be liable to maintain their child but not have any parental rights and responsibilities. All in all, it appears that UK law regarding acquisition of PR vis à vis unmarried fathers neither meets the expectations of the public today, nor satisfies their demands.

#### **1.4 Conclusion**

This chapter has analysed how easily unmarried fathers may acquire PR through the current legislative framework, evaluated how far this framework meets the Government’s dual aims, and provided evidence for the evolution of demographics and opinions concerning PR in 2024.

Evidence suggests that the ease through which one can acquire PR through this framework depends almost entirely upon the individual. Fathers who have the required funds and consent of the mother may find the system straightforward to navigate. Other fathers may find acquiring PR through this framework to be difficult and potentially inaccessible should they have neither the mother’s consent nor the funds to pursue a PRO or CAO. Whilst legal aid and fee waivers can be applied for, only a very small number of fathers will be eligible.

In terms of the second issue, the system appears to fall short of the Government’s aim to facilitate the access of ‘meritorious’ fathers whilst denying the access of those who are ‘unmeritorious’. The first technique through which the Government attempts to filter the ‘meritorious’ from the ‘unmeritorious’ is through the requirement for the mother’s consent. But as discussed, the mother’s consent cannot always be trusted as a reliable indicator of the father’s merit. Interestingly, the Law Commission even recognised this fact in their 1982 report, yet this is the very basis of four of the methods of acquisition vis à vis unmarried

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<sup>159</sup> Sheldon, ‘Unmarried Fathers and Parental Responsibility: A Case for Reform?’ (n 20) 103.

<sup>160</sup> Ibid 107; Nigel Lowe, ‘The Meaning and Allocation of Parental Responsibility – A Common Lawyer’s Perspective’ (1997) 11 *International Journal of Law, Policy and the Family* 192, 207.

fathers in the UK.<sup>161</sup> For those without the mother's consent, only two options remain: a PRO or a CAO. As discussed, both the *Re H* criteria used in PROs and evidential requirements applicable in CAOs are open to manipulation from 'unmeritorious' fathers and can present obstacles for the 'meritorious'.

Lastly, evolution in demographics, legal and political opinions and public opinion have been assessed. This evidence which will be crucial in Chapter Three when analysing whether the UK's framework fits within the margin of appreciation relevant to cases concerning acquisition of PR in 2024. Overlaying all of these issues is the curious fact that there is no universal, or clear, definition of either terms, 'meritorious' or 'unmeritorious'. Indeed, the Law Commission even admitted that they were unable to define these terms in their 'Illegitimacy' report.<sup>162</sup>

The legal framework through which the compatibility of UK law concerning acquisition of PR vis à vis unmarried fathers with Articles 8 and 14 of the Convention could be assessed, will now be set out in Chapter Two.

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<sup>161</sup> *Family Law: Illegitimacy Final Report* (n 10) para 4.39.

<sup>162</sup> *Ibid.*

## Chapter Two: The Legal Framework for Applications Concerning Compatibility with the European Convention on Human Rights

In 1951, the UK ratified the European Convention on Human Rights (the Convention), a treaty which enshrines a series of fundamental rights designed to protect citizens from arbitrary uses of power by the state. Taking a dualist approach to this treaty, UK citizens could only rely on its rights after the enactment of the Human Rights Act 1998 (HRA) which translated most of the Convention into UK law. It also allowed individuals to bring relevant applications in domestic courts, only appealing to the Strasbourg Court if necessary.

In 1995 and 2000 respectively, two cases were heard concerning an unmarried father's claim that the denial of automatic PR to unmarried fathers in the UK represented a violation of the Convention. Both relied upon two articles of the Convention in conjunction: Article 8, the 'right to respect for his private and family life, his home and his correspondence';<sup>163</sup> Article 14, the right to have all convention rights secured without discrimination on the basis of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.<sup>164</sup> As 'qualified' rights, states can depart from a commitment to Articles 8 and 14 if they can provide legitimate justification and demonstrate the proportionality of their actions.<sup>165</sup>

The first of these cases was the case of *McMichael v UK* in 1995.<sup>166</sup> The principle claim in this application was that documents concerning Mr McMichael's child's care proceedings had been withheld from him and Mrs McMichael, undermining the fairness of proceedings under Article 6 of the Convention.<sup>167</sup> However, pertinent to this thesis, an additional claim

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<sup>163</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

<sup>164</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 14.

<sup>165</sup> 'Human Rights Act 1998' (*Mind*) <https://www.mind.org.uk/information-support/legal-rights/human-rights-act-1998/articles-8-9-10-12-14/>.

<sup>166</sup> *McMichael v United Kingdom* (n 29).

<sup>167</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 6.

was included, that Mr McMichael's right to custody of his child had been refused in violation of Articles 8 and 14. A subsequent case arose in 2001: *B v UK*.<sup>168</sup> In this case, the mother and father ended their relationship shortly after the birth of their child, with whom the father had regular contact. When the mother and child moved to Italy, the father launched an application for PR in UK courts as well as seeking *ex parte* orders under the Hague Convention for his child's return to the UK. However, his ability to argue under the Hague Convention was refused since he had no current parental responsibility. Ultimately, the father launched an application at the Strasbourg Court under Articles 8 and 14 on the basis that UK law discriminates against unmarried fathers in regard to the acquisition of parental responsibility under Articles 8 and 14 of the Convention.

Although no violation was found by the Strasbourg Court in either case, these precedents demonstrate the ability to launch applications concerning the UK framework for acquisition of PR vis à vis unmarried fathers under Articles 8 and 14. Indeed, the Strasbourg Court in *McMichael v UK* explicitly confirmed the applicability of these articles in this context, stating that, 'the mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life'.<sup>169</sup> Hence, it is possible that another similar application be made in 2024.

An alternative basis arises under Article 1, protocol 12: an anti-discrimination protocol introduced for ratification in 2000. This amendment allowed complaints of discrimination to be made without the requirement of demonstrating the applicability of another convention right, as is the case with Article 14 claims. However, the UK has not ratified this protocol and so this will not be discussed any further.

Chapter Two will set out the legal procedures through which an application concerning UK law regarding the acquisition of PR vis à vis unmarried fathers' compatibility with Articles 8 and 14 of the Convention would proceed in 2024. Since a requirement for admissibility at the Strasbourg Court is that all domestic remedies have been exhausted, the law concerning the launching of this case in domestic courts will first be considered.

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<sup>168</sup> *B v the United Kingdom* (n 50).

<sup>169</sup> *McMichael v United Kingdom* (n 29) [86].

## 2.1 The Domestic Route

Before considering the legal requirements of demonstrating a violation of the relevant Convention articles, some preliminary points must be made. Firstly, several admissibility requirements must be met before the substance of the case can be considered. For example, in regard to the standing of the applicant, the HRA provides that the applicant must be a 'victim' of the relevant act.<sup>170</sup> Pressure groups are generally excluded from this definition since Article 34 of the Convention holds that the applicant must have been *personally* affected.<sup>171</sup> If, however, the group can demonstrate that they have *all* been directly affected, the court may accept such an application under section 7(1)(a) of the HRA. Furthermore, the application must be made within one year of the complained-of act and must concern the actions of a 'public body'.<sup>172</sup> A more detailed examination of these requirements is beyond the scope of this thesis and so will not be discussed in any more detail.

Another preliminary point is that precedent from the Strasbourg Court is not binding upon domestic courts; the HRA merely requires the judiciary to take this jurisprudence 'into account'.<sup>173</sup> Despite this, evidence suggests that in practice domestic courts usually treat Strasbourg case law as binding and so any precedent in this context is likely to be taken seriously.<sup>174</sup>

The impact of the margin of appreciation in domestic proceedings must also be considered. At the Strasbourg Court, the margin essentially represents how far, and for what reasons, a state can depart from a qualified convention right without violating it. The narrower the margin, the stricter the scrutiny the court must exert within assessment and the weightier the reasons required to justify the suspect policy, and vice versa.<sup>175</sup> Despite the central role of the margin at the Strasbourg Court, it is not applicable in domestic proceedings. Instead,

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<sup>170</sup> HRA 1998 s 7(7).

<sup>171</sup> *Ibid* s 7(3).

<sup>172</sup> *Ibid* s 7(5).

<sup>173</sup> *Ibid* s 2.

<sup>174</sup> *R (Ullah) v Special Adjudicator* [2004] UKHL 26; Anne Dennett, *Public Law Directions* (2nd edn, Oxford University Press 2021) 418.

<sup>175</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 36.

domestic courts have developed the concept of ‘the discretionary area of judgment’ which defers a measure of freedom to the relevant decision maker (in cases concerning legislation, to Parliament). After determining whether the claim falls within the ambit of a convention right, how much deference will be awarded to the decision maker is decided and a corresponding proportionality test chosen.

There are generally two approaches taken by UK courts when determining the ‘discretionary area of judgment’: the minimalist approach and the activist approach.<sup>176</sup> Where the minimalist approach is taken, courts may push for a wide area of discretion by using various techniques. For example, a minimalist approach was taken in the *Gillan* case,<sup>177</sup> the court watering down the scope of Article 8 and arguing that the interference complained of did not fall within it.<sup>178</sup> Alternatively, the court may consider analogous precedent where a large area of discretion was applied, using this to argue that, prima facie, the case displays no evidence of a violation, precluding the need to analyse the case in any more detail.<sup>179</sup> Such an approach is often taken where cases involve delicate social and political issues seen as best left in the domain of Parliament.<sup>180</sup>

In contrast, when taking an activist approach, the judiciary are likely to focus more on precedent where a narrow margin was applied, conceiving the scope of the right more narrowly.<sup>181</sup> Stricter proportionality tests will also be adopted, allowing less deference to the decision-maker. Interestingly, when this approach is taken, the judiciary are sometimes accused of overstepping their bounds by ‘reading up’ Convention rights and pushing for stronger protection than Parliament has legislated for.<sup>182</sup> Which approach is chosen will depend heavily upon the judiciary’s willingness to interact with the area of law concerned by the case and potentially their own moral views.

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<sup>176</sup> Alisdair Gillespie and Siobhan Weare, *The English Legal System* (9th edn, Oxford University Press 2023) 181.

<sup>177</sup> *R (on the application of Gillan) v Commissioner of Metropolitan Police* [2006] UKHL 12.

<sup>178</sup> *Ibid* [28].

<sup>179</sup> Helen Fenwick and Gavin Phillipson, *Media Freedom under the Human Rights Act* (Oxford University Press 2006) 147.

<sup>180</sup> Steve Foster, *Concentrate Questions and Answers Human Rights and Civil Liberties: Law Q & A Revision and Study Guide* (3rd edn, Oxford University Press 2022) 49.

<sup>181</sup> Helen Fenwick, *Fenwick on Civil Liberties & Human Rights* (5th edn, Routledge 2017) 237.

<sup>182</sup> *Ibid* 241.



Trends concerning the approach usually taken by the judiciary in the context of Article 8 have informed this thesis, leading to the rejection of the consideration of a claim under this Article alone. There are several reasons why a minimalist approach is likely to be taken in such cases. Fundamentally, Harris-Short has pointed out that there is ‘considerable opposition’ to the use of human rights within family law because such cases tend to raise issues related to socio-economic and public policy, and thus political areas perceived as falling within the role of Parliament.<sup>183</sup> *Bellinger v Bellinger* is such an example,<sup>184</sup> Harris-Short describing this judgment as ‘deeply conservative’.<sup>185</sup> Here, Lord Nicholls provided several reasons for deferring to Parliament including that, for the judiciary to involve themselves in issues of gender reassignment and marriage, they would also be involving themselves in the legal position of transsexuals in the UK, an issue which is ‘pre-eminently a matter for Parliament’.<sup>186</sup> For this reason the judiciary avoided reinterpreting statute under section 3 HRA and instead made a declaration of incompatibility (DOI) under section 4 HRA. A minimalist approach is also likely in the context of Article 8 since wide margins often overlay this Article at the Strasbourg Court. This argument was presented by Bonner, Fenwick and Harris-Short in 2003: ‘By ignoring particularly important factors influencing the outcome of Article 8 cases at the Strasbourg Court, most notably the large margin of appreciation afforded to States in this particular sphere, it is possible for the judiciary to rationalise a ‘minimalist’ approach’.<sup>187</sup>

A legal challenge taken under Article 8 alone in the context of the UK’s framework regarding to acquisition of PR for unmarried fathers would raise both of these issues and so is likely to trigger a minimalist response. Firstly, a case concerning acquisition of PR by unmarried fathers would raise questions concerning parenting, family units and the importance of marriage, all sensitive political issues which the judiciary are likely to view as outside their constitutional

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<sup>183</sup> Sonia Harris-Short, ‘Family law and the Human Rights Act 1998: judicial restraint or revolution?’ in Fenwick, Phillipson and Masterman *Judicial Reasoning under the Human Rights Act* (Cambridge University Press 2007) 308.

<sup>184</sup> *Bellinger v Bellinger* [2003] UKHL 21; Dennett (n 174) 421; See also Stephen Gilmore, ‘Corbett v Corbett – Once a man, always a man?’ in Stephen Gilmore, Jonathan Herring, and Rebecca Probert (eds) *Landmark Cases in Family Law* (Hart Publishing 2011).

<sup>185</sup> Harris-Short (183) 315.

<sup>186</sup> *Bellinger v Bellinger* (184) [37].

<sup>187</sup> David Bonner, Helen Fenwick and Sonia Harris-Short, ‘Judicial Approaches to the Human Rights Act’ (2003) 52 *The International and Comparative Law Quarterly* 549, 577.

prerogative. Secondly, a wide margin has often been applied at the Strasbourg Court in response to cases concerning family life under Article 8, particularly regarding cases concerning PR.<sup>188</sup> In contrast, domestic courts are more likely to take an activist approach to applications concerning Article 8 in conjunction with Article 14. Indeed, Harris-Short argues that one reason for this is because such cases raise concerns over discrimination and equality, issues which Baroness Hale has stated have particular constitutional importance in the UK.<sup>189</sup> Therefore, a legal claim under Article 8 alone will not be considered any further in this thesis. The legal procedure and requirements involved in an application concerning Article 8 in conjunction with 14 will now be set out.

## **2.2 Article 8 in Conjunction with Article 14**

There are four stages involved in assessing an application concerning Article 8 in conjunction with Article 14. First, whether Article 8 is engaged must be determined. In the context of the acquisition of PR, this stage will focus upon the existence of a ‘family tie’ between the applicant and his child. The ability of ‘private life’ to act as a catchall for cases where a family tie cannot be demonstrated will also be considered. Analysis then shifts to Article 14 and a difference in treatment between the applicant and a comparator in a ‘similar position’ must be shown.<sup>190</sup> Finally, the third and fourth stages concern justification: whether the state can provide a legitimate aim for the difference in treatment; whether the means taken to meet this aim are proportionate. The legal requirements of each stage, relevant to a case concerning UK law on acquisition of PR for unmarried fathers, will now be detailed.

### **a) Whether there Exists a Bond Which Pertains to ‘Family Life’**

Article 8 imposes a duty upon states to facilitate the development of *personal ties*: legal safeguards, including those relating to the acquisition and exercise of PR,<sup>191</sup> must be

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<sup>188</sup> ‘Guide on Article 8 of the European Convention on Human Rights’ (*European Court of Human Rights*, 31 August 2022) [https://www.echr.coe.int/documents/guide\\_art\\_8\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_8_eng.pdf) [307].

<sup>189</sup> Harris-Short (183) 321; *Ghaidan v Godin-Mendoza* [2004] UKHL 30 [132].

<sup>190</sup> *Zaunegger v Germany* (2009) 50 EHRR 952, para 42; ‘Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention’ (*European Court of Human Rights*, 31 August 2022) [https://www.echr.coe.int/Documents/Guide\\_Art\\_14\\_Art\\_1\\_Protocol\\_12\\_ENG.pdf](https://www.echr.coe.int/Documents/Guide_Art_14_Art_1_Protocol_12_ENG.pdf) 17.

<sup>191</sup> *McMichael* (n 29); *B v the United Kingdom* (n 50).

established as soon as possible after a child's birth to ensure smooth integration into their family.<sup>192</sup> Accordingly, it is essential that the applicant demonstrates that a 'personal' (or 'family') tie exists between himself and his child which should be protected.<sup>193</sup> Whilst such a bond is presumed between a married father and his child, proving a 'family tie' between an unmarried father and their child is more complicated. *Keegan v Ireland* defined these ties as 'de facto "family" ties',<sup>194</sup> the child becoming 'ipso iure part of that "family"'.<sup>195</sup> In order to prove such a 'de facto' family tie, the father must provide evidence for one or both of the following factors: the nature of the relationship between himself and the mother;<sup>196</sup> the father's 'demonstrable interest in and commitment by the natural father to the child both before and after birth'.<sup>197</sup> Both have developed in an ad hoc manner through case law and so relevant precedent will be discussed now.

In regard to the first criterion, *Keegan* suggested that whether a bond exists depends on the extent to which the relationship between the biological parents mirrors the commitments of marriage, the following factors satisfying this threshold: the parents had deliberately conceived a child, intended to get married and had cohabited for two years.<sup>198</sup> This test was developed in *Kroon v the Netherlands* where the Strasbourg Court confirmed that, despite cohabitation proving the ultimate evidence of a qualifying relationship, 'exceptionally, *other factors* may also serve to demonstrate that a relationship has sufficient constancy to create de facto "family ties"'.<sup>199</sup> For example, the fact that *more than one* child had been born to the couple in this case was significant in demonstrating levels of commitment synonymous to marriage between the parents.<sup>200</sup> Unfortunately though, *Kroon* left these 'other factors' ambiguous, thereby allowing subsequent caselaw to develop this further.<sup>201</sup>

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<sup>192</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 78; *Kroon and Others v the Netherlands* (1994) ECHR 35, para 32.

<sup>193</sup> *Konstantin Markin v Russia* (2012) ECHR 514, para 132.

<sup>194</sup> *Keegan v Ireland* (1994) ECHR 18, para 42.

<sup>195</sup> *Ibid*, para 44.

<sup>196</sup> *Ibid*, para 45.

<sup>197</sup> *Nylund v Finland* ECHR 1999-VI 14; Claire Fenton-Glynn, *Children and the European Court of Human Rights* (Oxford University Press 2021) 222-232; Also see Dafni Lima, 'The Concept of Parenthood in the Case Law of the European Court of Human Rights' in Katharina Boele-Woelki and Donald Martiny (eds), *Plurality and Diversity of Family Relations in Europe* (Intersentia 2019).

<sup>198</sup> *Keegan v Ireland* (n 194), para 45.

<sup>199</sup> *Kroon and Others v the Netherlands* (n 192), para 30.

<sup>200</sup> *Ibid*, para 30.

<sup>201</sup> *Ibid*, para 30.

For example, *L v the Netherlands* suggested that a romantic long-term relationship is sufficient, here, three years proving long-term enough.<sup>202</sup> A long-term *friendship* of two years has also been accepted,<sup>203</sup> but a purely *sexual* relationship has not.<sup>204</sup> Accordingly, it appears that an emotional bond, romantic or platonic, is required to exist between the parents, mere physical intimacy not proving enough. However, such a generalisation should be treated tentatively with no such conclusion having been articulated by the Strasbourg Court.

The second factor arose through *Nylund v Finland*: whilst the 'nature of the relationship between the natural parents' is central, the 'demonstrable interest in and commitment by the natural father to the child both before and after birth' must also be evaluated.<sup>205</sup> Again, the specific types of evidence required to show 'interest' and 'commitment' on the part of the father were left vague and so have continually developed through caselaw. Indeed, in *L v the Netherlands*, the Strasbourg Court articulated, perhaps, the only certain fact in this area: 'mere biological kinship, without any further legal or factual elements indicating the existence of a close personal relationship' is not enough to demonstrate a 'family tie'.<sup>206</sup>

However, several predictions based on caselaw can nevertheless be made. Firstly, a low threshold appears to exist, with a combination of arguably limited pieces of evidence proving acceptable. For example, in *L v the Netherlands* the father was deemed to meet this threshold due to having previously been named the child's 'auxiliary guardian',<sup>207</sup> been present at the child's birth<sup>208</sup> and changed the child's nappy and babysat a few times.<sup>209</sup> In *Söderbäck*, merely visiting the child 'a couple of times' and attending their christening was deemed sufficient.<sup>210</sup>

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<sup>202</sup> *L v Netherlands* App no 45582/99 (ECtHR, 1 June 2004), para 38.

<sup>203</sup> *Söderbäck v Sweden* App no 24484/94 (ECtHR, 22 October 1997), para 16.

<sup>204</sup> *Ahrens v Germany* App no. 45071/09 (ECtHR, 22 March 2012).

<sup>205</sup> *L v Netherlands* (n 202), para 14.

<sup>206</sup> *Ibid* para 37.

<sup>207</sup> *Ibid* para 38.

<sup>208</sup> *Ibid* para 39.

<sup>209</sup> *Ibid* para 39.

<sup>210</sup> *Söderbäck v Sweden* (103), para 36.

However, merely presenting evidence of persistent applications to court seeking rights regarding the child is not acceptable. For example, despite making several applications for shared PR, the court rejected the existence of a 'family tie' in *Katsikeros v Greece* because the father had never exercised his contact rights with the child.<sup>211</sup> Similar judgments were arrived at in *Ilya Lyapin v Russia* and *Pavel Shishkov v Russia*: in the former, the father had not had contact with his child for seven years;<sup>212</sup> in the latter, the father's last contact with the daughter was so long ago that she had no memory of him.<sup>213</sup> Despite this, if the father can provide justification for such behaviour the court may overlook such restraint: in *Anayo v Germany* the court recognised that the only reason the applicant had never met his children was because the mother and legal father had refused him access.<sup>214</sup> This was accepted as having been outside of the applicant's control and so his repeated efforts to make contact was deemed sufficient.<sup>215</sup> Indeed, this correlates with judicial comment in *Nylund*: Article 8 does not simply protect 'established' relationships, but also 'potential' relationships.<sup>216</sup>

Lastly, evidence of interest and commitment can be extinguished by criminal behaviour. For example, in *Evers v Germany* suspicions that the father had sexually abused his mentally disabled daughter destroyed any previously existing personal tie.<sup>217</sup> Similarly, in *Paradiso and Campanelli v Italy*, the parents' violation of adoption legislation and charge for 'misrepresentation of civil status' contributed to a finding that no family tie existed.<sup>218</sup> There exist no guidelines concerning which criminal offences may have such an effect and which will not. However, both examples are linked to the raising of the child and so a tentative prediction can be made that offences removed from the care of the child may not impact the case. This will fall upon the discretion of the court and the particulars of the crime.

It is usually a combination of evidence concerning both the nature of the parents' relationship as well as the father's 'interest' and 'commitment' which determines the existence of a 'family

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<sup>211</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 85.

<sup>212</sup> *Ilya Lyapin v Russia* [2020] ECHR 501, para 54.

<sup>213</sup> *Pavel Shishkov v Russia* [2021] ECHR 172, para 91.

<sup>214</sup> *Anayo v Germany* [2010] ECHR 2083, para 60.

<sup>215</sup> *Ibid*, para 62.

<sup>216</sup> *Nylund v Finland* (n 197).

<sup>217</sup> *Evers v Germany* [2020] ECHR 356.

<sup>218</sup> *Paradiso and Campanelli v Italy* [2017] ECHR 96.

tie': strong evidence of the latter may mitigate weak evidence of the former, and vice versa. For example, the Strasbourg Court may have been persuaded to accept the friendship in *Söderbäck* because of evidence of the father's interest and commitment, having visited the child 'a couple of times' and attended the child's christening.<sup>219</sup> Equally, despite the parents' cohabitation and engagement in *Nylund*, the fact that the father had never met his 10-year-old daughter was central to the Strasbourg Court's judgment that no family tie existed.<sup>220</sup>

When neither factor is supported by sufficient evidence, and so a 'family tie' cannot be shown, 'private life' has been described as a 'catchall' which allows some applicants to nevertheless proceed with their claim under article 8.<sup>221</sup> This has been permitted in cases concerning the recognition of paternity<sup>222</sup> as well as the particulars of contact schedules between the father and child, both issues which have been found to engage with important facets of 'private life'.<sup>223</sup> However, despite being branded a 'catchall', the Strasbourg Court has stated that such cases only occur 'exceptionally'.<sup>224</sup> Indeed, whether claims concerning the acquisition of PR could fall under 'private life' is unclear. Whilst *Rasmussen v Denmark* confirmed that a married father's right to *dissolve* PR would be encompassed, the Strasbourg Court has not yet allowed claims concerning its *acquisition*.<sup>225</sup>

Overall, although general predictions concerning evidence for a 'family tie' can be made, these must be treated tentatively: each case ultimately falls upon its own specific facts; none of these predictions have been firmly articulated at the Strasbourg level. Whether a 'family tie' could be found to exist between an unmarried father and his child in an application concerning the compatibility of UK law regarding acquisition of PR with Convention rights in 2024, will be analysed in Chapter Three.

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<sup>219</sup> *Söderbäck v Sweden* (103) para 36.

<sup>220</sup> *Nylund v Finland* (n 197) 14.

<sup>221</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 28; Büchler, 'The Right to Respect for Private and Family Life – The Case Law of the European Court of Human Rights on Parenthood and Family Forms' in A Büchler and H Keller (eds) *Family Forms and Parenthood: Theory and Practice of Article 8 ECHR in Europe* (Intersentia 2016) 30.

<sup>222</sup> *Nylund v Finland* (n 197) 14.

<sup>223</sup> *Katsikeros v Greece* [2022] ECHR 587, para 48.

<sup>224</sup> *Ibid*, para 47.

<sup>225</sup> *Rasmussen v Denmark* [1984] ECHR 17, para 33.

## b) The Existence of a Difference in Treatment

After a 'family tie' has been proven, the applicant must demonstrate the existence of a tangible difference in treatment between the applicant and a comparator who is in a 'similar position'.<sup>226</sup> Firstly, a comparator must be chosen. The comparator does not need to be in an identical position to the applicant, but, *in regard to the specific issue* raised, they must be in similar positions.<sup>227</sup> For example, in regard to conjugal visits, remand prisoners and convicted prisoners have been said to be in similar positions despite differing legal statuses.<sup>228</sup> Following this, a tangible difference in treatment must be identified. This can be based on direct discrimination, indirect discrimination or discrimination by association<sup>229</sup> and must be based upon one of the following characteristics: 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.<sup>230</sup> Marital status is an acceptable characteristic, having been confirmed as encompassed by 'other status' within caselaw.<sup>231</sup>

Whilst finding a difference in treatment linked to one of Article 14's protected characteristics usually proves fairly straightforward, disputes tend to focus upon whether the comparator chosen is in a 'similar position' to the applicant. In the context of unmarried fathers and a claim concerning their acquisition of PR under UK law, the appropriateness of two potential comparators will be discussed.

Firstly, an unmarried father could rely upon comparison with an unmarried mother, claiming discrimination on the basis of sex. Historically, this comparison has been challenged by two views. It could be argued that fathers and mothers are not 'similarly placed' due to evidence of a special biological and psychological bond between mothers and their children. This issue was raised in *Alexandru Enache v Romania*, a case concerning the inability of fathers to apply

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<sup>226</sup> *Zaunegger v Germany* (n 190) para 42; 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n 190) 17.

<sup>227</sup> *Ibid*, 17.

<sup>228</sup> *Varnas v Lithuania* [2013] ECHR 647.

<sup>229</sup> 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n 190) 18.

<sup>230</sup> Art 14 (n 164).

<sup>231</sup> *Şerife Yiğit v Turkey* App no 3976/05 (ECHR 2 November 2010); *Petrov v Bulgaria* [2018] ECHR 533.

for a stay of execution of sentence in order to care for a child aged under one.<sup>232</sup> Specifically, Judge Yudkivska argued that ‘men and women are equal, but they are not the same’ and hence, efforts to achieve gender equality must, at times, treat them differently.<sup>233</sup> Yudkivska supported this argument by citing recent medical evidence concerning the special case of mother-child attachment, demonstrating that the need for a stay of their execution of sentence to care for their baby is a need unique to mothers.<sup>234</sup> However, the majority of the Strasbourg Court judiciary opposed this argument, stating that the aim of the policy was to ensure the child ‘receives the appropriate attention and care during the first year of its life...both the mother and the father can provide this’.<sup>235</sup> Indeed, Judges Pinto De Albuquerque and Bošnjak emphasized that such a judgment aligns with growing European preference towards more equal sharing of child care responsibilities between mothers and fathers, men’s caring role having ‘gained recognition’.<sup>236</sup> The argument based on the mother’s special biological and psychological connection was also conclusively rejected in several other subsequent cases and so is not likely to be successfully raised in 2024.<sup>237</sup>

A different argument was pursued in *Zaunegger v Germany*: the Government argued that mothers and fathers were ‘not totally comparable, given that fatherhood could not be established from the outset if the parents were unmarried’.<sup>238</sup> In other words, whilst legal certainty of parentage was provided for the mother through the act of giving birth, no observable evidence exists for the father’s paternity. As a result, providing automatic PR to unmarried fathers was argued to pose a risk of bestowing PR upon a man who is not, in fact, the child’s biological father. Although providing no explanation why, the court rejected this argument. Perhaps this is due to recent scientific developments: DNA tests can now demonstrate the veracity of one’s paternity, hence providing the necessary legal certainty. Accordingly, this argument is also unlikely to be successful if raised in 2024. Therefore, since neither argument appears to have retained legitimacy, it is likely that unmarried fathers and

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<sup>232</sup> *Alexandru Enache v Romania* [2018] ECHR 825.

<sup>233</sup> *Ibid*, para 14.

<sup>234</sup> *Ibid*, paras 14 and 15.

<sup>235</sup> *Ibid*, para 68.

<sup>236</sup> *Ibid*, para 16.

<sup>237</sup> *Konstantin Markin v Russia* (n 193) para 132; *Petrovic v Austria* [1996] ECHR 21, para 36; *Weller v Hungary* [2009] ECHR 530, para 33.

<sup>238</sup> *Zaunegger v Germany* (n 190), para 31.



unmarried mothers would be found to be ‘similarly placed’ in regard to issues concerning the acquisition of PR in a case arising in 2024.

Alternatively, an unmarried father could rely upon comparison with a divorced or married father. The Strasbourg Court has consistently accepted comparisons between unmarried fathers and divorced or married fathers on the basis of ‘other status’, specifically, its inclusion of marital status.<sup>239</sup> For example, *Sahin v Germany* concerned legislation which only permitted courts the ability to award PR to unmarried fathers if it was deemed ‘in the best interests’ of the child, of which a relationship with the unmarried father was not presumed to be.<sup>240</sup> Here, comparison to divorced fathers, who were able to retain their automatically acquired PR with no need to prove merit, and married fathers, who acquire PR automatically, was authorised. Hence, clear precedent exists to demonstrate that, in the context of acquisition of PR, comparison to a divorced or married father is acceptable. Which comparator would be most recommendable for an unmarried father to use in a case concerning the compatibility of UK law concerning acquisition of PR with the Convention, will be analysed in Chapter Three.

### **c) The Presence of a Legitimate Aim**

At this stage of the Strasbourg Court’s assessment the burden of proof is shifted to the Government<sup>241</sup> to demonstrate that an objective and reasonable justification exists.<sup>242</sup> Some justifications have been found to be unreasonable in any circumstance. For example, ‘references to traditional, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on the grounds of sex’.<sup>243</sup> Justifications based on maintaining a difference between legitimate and illegitimate children has also now become obsolete, the court noting as early as 1979 that such a justification

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<sup>239</sup> *Ibid*, para 48.

<sup>240</sup> *Sahin v Germany* [2003] ECHR 340, para 55.

<sup>241</sup> ‘Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention’ (n 190) 78.

<sup>242</sup> *Alexandru Enache v Romania* (n 232), para 70.

<sup>243</sup> ‘Guide on Article 8 of the European Convention on Human Rights’ (n 188) 20.

would soon become socially unacceptable.<sup>244</sup> Indeed, by 2006, the Council of Europe had stated that ‘any legal solution which distinguishes between children born in and out wedlock would be contrary to numerous international instruments as well as the case law of the European Court of Human Rights’.<sup>245</sup> Nevertheless, three justifications relevant to claims concerning unmarried fathers and their acquisition of PR exist and will now be assessed.

### **Protection from ‘Unmeritorious’ Fathers**

In 1979 and 1982 the Law Commission of England and Wales published reports concerning the denial of automatic acquisition of PR to unmarried fathers in the UK.<sup>246</sup> As discussed previously, both presented unmarried fathers as a group which displayed a broad diversity of motivations towards parenthood, some being ‘meritorious’ in their intentions and character and others, ‘unmeritorious’. This was argued to justify this group’s denial of automatic PR, the UK Government feeling that this would most effectively protect unmarried women and their children.<sup>247</sup>

This justification was repeated in the case of *McMichael*, with the Strasbourg Court accepting that a range of motivations did indeed exist between unmarried fathers: ‘the nature of the relationships of natural fathers with their children will inevitably vary, from ignorance and indifference at one end of the spectrum to a close stable relationship’ on the other.<sup>248</sup> In their judgment the Strasbourg Court articulated that their reasoning for finding no violation was based on the argument that the aim of UK legislation was to ‘provide a mechanism for identifying “meritorious” fathers who might be accorded parental rights, thereby protecting the interests of the child and the mother’.<sup>249</sup>

Branchflower has made a particularly damning critique of this decision. He firstly argues that the justification permitted in this case was flawed since it failed to address why only

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<sup>244</sup> *Marckx v Belgium* [1979] ECHR 2, para 41.

<sup>245</sup> Committee of Experts on Family Law, *Report on Principles Concerning the Establishment and Legal Consequences of Parentage – “The White Paper”* (Report CJ-FA (2006) 4e, 23 October 2006), principle 25.

<sup>246</sup> *Working Paper No 74: Illegitimacy* (n 23); *Family Law: Illegitimacy Final Report* (n 10).

<sup>247</sup> *Working Paper No 74: Illegitimacy* (n 23) paras 3.12-3.13.

<sup>248</sup> *McMichael* (n 29), para 98.

<sup>249</sup> *Ibid.*

unmarried fathers should be denied automatic PR when married fathers, and indeed mothers, can be 'unmeritorious' too.<sup>250</sup> In fact, Branchflower points to confusion in this judgment as to what exactly the legitimate *aim* is as opposed to the *employed means*. Taking the latter quotation from the Strasbourg Court judgment in *McMichael*,<sup>251</sup> if the aim was truly to identify *meritorious* fathers then Branchflower questions the characterisation of this aim as 'legitimate' since it suggests that legal rights should only be available to those who deserve them. Equally, if the identification of 'meritorious' fathers is the *employed means* for the aim of protecting mothers and children, then this conclusion is curious since there is 'simply no link' between the two.

Nevertheless, this justification was subsequently developed through caselaw, 'unmeritorious' fathers soon being explicitly stated to include fathers who may exercise PR in a manner harmful to the child, not merely those who display 'ignorance' or 'indifference'.<sup>252</sup> For example, in *Keegan* the Government emphasized that the 'quality of welfare' of the child, should they have a relationship with their father, should be assessed before PR is awarded.<sup>253</sup> This legitimate aim was again successfully raised by the UK in *B v UK*.<sup>254</sup>

However, interestingly, these cases appear to conflict with the earlier judgment of *Marckx v Belgium*, a case concerning unmarried *mothers'* acquisition of PR.<sup>255</sup> Instead of acquiring PR automatically, unmarried mothers had to formally recognise and adopt their child.<sup>256</sup> The Government attempted to justify the law by arguing that they must protect children from unmarried mothers who do not intend to care for their child, citing statistics which claimed that 25% of unmarried mothers do not recognise their child.<sup>257</sup> However, the Strasbourg Court did not accept that the attitudes of '*some* unmarried mothers' could justify a blanket denial of automatic PR to *all* unmarried mothers<sup>258</sup> since 'such an attitude is not a general feature

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<sup>250</sup> Branchflower G, 'Parental Responsibility and Human Rights' [1999] Fam Law 34.

<sup>251</sup> *McMichael* (n 29), para 98.

<sup>252</sup> Branchflower (n250).

<sup>253</sup> *Keegan v Ireland* (n 194), para 12.

<sup>254</sup> *B v the United Kingdom* (n 50), paras 4-5.

<sup>255</sup> *Marckx v Belgium* (n 244).

<sup>256</sup> *Ibid*, para 14.

<sup>257</sup> *Ibid*.

<sup>258</sup> *Ibid*, para 39.

of the relationship between unmarried mothers and their children'.<sup>259</sup> Additionally, the court refused to accept that the likelihood of a mother being willing to care for her child was linked in any way to marital status: 'a *married* mother might not wish to bring up her child'.<sup>260</sup> Considering this judgment, it is perhaps surprising that the Strasbourg Court subsequently accepted an identical justification in regard to unmarried *fathers* in *McMichael*. It is for this reason that Branchflower has argued that the judgment in *McMichael* was a result of 'confused thinking', being completely 'at odds' with the *Marckx* case.<sup>261</sup>

Regardless of whether *McMichael* was indeed judged appropriately, post the 2000 case of *B v UK*<sup>262</sup>, the acceptance of this justification has proven highly inconsistent, indications suggesting that it is losing favour. It was rejected in *Sahin*, the court stating that it was simply untrue that unmarried fathers are particularly likely to 'lack interest in contact with their children and...leave a non-marital relationship at any time'.<sup>263</sup> But a few years later the justification was accepted in *Zaunegger*, though with the concession that not *all* unmarried fathers have a dysfunctional relationship with their children.<sup>264</sup> Since 2009 the justification has not been raised.

Disapproval for this justification has also been expressed by European institutions. For example, in 2015 the Council of Europe Parliamentary Assembly raised concerns that blanket generalisations distract domestic authorities from paying 'sufficient attention to the position of fathers vis-à-vis their children', wrongly judging applicants by reference to inaccurate stereotypes rather than genuinely assessing the individual's merit.<sup>265</sup> Furthermore, Margaria presents evidence that the Strasbourg Court has now developed an 'anti-stereotyping approach' under Article 14 which includes avoiding stereotyping unmarried fathers as generally 'irresponsible and uninterested' in their children.<sup>266</sup>

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<sup>259</sup> Ibid.

<sup>260</sup> Ibid.

<sup>261</sup> Branchflower (n250).

<sup>262</sup> *B v the United Kingdom* (n 50).

<sup>263</sup> *Sahin v Germany* (n 240), para 58.

<sup>264</sup> *Zaunegger* (n 180), para 56.

<sup>265</sup> Council of Europe Parliamentary Assembly, Report on *Equality and shared parental responsibility: the role of fathers* (Doc. 13870, 14 September 2015), 5.

<sup>266</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) pp 35 and 39.

For these reasons, whether or not *McMichael* and *B v UK* were judged appropriately, it appears unlikely that this justification would be successful in 2024: it has not been raised by respondents in Strasbourg litigation since 2009 and appears at odds with modern views emerging from prominent European institutions.

### **Legal Certainty**

Legal certainty has also been cited as a justification for awarding unmarried fathers lesser rights in regard to PR: whilst the mother's parentage is treated as an observable act through childbirth, paternity cannot be observed. In *Zaunegger* the German Government argued that, since paternity is ambiguous, awarding unmarried fathers automatic PR would risk bestowing PR upon a man who is not the biological father.<sup>267</sup> The court agreed, arguing that the best interests of the child are best protected by simply awarding PR to unmarried mothers, avoiding disputes between potential fathers as well as between mothers and fathers over custody.<sup>268</sup>

Interestingly, this justification has been undermined by modern scientific developments. DNA testing now means that paternity can be established with near certainty. In 2010, the European Parliament stated that 'the importance of presumption is decreasing due to...increased access to DNA testing for the establishment of the biological truth in fatherhood'.<sup>269</sup> Margaria also agreed with this statement, noting that there is an 'increasingly widespread resort to DNA testing'.<sup>270</sup> Accordingly, it could be argued that there is no longer an issue with legal certainty and that where disputes arise, a test can be taken.

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<sup>267</sup> *Zaunegger v Germany* (n 190), para 29.

<sup>268</sup> *Ibid*, para 52.

<sup>269</sup> European Parliament Directorate-General for Internal Policies, *Recognition of parental responsibility: biological parenthood v. legal parenthood, i.e. mutual recognition of surrogacy agreements: What is the current situation in the MS? Need for EU Action?* (Policy Department C: Citizens' Rights and Constitutional Affairs, PE 432.738, 2012), para 3.2.

<sup>270</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) pp 5 and 11.

However, DNA testing is not always straight-forward. In 2005, Sheldon stated that, even with the existence of DNA tests establishing fatherhood can be ‘complex’, throwing up ‘novel’ problems.<sup>271</sup> If the test is requested by a court, it is often required to be completed in a specific manner: healthcare professionals must take the samples and it must be processed by a specific named company. A test taken in any other way would not prove valid in court. However, since Sheldon’s comments in 2005, the system for DNA testing has strengthened, becoming more efficient and is easier to navigate.<sup>272</sup> Indeed, an estimate of 30 days is provided by CAFCASS for the time between the ordering of the test and the results being released.<sup>273</sup>

Nevertheless, the main issue is that, per the Human Tissue Act 2004, consent is required from all parties providing samples for the test.<sup>274</sup> As well as the possibility that the father refuses consent, issues may arise in regard to the child. For children under the age of 16, it is those with PR who can give consent to their samples being tested.<sup>275</sup> A mother who does not wish for the involvement of the biological father may, therefore, refuse consent to their child’s sample being taken for a test. However, in this event the court can order a test nevertheless provided they demonstrate that this would be in the child’s best interests.<sup>276</sup> On balance, despite potential issues over consent and procedure, it is likely that DNA testing would be able to resolve disputes and restore legal certainty where parentage is unclear.

Modern *medical* advances may also undermine this justification. Data released by the Child and Family Court Advisory and Support Service (CAFCASS) has demonstrated a 350% increase in international and UK-based surrogacy in the last twelve years.<sup>277</sup> This means that there is

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<sup>271</sup> Sally Sheldon, ‘Fragmented Fatherhood: The Regulation of Reproductive Technologies’ (2005) 68(4) *The Modern Law Review* 523, 550.

<sup>272</sup> Michael Greenwood, ‘The Future of Forensic DNA Analysis’ (*AZO Life Sciences*, 2022) <https://www.azolifesciences.com/article/The-Future-of-Forensic-DNA-Analysis.aspx#:~:text=Forensic%20DNA%20analysis%20has%20improved,huge%20backlog%20of%20forensic%20evidence>.

<sup>273</sup> ‘DNA testing’ (*Cafcass*) <https://www.cafcass.gov.uk/parent-carer-or-family-member/applications-child-arrangements-order/other-support-services-cafcass-delivers-behalf-ministry-justice/dna-testing#:~:text=After%20the%20sample%20is%20taken,the%20report%20to%20be%20delivered>.

<sup>274</sup> Human Tissue Act 2004 s 3.

<sup>275</sup> *Ibid* s 2(3).

<sup>276</sup> Family Law Reform Act 1969 s 21(3)(b).

<sup>277</sup> ‘New data from English family court shows 350% growth in UK and international surrogacy over the last 12 years’ (*Brilliantbeginnings*) <https://brilliantbeginnings.co.uk/new-data-family-court-350-percent-growth>

an exponentially rising number of women who are now giving birth to children who are not their biological kin. This undermines justification for the denial of PR to unmarried fathers based on legal certainty since there is no longer legal certainty in regard to maternity either. If this justification was truly relied upon, automatic PR should theoretically be removed from mothers too. Accordingly, justification based on legal certainty does not appear to fit with modern scientific and medical advances and so is, perhaps, unlikely to be successfully raised in 2024.

### **Recognising the Relative Importance of Motherhood and Fatherhood**

Lastly, the idea that mothers have a special role and bond with their child may be used to justify their comparatively stronger rights compared to fathers. For example, in *Alexandru Enache v Romania*, the Strasbourg Court judged that the existence of a 'special bond' between mothers and their new-born babies justifies mothers' unique ability to apply for a stay of execution of sentence to care for a child under the age of one.<sup>278</sup> In support of this argument, several European and International instruments which emphasize the need to protect women's roles during pregnancy and motherhood were raised.<sup>279</sup> Most notably, the court referred to Article 4 (2) of the United Nations Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) which directed that measures which protect maternity 'shall not be considered discriminatory'.<sup>280</sup> By placing the ability to apply for a stay of execution of sentence within this category, the Strasbourg Court concluded that no discrimination had been committed when comparing to the position of fathers.

Interestingly, this justification has not been consistently accepted. For example, it was rejected in *Konstantin Markin v Russia* where the Russian Government tried to argue that mothers should be entitled to longer periods of parental leave than fathers within the military

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[surrogacy/](#); see also Sarah Williams, 'The legal status of surrogacy in Europe' [2022] International Family Law 57.

<sup>278</sup> *Alexandru Enache v Romania* (n 232), para 71.

<sup>279</sup> *Ibid.*

<sup>280</sup> *Ibid.*, para 77.

because of their special biological and psychological bonds with their children.<sup>281</sup> The court stated that such a policy did not correlate with modern societal views: there has been a ‘gradual evolution of society towards a more equal sharing’ of child-care responsibilities between mothers and fathers.<sup>282</sup> Furthermore, the Strasbourg Court judged that the relevant policy could not be justified by reference to ‘positive discrimination’ since longer entitlements to parental leave would not ‘correct the disadvantaged position of women in society’, but instead is likely to perpetuate gender stereotypes<sup>283</sup> such that women should be the child-carers and men, the breadwinners.<sup>284</sup> Justification based on the relative importance of motherhood and fatherhood was again rejected in the 2022 case of *Paparrigopoulos v Greece*.<sup>285</sup> However, whilst rejecting it, the court simultaneously admitted that the justification may be successful in other cases, albeit the types of cases the court was referring to was left ambiguous.<sup>286</sup>

Explanation for the firm acceptance of this justification in *Alexandru Enache*, compared to the latter cases, may lie in the fact that it occurred within the context of criminal law, an area in which states have a wider margin of appreciation to derogate from convention rights.<sup>287</sup> Indeed, at paragraph 67, this case’s judgment reads:

‘The Court cannot ignore the Government’s submission that a difference has to be drawn between the present case and cases concerning parental leave owing to the criminal nature of the measure in issue here and the margin of appreciation enjoyed by the State in implementing its criminal-law policies’.<sup>288</sup>

Furthermore, it is important to note that the court was not unanimous in this case. In particular, dissenting Judges Pinto De Albuquerque and Bošnjak emphasized that gender equality was a ‘major goal’ of the Council of Europe<sup>289</sup> and that allowing fathers equal rights

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<sup>281</sup> *Konstantin Markin v Russia* (n 193), para 132.

<sup>282</sup> *Ibid*, para 139.

<sup>283</sup> *Ibid*, para 141.

<sup>284</sup> *Ibid*, para 143.

<sup>285</sup> *Paparrigopoulos v Greece* [2022] ECHR 538, para 39.

<sup>286</sup> *Ibid*, para 40.

<sup>287</sup> *Alexandru Enache v Romania* (n 232), para 72.

<sup>288</sup> *Ibid*, para 67.

<sup>289</sup> *Ibid*, 16.



to apply for stays of execution of sentence would 'ensure both men and women are seen as primary caregivers and that fathers are equally important in the lives of their children'.<sup>290</sup> This, in their opinion, would be more in keeping with modern societal views. As such, the overall trend in precedent is that this justification is unlikely to be successful if raised in 2024.

Although this section has predicted that none of the aforementioned justifications are likely to be successful in present-day litigation, this will depend upon the specific discretionary area of judgment, or margin of appreciation, employed in by domestic courts and the Strasbourg Court respectively, in different contexts. Chapter Three will consider these justifications in the specific context of an application concerning the compatibility of UK law regarding acquisition of PR with Articles 8 and 14 of the Convention.

#### **d) Proportionality**

The final issue is whether the measures taken by the state are proportionate to the cited legitimate aim: 'the Court requires a reasonable relationship of proportionality between the means employed and the aim sought to be realised'.<sup>291</sup> Firstly, this entails an assessment of whether the employed means do indeed *meet* the legitimate aim. Secondly, whether the means reasonably balance the rights and freedoms of the community as a whole with those of the individual,<sup>292</sup> in this case, the rights of the unmarried father, must be assessed.

There is little elaboration within the Strasbourg caselaw as to what this balance would look like, however Nilsson suggests that the following considerations will be analysed by the judiciary: the effects of the policy, the basis of the discrimination and the social position of the group impacted.<sup>293</sup> An investigation of the effects of the policy equates to considering how serious the interference is. If the policy is strict and rigid, with few exceptions to its operation, this will be a more severe interference and so stronger justification would be

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<sup>290</sup> Ibid, para 5.

<sup>291</sup> 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n 190) 20.

<sup>292</sup> *Belgian Linguistic case (No. 2)* [1968] 1 EHRR 252, para 10.

<sup>293</sup> Anna Nilsson, 'Same, Same but Different: Proportionality Assessments and Equality Norms' (2020) 7(3) Oslo Law Review 126, 130.

needed. Such an assessment would also involve considering whether less restrictive means could be implemented to reach the same aim.<sup>294</sup> In regard to the basis of the discrimination, Nilsson's second factor,<sup>295</sup> the Strasbourg Court has accepted interferences with 'suspect' grounds under Article 14, such as sex, require weightier justification.<sup>296</sup> Furthermore, reasoning based on negative perceptions towards social groups, or traditional social roles, cannot be relied on to justify differences in treatment.<sup>297</sup> Lastly, the social position of the group should be considered, the court having found that certain minority groups need to be protected more heavily. Whilst unmarried fathers have not generally been found to fall within such a category, states should avoid basing policies on stereotypical beliefs about any social groups since this could enhance public prejudice and perpetuate social exclusion.<sup>298</sup>

Whilst the bulk of judicial consideration would focus on the above concerns, three other issues which are particularly relevant to assessing proportionality within the context of PR for unmarried fathers will now be outlined: the importance of proving social fatherhood; the interests of mothers and children; the necessity of appropriate safeguards. In regard to the former, a 'father' can generally be defined in three ways: the *biological* father, genetically related to the child; the *social* father who actively cares for the child; and the *legal* father who is legally registered as holding PR. In issues concerning unmarried fathers' acquisition of PR, the father will always be the biological, but not the legal, father. Take, for example, the birth of a child whose biological father is not married to their biological mother, the mother instead being married to a different man. Under UK law, somewhat counter-intuitively, the husband of the mother in this scenario would be the automatic *legal* father of the child from birth, a principle described as the marital presumption of paternity; the *biological* father would have no such rights unless they subsequently acquire them.<sup>299</sup> Should this *biological* father complain to the Strasbourg Court that this preferential treatment towards the mother's husband is a violation of their Convention rights the court will, in determining whether this decision was reasonable, consider who the *social* father of the child is. That is, who is actively

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<sup>294</sup> Ibid.

<sup>295</sup> Ibid.

<sup>296</sup> Ibid.

<sup>297</sup> *Konstantin Markin v Russia* (n 193) para 143.

<sup>298</sup> Nilsson (n 293) 131.

<sup>299</sup> Children Act s 2(1), 2(2); also see D Lima, 'Legal Parenthood in surrogacy: shifting the focus to the surrogate's negative intention' [2024] *Journal of Social Welfare and Family Law* pp 13-14.

caring for the child. Essentially, a legal restriction upon an unmarried father's acquisition of PR is less likely to be found to be 'proportionate' if the applicant takes on social fatherhood as well as biological.

For example, in *Kroon*<sup>300</sup> the biological and social father was unable to acquire PR because the legal father (the mother's husband) must first relinquish his PR for this to be possible. However, the legal father could not be located or contacted. After weighing the importance of biological, social and legal fatherhood, the Strasbourg Court held that it was disproportionate for a legal presumption to trump the ability of a biological and social father to acquire PR. Specifically it was stated that, "'respect" for "family life" requires that *biological* and *social* reality prevail over a legal presumption which, as in the present case, flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone'.<sup>301</sup> In fact, even the mere *intention* to act as social father can be a convincing factor when assessing proportionality. For example, in *Görgülü* the applicant claimed that his denial of custody and contact rights, in relation to his biological child who had been adopted, was a violation of Article 8.<sup>302</sup> Crucially, the court found that, although the child had developed emotional and psychological bonds with their foster family,<sup>303</sup> the applicant's genuine desire to care for the child contributed to a finding that German law was disproportionate.

The court will, however, weigh the potential of the applicant as a social father against the level of care provided by the current legal father, if one exists. This was the case in *Söderbäck*, the court finding the inability of the biological father to challenge his child's adoption to be proportionate since the child's adoptive father was also taking on the role of social father.<sup>304</sup> Margaria, when summarising the Strasbourg position, stated that, 'When faced with two conflicting father figures, the rule followed by the Court seems to be that, if there is a more caring father, his claim should prevail over that of the biological father'.<sup>305</sup>

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<sup>300</sup> *Kroon and Others v the Netherlands* (n 192).

<sup>301</sup> *Ibid*, para 40.

<sup>302</sup> *Görgülü v Germany* App no. 74969/01 (ECtHR, 20 March 2003).

<sup>303</sup> *Ibid*, para 46.

<sup>304</sup> *Söderbäck v Sweden* (103).

<sup>305</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 107.

Such decisions can become more complex when a child has three different ‘fathers’: biological, legal, and social. Take, for example, C (a child) who is the biological child of BF (biological father) and M (mother). However, when C is born, M is married to LF (legal father), a different man to BF. M and LF later divorce and M begins to cohabit with SF (social father) who takes on an active role caring for C. In this scenario, should BF complain to the Strasbourg Court, the characteristics, and actions of all three fathers are likely to be considered.

Overall, precedent and societal opinion appears to suggest that a judgment of disproportionality is more likely to be found where the applicant either: is the social father of the child, is a better candidate for this role than the current legal or social father, or is motivated to be the social father should he acquire PR. The second factor which may impact the judiciary’s judgement of proportionality in cases concerning PR is the interests and wishes of other relevant parties.

The mother’s attitude towards the applicant’s claim may be considered. For example, the father’s success in demonstrating disproportionality in *Kroon* was somewhat aided by the fact that the mother supported his wishes.<sup>306</sup> Equally, domestic law was judged proportionate in *Nylund* where the mother denied the applicant’s paternity and opposed proceedings.<sup>307</sup> Despite this, the mother’s wishes appear to be becoming less important. For example, in *Paparrigopoulos* the court stated that there is ‘no reasonable relationship of proportionality between the refusal [of the mother] and the protection of the best interests of the child’.<sup>308</sup> In other words, the Strasbourg Court is starting to recognise that mothers do not always make decisions in the best interests of their child. This was supported by the Council of Europe Parliamentary Assembly in 2015 that argued a separation between parent and child should ‘only be ordered by a court’.<sup>309</sup> Hence, whilst the mother’s support or opposition of an applicant may affect the latter’s ability to persuade the court of their merit, if the mother’s opinion is unsubstantiated this is likely to be treated cautiously by the Strasbourg Court.

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<sup>306</sup> *Kroon and Others v the Netherlands* (n 192).

<sup>307</sup> *Nylund v Finland* (n 197) 15.

<sup>308</sup> ‘Guide on Article 8 of the European Convention on Human Rights’ (n 188) 21 (*insertion added*); See also *Paparrigopoulos v Greece* (n 285), paras 35-43.

<sup>309</sup> Council of Europe Parliamentary Assembly (n 265), [3] of the draft resolution.

The interests of the child are also important. In 2006, the Council of Europe equated the best interests of the child with having parents who jointly exercised PR.<sup>310</sup> This was supported by a 2015 Committee Opinion. Mr Schennach stated that, ‘children who have lived in such arrangements [where both parents jointly exercise PR] do, on average, as well or marginally better than children of other divorced couples’.<sup>311</sup> Hence, should the applicant’s child only have one parent, the court may be more likely to judge domestic law preventing the applicant’s acquisition of PR, as disproportionate. However, where the child already has two parents who jointly exercise PR, the court is likely to weigh the respective fathers against each other, judging whose care would be most beneficial to the child. For example, a judgment of disproportionality was found in *Kroon* since the applicant was already acting as the child’s social father, her legal father having disappeared.<sup>312</sup>

The specific weight placed upon the child’s interests will vary between UK courts and the Strasbourg Court though. In the UK, the child’s interests are described as the paramount consideration and have the ability to override the wishes of the parents.<sup>313</sup> In contrast, the best interests of the child in Strasbourg jurisprudence are described as a ‘crucial’ concern, which has not been interpreted to equate to the UK’s conception of ‘paramountcy’.<sup>314</sup> In fact, in *Elsholz* it is described thus: ‘a *fair balance* must be struck between the interests of the child and those of the parent’.<sup>315</sup> Hence, the impact of these varying standards must be considered when predicting the likely outcome of applications in UK courts as opposed to the Strasbourg Court.

Lastly, an assessment of proportionality will consider the presence, or lack thereof, of safeguards which aim to mitigate the impact of a measure that exclusively affects a group of people.<sup>316</sup> This is particularly important within the context of PR since the Strasbourg Court

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<sup>310</sup> Committee of Experts on Family Law (n 245), principle 19(1).

<sup>311</sup> Council of Europe Committee Opinion, Report on *Equality and shared parental responsibility: the role of fathers* (Doc. 13896, 30 September 2015) 15, (*insertion added*).

<sup>312</sup> *Kroon and Others v the Netherlands* (n 192).

<sup>313</sup> ‘Guide on Article 8 of the European Convention on Human Rights’ (n 188) 82.

<sup>314</sup> Harris-Short (183) 343; See also Shazia Choudhry and Helen Fenwick, ‘Taking the Rights of Parents and Children Seriously: Confronting the Welfare Principle under the Human Rights Act’ (2005) 25(3) *Oxford Journal of Legal Studies* 453.

<sup>315</sup> *Elsholz v Germany* [2000] ECHR 371, para 50.

<sup>316</sup> ‘Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention’ (n 190) pp 19-20.

has stated that 'stricter scrutiny' must be exercised when assessing safeguards concerning policies which may effectively curtail relationships between parents and children.<sup>317</sup>

*Sommerfeld* is an example of a case where safeguards were deemed insufficient.<sup>318</sup> This case concerned German law which made it a requirement to have the mother's consent in order for an unmarried father to acquire PR. Lack of consent could be judicially overridden but only if it was in the best interests of the child, with the starting assumption that 'contact between a child and the natural father prima facie' was 'not regarded... as in the child's interest'.<sup>319</sup> The fact that this assumption put the unmarried father at a disadvantage compared to divorced fathers, as well as their inability to appeal regional decisions,<sup>320</sup> led to a judgment that the law was disproportionate.<sup>321</sup> Several cases have also found the requirement for the mother's consent in order to acquire PR, without any right of appeal, to be disproportionate.<sup>322</sup> For example, in *Zaunegger*, the court argued that there was a significant lack of safeguards considering the inability to appeal the mother's refusal to give consent:<sup>323</sup> even if the mother's refusal was 'completely arbitrary', 'the father had no chance to have that declaration replaced by a court order'.<sup>324</sup>

Crucially, in regard to the UK, the Strasbourg Court has already judged the UK framework concerning acquisition of PR vis à vis unmarried fathers to respect proportionality since it allowed acquisition through *four* methods:<sup>325</sup> marriage to the mother,<sup>326</sup> consent of the mother,<sup>327</sup> being appointed guardian<sup>328</sup> and judicial decision.<sup>329</sup> The fact that unmarried fathers had *several* means through which to acquire PR was key. Regardless, it must be noted that this case occurred in 1995; whether this framework would still be considered

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<sup>317</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 79.

<sup>318</sup> *Sommerfeld v Germany* [2003] ECHR 341, para 77.

<sup>319</sup> *Ibid*.

<sup>320</sup> *Ibid*, para 96.

<sup>321</sup> *Ibid*, paras 91 and 94.

<sup>322</sup> *Anayo v Germany* (n 214); *Zaunegger v Germany* (n 190); *Sahin v Germany* (n 240); *Paparrigopoulos v Greece* (n 285).

<sup>323</sup> *Zaunegger v Germany* (n 190), para 58.

<sup>324</sup> *Ibid*, para 33.

<sup>325</sup> *McMichael* (n 29), para 98.

<sup>326</sup> CA 1998 s 2(1).

<sup>327</sup> *Ibid* s 4(1)(b).

<sup>328</sup> *Ibid* s 5.

<sup>329</sup> *Ibid* s 4(1)(a).

proportionate in 2024 will depend upon how these methods have developed since *McMichael* and in reference to the scope of the margin of appreciation today.

### e) Possible Outcomes

Should an incompatibility be found in domestic courts after assessing the latter four stages, the judiciary may respond in one of two ways. The court may use section 3 of the HRA to reinterpret legislation compatibly.<sup>330</sup> Specifically, section 3 states that, 'So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention right'.<sup>331</sup> However, the extent to which the judiciary can reinterpret legislation without infringing upon parliamentary sovereignty is ambiguous, precedent demonstrating a tension between the latter and the judiciary discharging their role. Despite this, some predictions can be made.

*Ghaidan v Godin-Mendoza* demonstrated that the addition of words into legislation can be acceptable: the Court of Appeal read the words 'as if they were... his or her wife or husband' so as to eliminate discrimination against same-sex couples in the Rent Act 1977.<sup>332</sup> Lord Nicholls confirmed that, as well as reading in entirely new words to legislation, the existing words of legislation can be interpreted 'expansively' in order to ensure compatibility with the Convention.<sup>333</sup> The threshold beyond which judicial liberty becomes unacceptable is where the fundamental meaning of the legislation is compromised, parliamentary sovereignty being respected above all.

Indeed, Convention compatibility would only have been possible by breaching this threshold in *Bellinger v Bellinger*.<sup>334</sup> This case centred on the ability to render a marriage void where 'parties are not respectively male and female'.<sup>335</sup> As a post-operative transsexual, under the Matrimonial Causes Act, Mrs Bellinger's marriage was technically void. The court refused to use section 3 to interpret 'female' in the legislation as including post-operative transsexuals,

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<sup>330</sup> Bonner, Fenwick and Harris-Short (n 187) 553.

<sup>331</sup> HRA 1998 s 3.

<sup>332</sup> *Ghaidan v Godin-Mendoza* (n 189).

<sup>333</sup> Ibid [31]-[34].

<sup>334</sup> *Bellinger v Bellinger* (184).

<sup>335</sup> Matrimonial Causes Act 1973 s 11.

arguing that this was too far removed from Parliament's original intention and so would distort the fundamental meaning of legislation. Furthermore, Parliament was already in the process of introducing legislation to correct this incompatibility, therefore, perhaps, the judiciary were more open to respecting parliamentary sovereignty.

Finally, Fenwick argues that the subject area of the legislation can also impact how radically section 3 is used.<sup>336</sup> Issues such as the collection of criminal evidence are likely to be subject to more expansive use of section 3 since this issue is viewed as within their constitutional domain. Social policy or resource allocation, on the other hand, are generally viewed as within Parliament's expertise, so encouraging a more cautious judicial response.

If section 3 would not be appropriate, the court may make a declaration of incompatibility (DOI) under section 4 of the HRA.<sup>337</sup> Bonner, Fenwick and Harris-Short have described DOIs as a 'last resort to be avoided unless plainly impossible to do so'.<sup>338</sup> This is for many reasons, primarily because it represents a clear clash between the executive and the judiciary. Before legislation is introduced into the Houses of Parliament for a second reading, the minister responsible for the bill must attach a statement as to the legislation's compatibility with the Convention.<sup>339</sup> By making a DOI, the judiciary would be opposing the executive's opinion in this regard. Although being a useful check on the executive's power, the judiciary will prefer to utilise section 3 since this better fits into their traditional role as interpreters of law rather than law-makers.<sup>340</sup>

DOIs also tend to be viewed undesirably because such a declaration will not invalidate primary legislation, but merely informs Parliament that reform is necessary. The Government is not legally obliged to remedy the conflicted legislation and, even if they do propose remedial measures, Parliament is not bound to accept them.<sup>341</sup> In fact, in a Government Report

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<sup>336</sup> Fenwick (n 181) 154.

<sup>337</sup> HRA 1998 s 4; Foster (n 180) 49; Dennett (n 174) pp 420-423.

<sup>338</sup> Bonner, Fenwick and Harris-Short (n 187) 554.

<sup>339</sup> HRA 1998 s 19.

<sup>340</sup> Bonner, Fenwick and Harris-Short (n 187) 555.

<sup>341</sup> 'Responding to human rights judgments' Report to the Joint Committee on Human Rights on the Government's response to human rights judgments 2021–2022 (*Ministry of Justice*, December 2022) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1121553/responding-human-rights-judgments-2022-print.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1121553/responding-human-rights-judgments-2022-print.pdf) 5.



published in July 2022, it was recorded that there had been 46 DOIs to date, only 25 leading to remedial measures, remedial orders or changes in legislation.<sup>342</sup> Therefore, although the judiciary are able to make DOIs, use of section 3 is likely to be their preference.

On the other hand, should a case be unsuccessful in domestic courts, the applicant has two options. Firstly, if the applicant feels that the judgment was unreasonable due to irrationality, illegality or procedural unfairness they may apply for judicial review of the decision.<sup>343</sup> This will not scrutinize the substance of the decision, but the procedural fairness of the decision-making process. Since this thesis focuses on the *substance* of a claim concerning acquisition of PR vis à vis unmarried fathers, judicial review is beyond this thesis' ambit and will not be considered in any further detail. The alternative option is to submit an application to the Strasbourg Court, the procedure and legal requirements of which will be set out now.

### 2.3 The Strasbourg Court

Should an unmarried father fail to demonstrate a violation in domestic courts, and they have exhausted *all* domestic remedies,<sup>344</sup> they can make an application to the Strasbourg Court under Article 34 of the Convention. In order to be found admissible the same matter must not have already been examined by the Strasbourg Court or another international body,<sup>345</sup> must be made within 6 months of the final national decision<sup>346</sup> and must not abuse the right of complaint. The latter requires that the application is genuine,<sup>347</sup> is compatible with the Convention (for example, it must concern a contracting state),<sup>348</sup> is not manifestly ill-founded (such as there is no obvious violation)<sup>349</sup> and the applicant must have suffered a 'significant disadvantage'.<sup>350</sup>

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<sup>342</sup> Ibid 43.

<sup>343</sup> Andrew Le Sueur, Maurice Sunkin, and Jo Eric Khushal Murkens, *Public Law: Text, Cases, and Materials* (5th edn, Oxford University Press 2023) 500.

<sup>344</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 35, s 35(1).

<sup>345</sup> Ibid 35(2)(b).

<sup>346</sup> Ibid 35(1).

<sup>347</sup> Fenwick (n 181) 36.

<sup>348</sup> Ibid pp 36-37.

<sup>349</sup> Art 35(3)(a) (n328).

<sup>350</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Protocol 14; Fenwick (n 181) pp 38-39.

Once admissibility has been surpassed, a friendly settlement between the parties can be arrived at under Article 39. If this is not possible, the case will proceed to the Court under Article 38. The specific procedure used henceforth can be designed by the Court to fit the specific case.<sup>351</sup> For example, a written stage usually proceeds the hearing, but other investigations can be arranged too such as an initial examination by a smaller group of judges. A judgment from a Chamber can be appealed to the Grand Chamber within three months of the Chamber Judgment. The decision of the Grand Chamber is final.

It is important to note that the Strasbourg Court cannot review law in abstract, instead it will judge whether domestic law or practice has violated the *specific applicant's* Convention rights.<sup>352</sup> Nevertheless, a partly abstract case may be accepted should the applicant be a group who can *all* demonstrate that they have suffered personal impacts. For example, in *Donnelly et al v UK* the Court accepted a partly abstract case, agreeing to review all actions of the security forces in Northern Ireland so long as the applicants could demonstrate that they had suffered personal impacts and it was viewed as in the public interest to do so.<sup>353</sup> Hence, the Strasbourg Court may be able to review UK law concerning PR vis à vis unmarried fathers in abstract should a large group of impacted individuals apply as one unit.

Before proceeding to a discussion of the relevant legal framework, it should be noted that very few cases proceed to being heard in the Strasbourg Court: despite 45,500 applications being submitted to the Court in 2022, judgments were only reached upon 4,168 of them, around 39,000 being judicially disposed of at an early stage in proceedings.<sup>354</sup> Indeed, the Strasbourg Court has been described as 'slow and cumbersome'.<sup>355</sup> Hence, an applicant should be made aware of these facts before launching an application.

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<sup>351</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 55.

<sup>352</sup> *Klass and ors v Federal Republic of Germany* (1978) 2 EHRR 214.

<sup>353</sup> *Donnelly et al v UK* App no. 5577-5583/72 (ECtHR 5 April 1973).

<sup>354</sup> 'Analysis of Statistics 2022' (*European Court of Human Rights*, January 2023)

[https://www.echr.coe.int/documents/d/echr/stats\\_analysis\\_2022\\_eng](https://www.echr.coe.int/documents/d/echr/stats_analysis_2022_eng).

<sup>355</sup> Fenwick (n 181) 31.

Furthermore, should a violation be found at the Strasbourg Court, the state will be bound to respond to this judgment by introducing appropriate remedial measures, the Committee of Ministers exerting continual supervision until such action is taken. Specifically, the state must submit an 'action plan' to the Committee of Ministers, followed by a 'action report' after measures are taken. Only when the Committee is satisfied with the state's actions will supervision be ended through a 'final resolution'.<sup>356</sup> Nevertheless, the specific remedy to be introduced is within the responsibility and freedom of the state.<sup>357</sup>

Since this thesis has not considered an application based on Article 8 alone in domestic courts due to the low likelihood of success, it will also not be considered at an international level. The structure of a case based upon Article 8 in conjunction with Article 14 will now be analysed.

In order to investigate whether there has been a violation of Article 8 in conjunction with Article 14 at the Strasbourg Court, the same four stage test as applicable at a domestic level applies: whether Article 8 is engaged by the claim; whether there is a difference in treatment; whether there is a legitimate aim; whether the means employed are proportionate to the legitimate aim. Alike in domestic courts, despite Strasbourg jurisprudence not being binding upon the court, the judiciary 'usually follow and appl[y their] own precedents, such a course being in the interests of legal certainty and the orderly development of Convention case-law.'<sup>358</sup>

The key distinguishing feature within this process at the Strasbourg Court is the margin of appreciation. The margin is a judicial tool used at the Strasbourg Court to determine whether a state has acted within the realms of what is perceived as acceptable when departing from a convention right. As such, it has a considerable impact upon the four-part test set out above. The narrower the margin, the more heavily the Strasbourg Court will scrutinize a state's justification and the weightier the reasoning required. The wider the margin, the less heavily

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<sup>356</sup> 'The Supervision Process' (*Council of Europe*) <https://www.coe.int/en/web/execution/the-supervision-process#:~:text=The%20Committee%20of%20Ministers%20ensures,closed%20by%20a%20final%20resolution.>

<sup>357</sup> Fenwick (n 181) pp 39-40.

<sup>358</sup> *Cossey v United Kingdom* [1990] ECHR 21, para 14.

the Strasbourg Court will scrutinize the state's justification and the more likely the court is to defer to the principle of subsidiary. This principle involves deferring judgment to national authorities who are perceived as being better placed to judge upon the relevant issue due to their intimate and more comprehensive knowledge of the state's cultural and social context.<sup>359</sup> Since the margin plays a key role in Strasbourg litigation, how to decipher the width of the margin in any relevant context is crucial.

This section will set out a three-stage framework which can allow the width of the margin to be predicted within the context of cases concerning family life under Articles 8 and 14. This is not a test used at the Strasbourg Court, but is an academic exercise unique to this thesis based upon Helfer's description of the margin as 'context-based', 'consensus' based and 'shifting'.<sup>360</sup> Although writing in 1993, Helfer's characterisation has been chosen here due to its clarity and continued compatibility with more recent research.<sup>361</sup>

### **Stage One: Contextual Factors**

Firstly, various contextual elements of the case may impact the width of the margin. The impacted group affected by the violation is relevant, certain social groups being considered to require particularly stringent protection. For example, the court will undertake a more 'careful' scrutiny of the respondent's justifications in regard to policies which impact children.<sup>362</sup> In fact, impacts identified upon the child are likely to be considerably important, the Strasbourg Court having confirmed that, where a conflict exists between parental interests and children's interests, 'particular importance should be attached to the best

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<sup>359</sup> Vassilis P Tzevelekos and Kanstantsin Dzehtsiarou, 'The Judicial Discretion of the European Court of Human Rights: The Years of Plenty, and the Lean Years' [2022] *European Convention on Human Rights Law Review* 285, 290.

<sup>360</sup> Lawrence R Helfer, 'Consensus, Coherence and the European Convention on Human Rights' (1993) 26(1) *Cornell International Law Journal* 133, 144.

<sup>361</sup> Petr Agha, *Human Rights Between Law and Politics: The Margin of Appreciation in Post-National Contexts* (Bloomsbury Publishing Plc 2017) 28; Bernadette Rainey, Pamela McCormick and Clare Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights* (8<sup>th</sup> edn, Oxford University Press 2020) pp 367, 369 and 370; Helga Molbæk-Steensig, 'Subsidiarity does not win cases: A mixed methods study of the relationship between margin of appreciation language and deference at the European Court of Human Rights' (2023) 36(1) *Leiden Journal of International Law* 83, pp 87-88.

<sup>362</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 82; *C.E. and Others v France* [2022] ECHR 263, paras 85-90.

interests of the child', which may, ultimately, 'override' those of the parents.<sup>363</sup> Another contextual consideration is whether the application raises any sensitive issues. For example, narrower margins tend to be imposed where the application concerns discrimination and equality. This margin will be particularly narrow where 'a particularly important facet of an individual's existence or identity' are at stake.<sup>364</sup>

However, it is important to note that cases which raise moral or ethical issues may alternatively lead to a *widening* of the margin in accordance with the concept of the 'moral margin'.<sup>365</sup> In such circumstances, this wider margin is in recognition of the national authorities' unique understanding of the intricate underpinnings of their society and how to best mould sensitive legislation to fit it. For example, a 'moral margin' has been found to exist in regard to a member state's decisions upon what types of literature are acceptable in their jurisdiction due to their better knowledge concerning the topics which may offend public morals.<sup>366</sup>

## Stage Two: Consensus

European consensus is the second factor which can impact the width of the margin. According to Helfer there are three aspects to consider here: *legal* consensus, demonstrated through regional, international and domestic legislation; *expert* consensus, for example, in family related issues the Committee of Experts on Family Law have been historically referred to;<sup>367</sup> *public* consensus through, for example, public polls.<sup>368</sup> Since there is no clarity upon which factor holds the most weight in analysis, each must be thoroughly examined.<sup>369</sup> The combined assessment of all three investigations will determine the overall level of consensus, impacting the level of scrutiny exerted upon state justification. Specifically, where there exists little, or no, European consensus, the margin will be wider, more restrained levels of scrutiny being

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<sup>363</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 82.

<sup>364</sup> *Evans v United Kingdom* [2006] ECHR 200, para 77.

<sup>365</sup> See Clare Ryan, 'Europe's Moral Margin: Parental Aspirations and the European Court of Human Rights' (2018) 56 *Columbia Journal of Transnational Law* 473.

<sup>366</sup> *Handyside v UK* App no. 5493/72 (ECtHR, 7 December 1976).

<sup>367</sup> *F. v Switzerland* [1987] ECHR 32, para 17.

<sup>368</sup> Helfer (n 360), 139.

<sup>369</sup> *Ibid*, 140.

applied to the state's reasoning; where high consensus is found, the margin will be narrower and the level scrutiny more intense. For example, Margaria points out that, in regard to the rights of *biological* fathers to challenge the paternity of *legal* fathers, no consensus has been found and hence a wide margin remains applicable.<sup>370</sup>

However, an issue arises when considering the level of agreement which equates to 'consensus'. This measurement is considerably ambiguous, leading to criticism of the Strasbourg Court as working 'ad hoc', in an unpredictable fashion.<sup>371</sup> For example, in deliberations concerning *legal* consensus the Strasbourg Court often uses terms such as a 'great number' of states agree, when describing high levels of consensus.<sup>372</sup> The exact percentage or number of states which equates to a 'great number' is unknown, making predictions of the width of the margin somewhat uncertain.<sup>373</sup>

Helfer further argues that the impact of *legal* consensus is particularly ambiguous in family law, partly due to this area's entrenchment in national culture and traditions.<sup>374</sup> For example, despite being the last state in Europe to enforce a waiting period between a divorce and remarriage after a 'gradual evolution' of states removing this restriction, the Strasbourg Court stated in *F v Switzerland* that this 'does not necessarily imply that that aspect offends the Convention, particularly in a field of matrimony which is so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit'.<sup>375</sup> Accordingly, legal consensus could be interpreted as having little impact upon cases concerning family life.

Despite this, the width of the margin has proven considerably straightforward in some areas of family law despite specific levels of consensus. For example, where cases concern the equal

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<sup>370</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 37.

<sup>371</sup> Helfer (n 360) 154.

<sup>372</sup> *Johnston v Ireland* [1986] ECHR 17, para 30.

<sup>373</sup> Aduku Abdul Ainoko, 'The Margin of Appreciation Doctrine and the European Court of Human Rights: The Inconsistent Application in the Interpretation of the Right to Freedom of Expression and the Right to Freedom of Thought, Conscience and Religion' (2022) 5(1) *Strathclyde Law Review* 91, 95.

<sup>374</sup> Helfer (n 360) 154.

<sup>375</sup> *F. v Switzerland* (n 367), paras 16-17.

treatment of non-marital and marital relationships,<sup>376</sup> the Strasbourg Court has consistently argued that ‘weighty reasons’ are required to justify any difference in treatment regardless of specific levels of consensus.<sup>377</sup> This is a position which will be analysed further in Chapter Three.

### **Stage Three: Evolution**

The last consideration when predicting the width of the margin is intrinsically linked to the convention’s role as a ‘living instrument’: the width of the margin will evolve over time in response to changes in societal views and composition. For example, in *Petrovic v Austria* the Strasbourg Court noted a gradual ‘evolution’ of opinions in Europe with which Austria was praised for modifying their legislation in line with.<sup>378</sup>

There is some ambiguity in this assessment. For example, there exist no guidelines concerning the level of societal agreement required to demonstrate a ‘change’ in public opinion. This is where judicial activism can sometimes come into play: the Strasbourg Court may capitalise upon the evolving nature of the margin in order to push forward their own moral agenda.<sup>379</sup> Johnson supports this observation, providing evidence to suggest that the Strasbourg Court pushed for rights for LGBT+ individuals despite a lack of European consensus and corresponding wide margin.<sup>380</sup> Specifically, the court downplayed the lack of consensus and instead emphasized that importance of protecting sexual orientation, pushing for the narrower margin which better reflected *their* moral views.<sup>381</sup>

Helfer has presented evidence against the idea of judicial activism in this manner: particularly in the context of Article 8 where the Strasbourg Court usually acts cautiously through waiting until consensus has developed before narrowing the margin.<sup>382</sup> Gerards agrees, stating that

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<sup>376</sup> Helfer (n 360) 146.

<sup>377</sup> *Sahin v Germany* (n 240), para 94; *Zaunegger v Germany* (n 190), para 51.

<sup>378</sup> *Petrovic v Austria* (n237), para 41.

<sup>379</sup> Janneke Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’ (2018) 18 Human Rights Law Review 500.

<sup>380</sup> Paul Johnson, *Homosexuality and the European Court of Human Rights* (1<sup>st</sup> edn, Routledge 2013), 66.

<sup>381</sup> *Ibid*, 72.

<sup>382</sup> Helfer (n 360) 142.

the Strasbourg Court is particularly 'cautious' where cases raise complex moral and ethical issues and do not draw a consensus among states.<sup>383</sup> However, although avoiding dramatic leaps in judicial thought, Gerards notes that the Strasbourg Court does make small steps towards certain opinions on divisive issues in what she calls 'incrementalism'.<sup>384</sup> The truth is likely to be somewhere between these extremes. Even if the Strasbourg Court does, in fact, engage in judicial activism, there should still be an underlying correlation between their narrowing or widening of the margin and general societal views on the matter.

Overall, it is a *balance* of these factors which determines the width of the margin. This can be difficult should the various factors conflict with each other, the Strasbourg Court never having explained which factors would take precedence in a conflict.<sup>385</sup> For example, a low level of consensus, which would indicate a wide margin, may be undermined by the presence of strong moral and ethical issues, meaning that a narrow margin nevertheless is found. Margaria cites surrogacy as an example: 'despite surrogacy giving rise to ethical and moral issues on which there is generally no European consensus, national authorities have been awarded a narrow margin with respect to the refusal to grant recognition to the biological parentage of a child born through surrogacy abroad.'<sup>386</sup> Despite this, tentative predictions can be made by considering Helfer's three factors as well as relevant precedent. Chapter Three will embark on such a challenge in the context of the acquisition of PR in the UK.

## 2.4 Conclusion

This chapter has set out the legal framework through which an unmarried father would progress should they bring an application concerning their denial of automatic PR under Articles 8 and 14 of the Convention in 2024.

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<sup>383</sup> Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (n 379) 13.

<sup>384</sup> *Ibid*, pp 13-14.

<sup>385</sup> *Ibid*, 8.

<sup>386</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 38.



Firstly, since admissibility to the Strasbourg Court requires all domestic remedies to be exhausted, a claim would first need to be launched through domestic courts. Here, a four-stage test would be considered: whether a 'family tie' exists between the applicant and child; whether a difference in treatment exists between the applicant and a suitable comparator; the presence of a legitimate aim; whether the government's employed means to achieve the legitimate aim are proportionate. This four-stage test will be assessed within a 'discretionary area of judgment' to which there are two approaches, 'minimalist' and 'activist'. It was concluded that a claim under both Article 8 and 14 is more likely to trigger an 'activist' response from the UK judiciary than a claim taken under Article 8 alone and thus the thesis will henceforth focus solely on the former.

Should a domestic claim be unsuccessful, an applicant may be able to appeal to the Strasbourg Court provided all admissibility requirements are met. Whilst the same four-stage test would be relevant here, the principle of the margin of appreciation would apply instead of a 'discretionary area of judgment'. The chapter subsequently set out how the width of the margin of appreciation area may be determined, that is, through consideration of contextual factors, consensus, and evolution.

In Chapter Three these tests will be applied to the specific case of UK law concerning acquisition of PR vis à vis unmarried fathers, outlined in Chapter One, in order to assess the likely outcome of such an application in both the domestic courts and at the Strasbourg Court.

## Chapter Three: Prediction of a Successful Legal Challenge in

### 2024

In 1995 and 2000 respectively, two applications were filed at the Strasbourg Court claiming that the denial of automatic PR to unmarried fathers in the UK violated Articles 8 and 14 of the Convention.<sup>387</sup> In both cases no violation was found, the court instead accepting the UK's justification that this policy was necessary in order to protect mothers and children from 'unmeritorious' men.<sup>388</sup> However, over the last two decades societal views, demographics and legal frameworks have evolved significantly and hence, whilst these cases were rejected in 1995 and 2000, a violation may now be found in 2024 should a similar case arise.

This chapter will assess the likelihood of this outcome by applying UK domestic law, set out in Chapter One, to the relevant legal frameworks set out in Chapter Two. Since the same four-stage test is required in both domestic courts and at the Strasbourg Court, an unmarried father's likelihood of surpassing this test will first be considered before applying the courts' specific contexts.

### **3.1 The Four-Stage Test**

#### **a) Whether There Exists a Bond Which Pertains to 'Family Life'**

As outlined in Chapter Two, the applicant must first demonstrate that there is a 'family tie' between himself and his child.<sup>389</sup> In non-marital relationships, 'de facto' family ties<sup>390</sup> can be found where relevant evidence exists concerning the 'nature of the relationship between the natural parents' and the 'demonstrable interest in and commitment by the natural father to the child both before and after birth'.<sup>391</sup> Chapter Two was able to make some tentative

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<sup>387</sup> *McMichael v United Kingdom* (n 29); *B v the United Kingdom* (n 50).

<sup>388</sup> *McMichael v United Kingdom* (n 29), para 98; *Family Law: Illegitimacy Final Report* (n 10).

<sup>389</sup> *Konstantin Markin v Russia* (n 193), para 132.

<sup>390</sup> *Keegan v Ireland* (n 194), para 44.

<sup>391</sup> *Nylund v Finland* (n 197), p14.

conclusions based on previous caselaw, indicating that evidence supporting either of the aforementioned factors is likely to be sufficient.

In regard to the former factor, the closer the unmarried father's relationship with the mother mirrors marriage, the more likely a 'family tie' will be found.<sup>392</sup> Whilst the act of living together appears to be the strongest evidence here, other factors have been found to be relevant, for example, the deliberate conceiving of the child.<sup>393</sup> The nature of the relationship should also be long-term and *emotional* as opposed to purely sexual.<sup>394</sup> Alternatively, the unmarried father may still demonstrate a 'family tie' by providing strong evidence of interest and commitment to the child. For example, the following have been successfully raised by past applicants: visiting the child a 'couple of times',<sup>395</sup> attending the child's christening,<sup>396</sup> and being present at the child's birth.<sup>397</sup> Evidence provided must extend beyond merely making judicial applications for PR unless the applicant can prove that no further evidence exists because the mother unreasonably prevented contact between the father and child.<sup>398</sup> As long as the unmarried father can provide evidence for *either* of the aforementioned factors, and he doesn't possess a criminal record which may extinguish this tie, he should be able to surpass this stage of the test.<sup>399</sup>

## **b) The Existence of a Difference in Treatment**

The second stage of the test requires three things: the applicant must choose a comparator who is in a 'similar position' to them;<sup>400</sup> a tangible difference in treatment between the two must be evidenced;<sup>401</sup> this difference must be based on one of the protected grounds under

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<sup>392</sup> *Keegan v Ireland* (n 194), para 45.

<sup>393</sup> *Ibid.*

<sup>394</sup> *Ahrens v Germany* (n 194).

<sup>395</sup> *Söderbäck v Sweden* (103), para 36.

<sup>396</sup> *Ibid.*

<sup>397</sup> *L v Netherlands* (n 202), para 39.

<sup>398</sup> *Anayo v Germany* (n 214), para 59.

<sup>399</sup> *Evers v Germany* (n 217).

<sup>400</sup> *Zaunegger v Germany* (n 190), para 42; European Court of Human Rights, 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n 190) 17.

<sup>401</sup> 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n 190) 18.

article 14.<sup>402</sup> In regard to an unmarried father who is challenging UK law concerning acquisition of PR, two possible comparators were identified in Chapter Two.

Firstly, comparison with an unmarried mother may be drawn. Specifically, the applicant can demonstrate a tangible difference in treatment by reference to relevant provisions of UK legislation which stipulates that unmarried mothers will acquire PR automatically,<sup>403</sup> whilst unmarried fathers will not.<sup>404</sup> Since this difference is explicitly embedded in legislation, this would qualify as potential direct discrimination<sup>405</sup> on the basis of sex, a protected characteristic under Article 14.<sup>406</sup> Alternatively, the unmarried father may rely upon the *married* father as their comparator. A tangible difference in treatment could be evidenced again using relevant UK legislation which awards automatic acquisition of PR to married fathers,<sup>407</sup> but not, unmarried fathers.<sup>408</sup> Such a difference could qualify as direct discrimination<sup>409</sup> on the ground of marital status, a characteristic found to fall within 'other status' in Article 14.<sup>410</sup> Accordingly, an unmarried father is likely to successfully surpass this stage through comparison with either comparator.

### c) The Presence of a Legitimate Aim

As set out in Chapter Two, three key justifications have been raised in previous caselaw to justify awarding unmarried fathers' lesser rights in the context of child care: the importance of protecting children and mothers from 'unmeritorious' fathers, concerns over legal certainty, and justification based on the relative importance of motherhood and fatherhood. A consideration of each justification in the context of a claim concerning the UK's denial of automatic PR to unmarried fathers will now take place.

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<sup>402</sup> Art 14 (n 164).

<sup>403</sup> Children Act, s 2(2)(a).

<sup>404</sup> *Ibid*, s 2(2)(b).

<sup>405</sup> 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n 190) 18.

<sup>406</sup> Art 14 (n 164).

<sup>407</sup> Children Act, s 2(2)(4); The Civil Partnership (Opposite-sex Couples) Regulations 2019, SI2019/1458, regs 1(2) and 15(2).

<sup>408</sup> Children Act, s 2(2)(b).

<sup>409</sup> 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n 190) 18.

<sup>410</sup> *Şerife Yiğit v Turkey* (n 231); *Petrov v Bulgaria* (n 231).

## Protecting Mothers and Children from ‘Unmeritorious’ Unmarried Fathers

According to the Law Commission’s 1982 ‘illegitimacy’ Report, the main motivation of Parliament for denying unmarried fathers automatic PR was to facilitate the access of ‘meritorious’ fathers to PR whilst circumventing the ‘unmeritorious’.<sup>411</sup> Chapter Two noted that this justification has experienced inconsistent acceptance at the Strasbourg Court, has not been raised since 2009, and appears to be at odds with modern views concerning the acceptability of blanket stereotypes about a particular social group.<sup>412</sup> Despite this assessment in an abstract sense, since Strasbourg precedent is not binding upon either domestic courts or the Strasbourg Court itself, the court may still choose to accept this as a legitimate aim in a 2024 case concerning unmarried fathers’ acquisition of PR in the UK. In other words, two options appear to exist. One is that the court find the justification to be unreasonable since it relies upon a blanket stereotype about a social group, relying upon *Marckx* and *Sahin*.<sup>413</sup> Alternatively, relying on *McMichael*, *B v UK*, *Keegan* and *Zaunegger*, the court may accept this justification and the veracity of its claims.<sup>414</sup>

Considerations upon the accuracy of this justification may persuade the court to reject its use. By denying all unmarried fathers automatic PR, UK law essentially paints the entire group as untrustworthy and potentially ‘unmeritorious’. Indeed, Eekelaar and Bainham confirm that in the UK unmarried fathers are collectively stereotyped as social deviants who are ‘interfering’ and represent ‘a threat to the security of the mother...[and] the welfare of the child’.<sup>415</sup> Some may argue that, although not *all* unmarried fathers will present these characteristics, a large proportion will. For example, Sheldon emphasizes the position of mothers suffering from domestic violence, statistics recording a higher incidence of domestic violence towards

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<sup>411</sup> *Family Law: Illegitimacy Final Report* (n 10) para 4.27.

<sup>412</sup> Council of Europe Parliamentary Assembly (n 265) 5.

<sup>413</sup> *Marckx v Belgium* (n 244), para 39; *Sahin v Germany* (n 240), para 58.

<sup>414</sup> *McMichael v United Kingdom* (n 29); *B v the United Kingdom* (n 50); *Keegan v Ireland* (n 194); *Zaunegger v Germany* (n 190).

<sup>415</sup> John Eekelaar, ‘Second Thoughts on Illegitimacy Reform’ (1985) 15 *Family Law* 261, 262; Andrew Bainham, ‘When is a parent not a parent? Reflections on the unmarried father and his child in English law’ (1989) 3 *International Journal of Law and the Family* 208, 227.

women occurring from cohabiting partners (9%) than spouses (3.4%).<sup>416</sup> The higher rates of lone-mother families (84%) compared to lone-father families (16%) may also indicate a higher rate of abandonment from fathers than mothers in the context of extramarital childcare.<sup>417</sup> Such predictions must be treated tentatively though. For example, in regard to the latter statistics, these percentages include violence from *female* cohabiting partners and spouses. All statistics will also be affected by rates of reporting, not everyone wishing to disclose such behaviour. Regardless, even if it is accepted that *some* unmarried fathers may accurately be described as 'unmeritorious', it certainly doesn't encapsulate *all* unmarried fathers, perhaps not even the majority. In response to statistics which recorded just one denial of a PRO application in 2019, the UK's Lord Chancellor's Department stated that 'it is clearly impossible to assume that *most* unmarried fathers are irresponsible or uninterested in their children'.<sup>418</sup>

This justification's reliance upon marital status also casts doubt upon its accurateness. As demonstrated in *F v M*, married fathers can be 'unmeritorious' too: here, the court found the married father to be coercive and controlling.<sup>419</sup> Bainham sums this issue up well, stating that in the UK 'a married man who abandons his pregnant wife' can retain PR 'while the unmarried father cohabiting and playing a full parental role' may be denied it.<sup>420</sup> The choice not to marry is certainly not always due to a lack of commitment or motivation to care for resulting children. This justification's reliance upon gender also limits its accuracy since it seemingly ignores the fact that mothers may be 'unmeritorious' too.<sup>421</sup> Overlaying all of this, is this justification's basis upon the ambiguous dichotomy between 'meritorious' and

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<sup>416</sup> Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (n 20) 110; Meghan Elkin, 'Domestic abuse victim characteristics, England and Wales: year ending March 2019' (*Office for National Statistics*, 25 November 2019)

<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/articles/domesticabusevictimcharacteristicsenglandandwales/yearendingmarch2019#marital-status>.

<sup>417</sup> Amanda Sharfman and Pamela Cobb, 'Families and households in the UK: 2022' (*Office for National Statistics*, 18 May 2023)

[https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2022#:~:text=While%20the%20majority%20of%20lone,%2Dfather%20families%20\(48%25\)](https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2022#:~:text=While%20the%20majority%20of%20lone,%2Dfather%20families%20(48%25)).

<sup>418</sup> 'Statistics on father's applications for parental responsibility orders' (n 92); 'press notice 201/98' (n 136) para 51; Gilmore, 'Parental Responsibility and the unmarried father – a new dimension to the debate' (n 99) footnote 14 (*emphasis added*).

<sup>419</sup> *F v M* (n 28).

<sup>420</sup> Andrew Bainham, 'Reforming Scottish children law – sense from north of the border' (1993) 5(1) *Journal of Child Law* 3, 6.

<sup>421</sup> John Clifton, 'The long road to universal parental responsibility: some implications from research into marginal fathers' [2014] *Fam Law* 858, 861.

'unmeritorious' fathers, terms even the Law Commission themselves were unable to accurately define in their 1982 report.<sup>422</sup> All in all, these considerations may persuade a court to reject this justification in a relevant case in 2024.

A second indicator of judicial response to this justification in 2024, is recent judicial comments and judgments. It has already been noted that at an international level, the Strasbourg Court appears to have committed to an 'anti-stereotyping' approach, disapproving of blanket stereotypes of particular groups, and that no respondents have raised this justification since 2009, perhaps suggesting a modern distaste for its applicability.<sup>423</sup> Acceptance of this justification in any given case will, however, also depend upon the specific margin of appreciation applied in that context; if a wide margin is employed, it is possible that this justification could be accepted. This is an issue which will be explored further in due course. Disapproval for this justification has also arisen at a domestic level from prominent judicial figures such as Lady Hale and Russell J.<sup>424</sup> However, other recent domestic cases present opposing views. For example, in *Re A*, McFarlane stated that maintaining different legal frameworks for married and unmarried fathers in the context of PR was still justified due to the higher levels of 'commitment' and stability within marriage as opposed to cohabitation.<sup>425</sup>

Drawing these arguments together, although it appears that views are shifting towards a rejection of this justification, such evolution has not yet reached a point where it can be predicted with certainty that it would be rejected either internationally or domestically should a case arise in 2024. What is clear is that there is a *possibility* that it would be accepted, and the case proceed to the final stage of the four-stage test.

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<sup>422</sup> *Family Law: Illegitimacy Final Report* (n 10).

<sup>423</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 35.

<sup>424</sup> See Lady Hale, 'Human Rights and Family Life in the United Kingdom and Islands' (Caroline Weatherill Memorial Lecture, The Isle of Man Law Society 5 December 2018), p3 of script; Also see *MZ v FZ and others* [2022] EWHC 295 (Fam) [119].

<sup>425</sup> *Re A (Parental Responsibility)* (n 28) [101].

## Legal Certainty

This justification is based upon the premise that, since paternity is not obvious based on observable fact, awarding unmarried fathers automatic PR risks bestowing PR upon a man who is not, in fact, the child's biological father. Chapter Two made a key point here: due to modern advances in surrogacy, correct identification of *maternity* is not always certain. In fact, the bestowing of automatic PR upon *married* fathers is also curious since a child born within a marriage is not necessarily the biological child of the mother's husband. Accordingly, the first issue with this justification is that, should it be relied upon to deny unmarried fathers automatic PR, logically, it should also result in the denial of automatic acquisition of PR to mothers and married fathers.

The feasibility of using DNA tests to confirm paternity may also push the judiciary towards a rejection of this justification. Legal certainty could be secured under a framework which allows unmarried fathers to acquire PR automatically because, where disputes over paternity arise, a DNA test can be taken. The main issue here is that, since over 50% of children born in the UK today are extramarital, potentially tens of thousands of paternity tests may be required, putting a huge administrative burden upon courts and scientific laboratories.<sup>426</sup> Nevertheless, it is unlikely that all unmarried fathers would require such tests, and so, depending on demand, DNA testing may nevertheless prove a viable safeguard. For both of these reasons, and the fact that this justification has not been raised in the Strasbourg Court in the context of acquisition of PR since 2009, it appears unlikely that this justification would be successfully raised in a case in 2024.<sup>427</sup>

## Justification Based on the Relative Importance of Motherhood and Fatherhood

Finally, the Government could rely upon the idea that a special bond exists between mothers and their children in order to justify awarding automatic PR to all mothers but not all fathers. As outlined in Chapter Two, whilst being accepted in *Alexandru Enache*,<sup>428</sup> this justification

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<sup>426</sup> Siân Bradford and Faiza Mohammad (n 129).

<sup>427</sup> *Zaunegger v Germany* (n 190), para 29.

<sup>428</sup> *Alexandru Enache v Romania* (n 232), para 71.



was rejected in *Konstantin Markin*<sup>429</sup> and most recently in *Paparrigopoulos*.<sup>430</sup> Despite the fact that its acceptance in *Alexandru Enache* could be explained by reference to the wider margin of appreciation which exists within criminal law, the court in *Paparrigopoulos* somewhat ambiguously suggested that this justification may be acceptable in other cases.<sup>431</sup>

A rejection of this justification within the context of unmarried fathers' acquisition of PR is potentially indicated by evolution in European expert and public opinion towards an enhanced valuing of fatherhood. In 2006, the Committee of Experts on Family Law stated that 'joint exercise of parental responsibilities is in the best interests of the child irrespective of whether the child was born in or out of wedlock'.<sup>432</sup> The Council of Europe also began emphasizing the benefits of equal parenting<sup>433</sup> and the 'important role of fathers',<sup>434</sup> eventually arguing in 2014 that equal acquisition of PR between mothers and fathers was a 'necessary step in order to progress towards a fully egalitarian society'.<sup>435</sup> In fact, in 2015 the Parliamentary Assembly of the Council of Europe argued, inter alia, that: unequal policies concerning acquisition of PR are based on gender stereotypes which do not reflect sociological reality today<sup>436</sup> and called all states to 'remove from their laws any difference based on marital status between parents who have acknowledged their child'.<sup>437</sup> Thus, it would be strange and inconsistent with prevailing trends for the Strasbourg Court to rely on justification based on a special bond between mother and child.

The unlikelihood of this justification being successful in a case in 2024 is further supported by an issue of logic: UK legislation does not deny automatic PR to *all* fathers but merely those who are *unmarried*. Based on this justification, automatic PR should be denied to *all* fathers, regardless of marital status. Since this is not the case in UK law, a conflict exists with this

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<sup>429</sup> *Konstantin Markin v Russia* (n 193), para 132.

<sup>430</sup> *Paparrigopoulos v Greece* (n 285), para 39.

<sup>431</sup> *Ibid*, para 40.

<sup>432</sup> Committee of Experts on Family Law (n 245), Principle 19(1) (*emphasis added*).

<sup>433</sup> Council of Europe Committee of Ministers, *Recommendation Rec(2006)19 on policy to support positive parenting* (Rec(2006)19, adopted by the Committee of Ministers on 14 November 2007), point 2.

<sup>434</sup> *Ibid*, point 6.

<sup>435</sup> Council of Europe Parliamentary Assembly, Motion for resolution on *Equality and shared parental responsibility: the rights of fathers* (Doc. 13443, 18 March 2014).

<sup>436</sup> Council of Europe Parliamentary Assembly (n 265) 4.

<sup>437</sup> *Ibid*, para 5.3.

justification and so its applicability to a case concerning the acquisition of PR vis à vis unmarried fathers appears tenuous.

Ultimately, although issues have been noted in regard to all three justifications, the latter two appear particularly unlikely to be accepted by a court in 2024. For this reason, these justifications will not be discussed in any more detail and the following sections will proceed on the basis that the Government is relying upon a justification based on protecting mothers and children from ‘unmeritorious’ fathers, which was explored in Chapter One.

#### **d) Proportionality**

In order to assess whether there exists ‘a reasonable relationship of proportionality between the means employed and the aim sought to be realised’,<sup>438</sup> several issues will be considered: whether the employed means meet the aim; whether the means reasonably balance the rights and freedoms of the community with those of the unmarried father; the importance of demonstrating social fatherhood; the interests of the mother and children; and whether appropriate safeguards exist.

In regard to the first issue, the Government’s employed means, that is, the six methods of acquisition available to unmarried fathers, do not effectively meet the aim of facilitating access to ‘meritorious’ fathers to PR whilst excluding the ‘unmeritorious’.<sup>439</sup> Firstly, Chapter One demonstrated that not all ‘meritorious’ fathers are able to acquire PR under the current legislation. A key issue is that, whilst a father can acquire PR fairly easily with the consent of the mother, not all ‘meritorious’ applicants will have consent, sometimes it being withheld by the mother for no good reason.<sup>440</sup> For these applicants, two options remain: a PRO or a CAO. Issues relating to their effectiveness have been found with both orders, meaning that some meritorious fathers may be prevented from acquiring PR altogether.

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<sup>438</sup> ‘Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention’ (n 190) 20.

<sup>439</sup> *Family Law: Illegitimacy Final Report* (n 10) para 4.39.

<sup>440</sup> In the following ways: acquiring a formal parental responsibility agreement with the child’s mother; marrying the child’s mother; being appointed a guardian; signing the birth certificate.

In regard to PROs, evidence was presented to suggest that mothers can prevent an applicants' ability to demonstrate commitment, interest and motivation to care for the child as well as attachment to the child under the *Re H* criteria.<sup>441</sup> In regard to CAOs the key issue appears to be overcoming the no order principle which requires the father to not only prove his own merit, but demonstrate that his care would be better than the current carer's.<sup>442</sup> Furthermore, both methods are only accessible to those who can afford them. Clifton emphasises this issue, advocating for meritorious 'poor and marginal' fathers, who, if they do not have the consent of the mother, cannot otherwise pursue PR.<sup>443</sup> Chapter One also presented evidence to suggest that not all 'unmeritorious' fathers are prevented from acquiring PR. For example, the Law Commission themselves admit that the fact that a father can acquire PR through the consent of the mother effectively plays into the strengths of some manipulative and coercive men.<sup>444</sup> For 'unmeritorious' fathers who are unsuccessful here, they may still be able to easily acquire PR through PROs due to the relatively low threshold of evidence required by the *Re H* criteria as well as the high evidential threshold required to oppose a father's application on welfare grounds.<sup>445</sup> Uncertainties were also identified within the law, for example, whether the paramountcy principle applies to section 4 PROs.<sup>446</sup> Hence, not only is this legal framework failing to meet the aims of the Government, there appears to exist an element of confusion in the application of the law among judges.

Furthermore, it is unlikely that the rights and freedoms of the community are being effectively balanced with those of unmarried fathers.<sup>447</sup> As discussed in Chapter Two, Nilsson's three factors will be considered in the following analysis: the effects of the policy, the basis of the discrimination and the social position of the group impacted.<sup>448</sup> This thesis will focus upon

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<sup>441</sup> *Re H (Minors) (Local Authority: Parental Rights) (No 3)3* (n 86); *Re S (Parental Responsibility: Jurisdiction)* (n 85).

<sup>442</sup> The Children Act, s 1(5).

<sup>443</sup> John Clifton, 'The long road to universal parental responsibility: some implications from research into marginal fathers' (n 421).

<sup>444</sup> *Family Law: Illegitimacy Final Report* (n 10) para 4.39.

<sup>445</sup> *Re S (A Minor) (Parental Responsibility)* (n 108) [652-B].

<sup>446</sup> Gillian Douglas and Stephen Gilmore (n 91) 109.

<sup>447</sup> *Belgian Linguistic case (No. 2)* (n 292), para 10.

<sup>448</sup> Nilsson (n 293) 130.

Nilsson's three factors through analysis since it provides a contemporary, clear formula which correlates with other academic viewpoints.<sup>449</sup>

Firstly, in regard to the effects of the policy, how serious the interference impacts the rights of the applicant, and whether less restrictive means could have been implemented instead to meet the relevant aim, must be considered.<sup>450</sup> Before considering the effects of the policy upon unmarried fathers, the benefits which result to the community will be noted. Firstly, as emphasized in the Law Commission's reports, where the father is 'unmeritorious', UK law protects the mother and child should they be unmarried. This benefit can be understood most clearly in the context of a child born through the unmarried father's rape of the mother.<sup>451</sup> The current law ensures that the rapist cannot benefit from his crime by subsequently acquiring PR, protecting the mother from the trauma of having to co-parent with her abuser. A benefit also results for mothers whose child was conceived during a fleeting sexual encounter or 'one-night stand'. In this scenario, the mother may not wish to have the interference of a stranger in the child's life.

The denial of automatic PR may also benefit some unmarried fathers. Unmarried fathers who impregnate a woman during a 'one-night stand' may not wish to have PR for a child whom they did not intend to create. Some may not even know the child exists. In this way, by denying unmarried fathers automatic PR, the Government is avoiding the possibility that such men unknowingly hold legal responsibilities for a child they do not know. Such a result could be seen as unfair but would also make it very difficult for others holding PR for the child to make decisions concerning their care: for some decisions, such as putting the child up for adoption,<sup>452</sup> all individuals with PR must give their permission, or at least be notified.<sup>453</sup> If the mother does not know who the father is this task could be near impossible.

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<sup>449</sup> Alain Zysset, 'Freedom of Expression, the Right to Vote, and Proportionality at the European Court of Human Rights: An Internal Critique' (2019) 17 *International Journal of Constitutional Law* 230, 234; Also see Jeremy Letwin, 'Proportionality, Stringency and Utility in the Jurisprudence of the European Court of Human Rights' [2023] 23 *Human Rights Law Review* 1.

<sup>450</sup> Nilsson (n 293) 130.

<sup>451</sup> *Working Paper No 74: Illegitimacy* (n 23); *Family Law: Illegitimacy Final Report* (n 10).

<sup>452</sup> Family Procedure Rules 2010 (FPR), r 14.3.

<sup>453</sup> Karen Lennon and Shannon Woodley, 'Termination of parental responsibility: not the exception but rare – should it be?' [2021] *Fam Law* 1298, 1302.

However, unmarried fathers arguably experience disproportionate disadvantages. Though the strength of any specific application here will depend upon the specific disadvantages faced by the applicant, some universal negative impacts will be set out now. At a fundamental level, a key disadvantage an unmarried father could raise is that he is unable to exercise PR automatically. As noted in Chapter One, this scenario can be particularly traumatic for a father who wrongly believing they had PR, but later found himself powerless to oppose the child's adoption should one with PR make such a decision.<sup>454</sup> The stereotype this policy places upon all unmarried fathers as inherently untrustworthy and potentially unsuitable as a parent may leave many with feelings of inferiority and distrust from the outset. Unmarried fathers may feel further humiliated should they apply for a PRO or CAO since such litigation may involve invasive reviews of the father's past, overall character and actions vis à vis the child.<sup>455</sup>

The children of unmarried fathers may also be negatively affected by the stereotypes placed upon their fathers. Gilmore has pointed out that, should a child watch their father attempt and fail to prove their merit, that child's self-esteem may be negatively impacted.<sup>456</sup> They may feel embarrassed and insecure by the knowledge that their father has been deemed unsuitable to care for them whilst their peers have two parents. Ward LJ agreed with this assessment in *Re S*, stating that a negative perception of their father can make a child 'struggle to find her own identity', perhaps worrying that the reason their father is seen as unmeritorious is something that can be inherited.<sup>457</sup>

Before proceeding to consider Nilsson's second factor, discrimination, whether less restrictive means exist which could be employed to create a better balance will be considered. As mentioned in Chapter One, the Law Commission Report of 1982 concluded that no feasible less restrictive means existed at that time. However, a solution not considered was to award all fathers automatic PR with the possibility of their PR being terminated acting as a safeguard. This could strike a more appropriate balance: unmarried fathers would have acquired equal

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<sup>454</sup> *Re L* (n 19).

<sup>455</sup> *Ibid*; John Clifton, 'The long road to universal parental responsibility: some implications from research into marginal fathers' (n 421).

<sup>456</sup> Gilmore, 'Parental Responsibility and the unmarried father – a new dimension to the debate' (n 99) 26.

<sup>457</sup> *Re S (A Minor) (Parental Responsibility)* (n 108) [657H].

rights and so would no longer be collectively perceived as untrustworthy, but mothers and children could still protect themselves from the ‘unmeritorious’.

Currently, the court may remove an unmarried father’s PR in response to an application from anyone else with PR or from the child themselves should they have sufficient understanding.<sup>458</sup> Several issues may be considered during proceedings such as whether he would surpass the *Re H* criteria and the impact of his continued PR upon the mother and child.<sup>459</sup> Specifically, removal is favoured should continuing PR leave the mother in an ‘intolerable situation’ or the Article 8 rights of the father conflicts with those of the child, the latter overriding.<sup>460</sup> The overall process could be interpreted as beneficial for the applicant, Lennon and Woodley<sup>461</sup> pointing out that on top of this, there is no presumption of continued PR. Accordingly, Mr Justice MacDonald has argued that the threshold for termination is not ‘incredibly high’.<sup>462</sup>

However, there are few reported cases involving termination, suggesting that this only occurs where *serious* welfare concerns exist: in *Re P*, termination was due to the father’s imprisonment for inflicting serious injuries upon his child;<sup>463</sup> in *CW v SG* removal was due to the father’s imprisonment for sexual abuse of his child’s half-sisters;<sup>464</sup> and in *Nottingham CC v Farmer* the removal of PR followed the father receiving a life-sentence for murdering the children’s mother.<sup>465</sup> Granted, termination was ordered in *C v D and another* where the father had not committed any serious crime or physical assault, having instead emotionally abused his child.<sup>466</sup> However, this appears to be an exception rather than the trend.

Accordingly, in contrast to the view expressed by Mr Justice MacDonald, several judges of the Court of Appeal have argued that termination is ‘draconian’ and ‘rare’.<sup>467</sup>

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<sup>458</sup> Children Act, ss 4(2A), 4(3) and 4(4).

<sup>459</sup> *Re P (Terminating Parental Responsibility)* [1995] 1 FLR 1048 (Fam); *Re W (Direct Contact)* [2012] EWCA Civ 999; *CW v SG* (n 63).

<sup>460</sup> *Yousef v Netherlands* [2002] ECHR 716.

<sup>461</sup> Karen Lennon and Shannon Woodley (n 453) 1300.

<sup>462</sup> *Ibid*, 1298; *D v E and another* [2021] EWFC 37 [19].

<sup>463</sup> *Re P (Terminating Parental Responsibility)* (n 459).

<sup>464</sup> *CW v SG* (n 63).

<sup>465</sup> *Nottingham CC v Farmer* [2022] EWFC 66.

<sup>466</sup> *C v D and another* [2018] EWHC 3312 (Fam).

<sup>467</sup> *Re D (Withdrawal of Parental Responsibility)* [2014] EWCA Civ 315.

Moreover, Lennon and Woodley<sup>468</sup> point out that the no order principle is applicable in these proceedings, placing a significant burden upon the applicant to demonstrate that the respondent is unsuitable for fatherhood.<sup>469</sup> Courts will usually consider whether restricting PR through orders such as Prohibited Steps Orders (PSOs) or Specific Issue Orders (SIOs) would be more appropriate.<sup>470</sup> For example, in *Re A and E*, the court utilised these orders to allow the mother to change the surnames of the children, preventing the father from locating them or accessing their personal details.<sup>471</sup> However, mothers in these contexts may still be required to notify or obtain the consent of the father in regard to some legal proceedings concerning the child,<sup>472</sup> potentially causing further trauma and risking the possibility that the father use this power to obstruct legal proceedings.<sup>473</sup>

Furthermore, if termination of PR was used as a safeguard where PR is automatically acquired by *all* fathers, this would place a huge burden upon the applicant. In a scenario where the unmarried father is abusive it would take great strength for the mother to initiate such proceedings. Many may lack the courage, fear retaliation or find the legal process confusing and difficult to navigate. The cost of such litigation may also pose a barrier to some, with legal aid not covering litigation to terminate someone's PR.

Finally, the very legal principles upon which termination is governed prove somewhat uncertain. In 2015 Gilmore pointed out that the existence of a presumption for continued PR was contested, Ryder LJ's denial of its existence in *Re D (Withdrawal of Parental Responsibility)* seemingly conflicting with the judgements of *Re P* and *Re M*.<sup>474</sup> Although this specific issue has been remedied through the Children Act,<sup>475</sup> other uncertainties remain such as the scope of behaviour which may warrant removal of PR and whether conducting a

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<sup>468</sup> Karen Lennon and Shannon Woodley (n 453) 1300.

<sup>469</sup> Children Act, s 1(5).

<sup>470</sup> Karen Lennon and Shannon Woodley (n 453) 1301.

<sup>471</sup> *Re A and B (Children: Restrictions on Parental Responsibility: Radicalisation and Extremism)* [2016] EWFC 40.

<sup>472</sup> FPR (n436), r 12.8(1).

<sup>473</sup> Karen Lennon and Shannon Woodley (n 453) 1303

<sup>474</sup> Stephen Gilmore, 'Withdrawal of Parental Responsibility: Lost Authority and a Lost Opportunity' (2015) 78 *Modern Law Review* 1042, 1053; *Re D (Withdrawal of Parental Responsibility)* [2015] 1 FLR 166; *Re P (Terminating Parental Responsibility)* (n 459); *Re M (Minors)* [1995] EWCA Civ J1011-1.

<sup>475</sup> CA 1989, ss (2A), 1(6)(a) and 1(7).

welfare analysis is necessary in proceedings to remove a non-biological father's PR.<sup>476</sup>

Lauren Stocks, summarises the overall issue in this area thus: 'there is a wide discretion as to how matters regarding parental responsibility are dealt with and each Judge will interpret the law differently'.<sup>477</sup> In order to confidently rely upon this framework as a safeguard for awarding unmarried fathers with automatic PR, such uncertainties would ideally be remedied.

Overall, although this alternative system may strike a better balance between the rights of the community and unmarried fathers, without substantial reform, the current law is arguably unsuitable for this solution. There have been calls for reform already: as mentioned in Chapter One, in *F v M* Hayden J stated that he was 'uncomfortable' with the fact that, in 2023, a court can remove PR from unmarried fathers and not married ones.<sup>478</sup>

The second of Nilsson's factors to consider is the basis of discrimination. The Strasbourg Court has stated that interferences with 'suspect' grounds under Article 14 require weightier justification, negative prejudices towards social groups or their traditional social roles not meeting this threshold.<sup>479</sup> In regard to the denial of automatic PR to unmarried fathers, not only does it involve a difference in treatment based on a 'suspect' ground under Article 14, ie gender, but its justification relies upon furthering and accepting negative perceptions of unmarried fathers, lending weight to the view that this policy is disproportionate.<sup>480</sup>

Finally, the social position of the impacted group must be considered. As mentioned in Chapter Two, unmarried fathers have not been explicitly considered as a minority group requiring heavier protection. However, it is generally accepted that policies based on stereotypical beliefs about social groups are likely to be seen as unreasonable since they could

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<sup>476</sup> *Re C & A (Children: Acquisition and Discharge of Parental Responsibility by an Unmarried Father)* [2023] EWHC 516 (Fam); *A Local Authority v SB & Ors* [2022] EWFC 111.

<sup>477</sup> Lauren Stocks, 'Re C & A (Children: Acquisition and Discharge of Parental Responsibility by an Unmarried Father) [2023] EWHC 516 (Fam)' (*Wright Hassall*, 3 April 2023) <https://www.wrightshassall.co.uk/knowledge-base/re-c-a-children-acquisition-and-discharge-of-parental-responsibility-by-an-unmarried-father-2023-ewhc-516-fam#:~:text=The%20outcome%20of%20this%20case,to%20be%20the%20biological%20father>

<sup>478</sup> *F v M* (n 28) [7].

<sup>479</sup> *Konstantin Markin v Russia* (n 193), para 143.

<sup>480</sup> Nilsson (n 293) 130.



enhance public prejudice and social exclusion of that group.<sup>481</sup> In this case, the 1979 and 1982 Law Commission Reports demonstrate that stereotypical beliefs about the character of unmarried fathers have indeed formed the basis of their denial of automatic PR.<sup>482</sup>

Having considered all three aspects of Clifton's test,<sup>483</sup> there does not appear to be a sufficient balance between the rights and freedoms of the community as opposed to those of unmarried fathers. Although several benefits were identified for both groups, the UK's framework for unmarried fathers' acquisition of PR is based upon a suspect ground, relies upon a negative blanket stereotype and leaves some unmarried fathers in positions where they are unable to care for their child despite their 'merit' for such a role.

Before concluding, some final contextual issues must be considered. Chapter Two pointed out that the court is more likely to find the interference to be disproportionate if the applicant is either acting as social father to his child,<sup>484</sup> or can demonstrate a genuine *desire* to take on this role,<sup>485</sup> and is/would perform this role better than the current legal and/or social father should one exist.<sup>486</sup> If the applicant can demonstrate both, there is a higher likelihood that the court will find the interference to be disproportionate. An assessment of the child's best interests will also impact the outcome of a relevant case. Since European institutions have expressed opinions that joint parenting is always in the best interests of the child,<sup>487</sup> should the child of applicant currently lack a father figure, this may increase the likelihood that the applicant's inability to acquire PR is disproportionate.<sup>488</sup>

Lastly, Chapter Two identified the need for adequate safeguards, 'stricter scrutiny' being placed upon measures which effectively curtail relationships between children and their parents.<sup>489</sup> Since *McMichael*, where this framework was already deemed to have sufficient

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<sup>481</sup> *Ibid*, 131.

<sup>482</sup> *Working Paper No 74: Illegitimacy* (n 23) para 2.11; *Family Law: Illegitimacy Final Report* (n 10) para 3.9.

<sup>483</sup> Nilsson (n 293) 130.

<sup>484</sup> *Kroon and Others v the Netherlands* (n 192), para 40.

<sup>485</sup> *Görgülü v Germany* (n 302).

<sup>486</sup> *Söderbäck v Sweden* (103).

<sup>487</sup> Committee of Experts on Family Law (n 245), Principle 19(1); Council of Europe Committee Opinion (n 295) 15, (*insertion added*).

<sup>488</sup> *Kroon and Others v the Netherlands* (n 192).

<sup>489</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 79.

safeguards, a further safeguard has been introduced: the ability to acquire PR through registration on the child's birth certificate.<sup>490</sup> Depending on the specific applicant, he may wish to raise the expense of PRO or CAO proceedings here. Although this could theoretically lead to a claim under Article 6 of the Convention, no precedent exists whereby the expense of a procedure indicated inadequate safeguards under Article 14.<sup>491</sup> Thus, consideration of the presence of inadequate safeguards may go against the applicant in a relevant case.

Accordingly, although unique contextual issues may affect proportionality in any given case, the balance of evidence suggests that the UK framework for unmarried fathers' acquisition of PR is likely to be judged disproportionate since it does not meet the Government's dual aims nor appropriately balance the rights and freedoms of the community with those of unmarried fathers.

#### **e) Conclusion to the Four-Stage Test**

Should a case arise in 2024, evidence suggests that the first two stages of the relevant test are likely to be fulfilled by the applicant, however, the Government may struggle to satisfy the latter two. Whether this would realistically result in a judgment of incompatibility will depend upon the judicial approaches of the specific court. Thus, the impact of the 'discretionary area of judgement' in UK domestic courts and the margin of appreciation at the Strasbourg Court will now be considered in order to more accurately predict the likely outcome.

### **3.2 Likelihood of Success in Domestic Courts**

In order to assess the likelihood of success in domestic courts, two issues will be discussed: the likely judicial approach and the impact of the welfare principle guaranteeing that the child's welfare shall be the court's paramount consideration. As discussed in Chapter Two whether the judiciary take a minimalist or activist approach to the 'discretionary area of judgment' can greatly impact the outcome of a case. Which approach is taken will depend

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<sup>490</sup> *McMichael v United Kingdom* (n 29), para 98; Children Act s 4(1) and (1A).

<sup>491</sup> *Airey v Ireland* [1981] ECHR 1.

upon several factors including the type of law concerned, the judiciary's own moral perspective on the issue and the impact of British constitutional values.

In the context of a case concerning unmarried fathers' acquisition of PR, an 'activist' approach may be taken since such a case would raise issues related to discrimination and equality, concepts which Baroness Hale has stated have particular constitutional importance in the UK.<sup>492</sup> Indeed this proved the case in some previous caselaw raising Article 8 in conjunction with Article 14. *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* is a key example here, a case concerning the inability of opposite-sex couples to form civil partnerships as opposed to their same-sex counterparts.<sup>493</sup> Despite the fact that a finding of incompatibility would involve commenting upon social policy, an area which falls to Parliament, the judiciary arrived at this very decision.<sup>494</sup> Similarly, the judgment of incompatibility in *Ghaidan v Godin-Mendoza* could be interpreted as 'activist' since it challenged traditional British views on same-sex relationships as well as the validity of inheritance law, a complex area of social policy.<sup>495</sup> However, aside from these isolated examples, the overarching judicial trend has proven 'minimalist' in regard to cases concerning Articles 8 and 14. Indeed, Harris-Short states that there is an 'overall picture of judicial caution and restraint' and, when they had shown activism, this has been in response to issues Parliament was already intending to reform.<sup>496</sup> For example, a closer look at *Ghaidan* reveals that Parliament was already engaged in a process of public consultation on the Civil Partnership Bill and therefore, the use of section 3 to reinterpret legislation in line with parliamentary discussions was not truly activist.<sup>497</sup>

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<sup>492</sup> *Ghaidan v Godin-Mendoza* (n 189) [132]; Also see Harris-Short (183) 321; and Bernadette Rainey, *Human Rights Law Concentrate: Law Revision and Study Guide* (4<sup>th</sup> edn, Oxford University Press 2017) 178; and Paula Devine, Grace Kelly and Martina McAuley, 'Equality and Devolution in the United Kingdom: A Story in Three Acts and a Sequel' in *Social Policy and Society* (Cambridge University Press 2021).

<sup>493</sup> Andy Hayward, 'Taking the Time to Discriminate - *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development*' (2019) 41(1) *Journal of Social Welfare and Family Law* 92; *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* [2018] UKSC 32.

<sup>494</sup> *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* (n 493) [36].

<sup>495</sup> *Ghaidan v Godin-Mendoza* (n 189) [24].

<sup>496</sup> Harris-Short (183) 309; Also see Rachel Taylor, 'Putting Children First: Children's Interests as a Primary Consideration in Public Law' (2016) 28(1) *Child and Family Law Quarterly* 45, 64.

<sup>497</sup> *Ghaidan v Godin-Mendoza* (n 189).

Bonner, Fenwick and Harris-Short have stated that judicial approaches in issues concerning family law in particular have been ‘cautious and defensive – even openly hostile’.<sup>498</sup> In fact, they note a:

‘marked failure by the judiciary to really engage with (i) the legislative requirements of the HRA and (ii) the demands of the European Convention and its jurisprudence, in cases which impinge upon the rights of family members’.<sup>499</sup>

Whilst these comments were published in 2007, recent caselaw suggests that little has changed in this judicial approach in the last 16 years. Indeed, this approach can be identified in the specific context of the law concerning PR through the 2023 cases of *F v M*<sup>500</sup> and *Re A (Parental Responsibility)*.<sup>501</sup> As discussed in Chapter One, in *F v M* Hayden J stated that he was ‘uncomfortable’ with the differing frameworks concerning the removal of PR vis à vis unmarried fathers and married fathers respectively.<sup>502</sup> Although this case did not lead to an ‘activist’ judgment in this context, the case primarily concerning a section 91(14) order, Hayden J’s opinions certainly could not be described as cautious or restrained.<sup>503</sup>

However, this bold judicial opinion was followed by a much more restrained ruling in *Re A (Parental Responsibility)*, a case which concerned a mother who sought an appeal of a previous decision on the basis that, by allowing PR to be removed from unmarried fathers but not married ones, the UK was in breach of Articles 8 and 14 of the Convention.<sup>504</sup> Refusing to allow the appeal, Sir Andrew McFarlane stated that the UK’s differentiation between married and unmarried fathers in this context was justified on the basis of a ‘long standing principle’, whereby ‘priority’ is given to the ‘establishment, and maintenance, of stable family life by commitment through marriage or civil partnership’.<sup>505</sup> He went on to state that the judiciary would not rule against Parliament’s differentiating frameworks concerning PR unless there

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<sup>498</sup> Bonner, Fenwick and Harris-Short (n 187) 572.

<sup>499</sup> *Ibid.*

<sup>500</sup> *F v M* (n 28).

<sup>501</sup> *Re A (Parental Responsibility)* (n 28).

<sup>502</sup> *F v M* (n 28) [7].

<sup>503</sup> CA 1989, s 91(14).

<sup>504</sup> *Re A (Parental Responsibility)* (n 28).

<sup>505</sup> *Ibid.*, [101].

was ‘convincing evidence of a significant adverse impact of the policy’.<sup>506</sup> This judgment’s continued support for the institution of marriage, and articulation of the importance of protecting this relationship status, is interesting considering the fact that recent statistics record that more children are now born outside of marriage than within.<sup>507</sup> Accordingly, McFarlane P’s approach much more closely mirrors ‘minimalism’, even to the point of appearing at odds with modern statistics. Comparison between these cases may be affected by the fact that Hayden J may only have presented more activist views in *F v M* since this judgment was not directly concerned with an issue of compatibility with the Convention.<sup>508</sup> Nevertheless, it remains evident that judicial responses to this issue are not consistent.

In a recent publication Gilmore provides evidence to suggest that the judiciary’s approach to discretion in family law may be starting to change, becoming increasingly influenced by social science research evidence.<sup>509</sup> Indeed, a significant amendment to UK law has recently been tabled by Labour MP Harriet Harman: an ability for courts to remove the PR of a father, married or unmarried, who is convicted of the rape of a child under the age of 13.<sup>510</sup> Although this amendment has not yet been decided upon, due to be considered by parliament in due course, it does have the backing of the Lord Chancellor. Harman has expressed hopes that this change to UK law could be ‘extended’ overtime to increase the scope of this power of removal to other fathers convicted of less serious sexual offences.<sup>511</sup>

Such developments could suggest that research which demonstrates negative psychological impacts upon some unmarried fathers may begin to influence the judiciary, potentially leading to more ‘activist’ judicial approaches in future cases concerning the automatic

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<sup>506</sup> *Ibid*, [102].

<sup>507</sup> Siân Bradford and Faiza Mohammad (n 129).

<sup>508</sup> *F v M* (n 28).

<sup>509</sup> Stephen Gilmore, Daniel Monk, Ruth Lamont and Jonathan Herring, ‘Reflections on future directions in family law’ [2023] *Child and Family Law Quarterly* 99, 100.

<sup>510</sup> ‘Paedophiles could be stripped of parental rights under new law’ (Sanchia Berg BBC news, 17 April 2024) <https://www.bbc.co.uk/news/uk-68830796#:~:text=After%20hearing%20the%20story%2C%20Labour,deprived%22%20of%20their%20parental%20rights.>

<sup>511</sup> ‘Paedophiles to lose parental rights under new law’ (Bracknell News, 17 April 2024)

<https://www.bracknellnews.co.uk/news/national/24258454.paedophiles-lose-parental-rights-new-law/>.

*acquisition* of PR by unmarried fathers too.<sup>512</sup> However, whilst this may become the case in the future, there is no evidence of any shift in this context yet.

In summary, in regard to an application concerning the UK's denial of automatic PR to unmarried fathers under Articles 8 and 14, it is likely that a 'minimalist' approach would be taken since this attitude generally appears to dominate family law, recent caselaw in the context of PR also following this trend. As demonstrated by *Steinfeld* and *Ghaidan*, when 'activist' approaches have been taken, Parliament is usually already working on relevant reform.<sup>513</sup> Since this isn't currently the case in regard to unmarried fathers' acquisition of PR in the UK, this further undermines the likelihood of an 'activist' approach.

The finding of an incompatibility becomes even less likely when considering domestic conceptualisations of the welfare principle. UK law stipulates that in cases involving children, the child's welfare is the 'paramount' concern, a term described by reference to *J v C*: the 'course to be followed [in any case concerning children] will be that which is most in the interests of the child's welfare'.<sup>514</sup> Essentially, the *child's* interests are the *only* consideration at a domestic level, the rights and interests of other parties being secondary: in *Re P (Contact: Supervision)* it was held that 'the court is concerned with the interests of the mother and the father only in so far as they bear on the welfare of the child'.<sup>515</sup> This greatly differs to conceptions of the welfare principle at the Strasbourg Court. Here, the rights and interests of all relevant parties are considered with a 'fair balance' being struck between all and particular importance placed upon a parent's right to a meaningful parent-child relationship.<sup>516</sup> Following the domestic conceptualisation, in a case concerning unmarried fathers' acquisition of PR, the judiciary may focus upon the risk to children posed by 'unmeritorious' unmarried

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<sup>512</sup> Clifton, 'Birth fathers and their adopted children: Fighting, withdrawing or connecting' (n 22).

<sup>513</sup> *R (on the application of Steinfeld and Keidan) v Secretary of State for International Development* (n 493); *Ghaidan v Godin-Mendoza* (n 189).

<sup>514</sup> Children Act, s 3; *J v C* [1970] AC 668, (*insertion added*).

<sup>515</sup> *Re P (Contact: Supervision)* [1996] 2 FLR 314; Also see Shazia Choudhry and Helen Fenwick (n 314); Andrew Bainham, 'Private and public children law: an under-explored relationship' (2013) 25(2) *Child and Family Law Quarterly* 138, 155; Jonathan Herring, 'The Human Rights Act and the Welfare Principle in Family Law – Conflicting or Complementary?' [1999] CFLQ 223.

<sup>516</sup> *Johansen v Norway* [1996] ECHR 31; Bonner, Fenwick and Harris-Short (n 187) 579; Nigel Lowe, Gillian Douglas, Emma Hitchings, and Rachel Taylor, *Bromley's Family Law* (12th edn, Oxford University Press 2021) pp 515-518.

fathers, omitting proper consideration of the unmarried father's experience and so leaning towards a finding of compatibility.

Drawing all these points together, should a case arise at domestic courts concerning the compatibility of unmarried fathers' acquisition of PR in the UK with Articles 8 and 14 of the Convention in 2024, it is unlikely that an incompatibility would be found. Accordingly, whether appealing to the Strasbourg Court may be successful will now be considered.

### **3.3 Likelihood of Success at the Strasbourg Court**

Should the applicant be able to demonstrate fulfilment of the relevant admissibility requirements, an application can be launched at the Strasbourg Court. As mentioned in Chapter Two, whether a friendly settlement can be arrived at under Article 39 will first be considered before the case proceeds to court under Article 38. A preliminary issue which may arise in the context of this thesis is overcoming the admissibility requirement that the same matter must not have already been examined by the Strasbourg Court or another international body.<sup>517</sup> It may be that the court's consideration of relevant UK law in *McMichael*<sup>518</sup> and *B v UK*<sup>519</sup> would mean that a similar application in 2024 would be found inadmissible.

However, in *Kafkaris v Cyprus*, the Strasbourg Court found that a case on similar facts to a previous case can be considered if 'new information' is included in the complaint.<sup>520</sup> This was developed in *Ekimdzhev and Others v Bulgaria*, where changes in domestic law over time were found to qualify as 'new information'.<sup>521</sup> Specifically, the court stated that: 'In that earlier case, the Court scrutinised the system of secret surveillance in Bulgaria as it stood in mid-2007, whereas in the case at hand it must scrutinise that system as it stands now'.<sup>522</sup> Previous cases concerning the acquisition of PR vis à vis unmarried fathers in the UK occurred

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<sup>517</sup> Art 35(2)(b) (n328).

<sup>518</sup> *McMichael v United Kingdom* (n 29).

<sup>519</sup> *B v the United Kingdom* (n 50).

<sup>520</sup> *Kafkaris v Cyprus* [2011] ECHR 1089.

<sup>521</sup> *Ekimdzhev and Others v Bulgaria* [2022] ECHR 1

<sup>522</sup> *Ibid*, para 255.

in 1995 and 2000.<sup>523</sup> Since it has been over two decades since then, admissibility could be found in line with *Ekimdzhev and Others v Bulgaria*.<sup>524</sup>

Subsequent to a finding of admissibility a relevant case would be considered through the same four-stage test as discussed above. Whilst a ‘discretionary area of judgment’ was found to exist in domestic courts, a different judicial concept is relevant here: the margin of appreciation, as discussed in Chapter Two. This section will predict the width of the margin in regard to the denial of automatic PR to unmarried fathers using Helfer’s three observed features of the margin.<sup>525</sup>

Contextual factors must first be considered. This criterion considers who the interference impacts, the nature of the interference and whether it raises any moral or sensitive issues. A relevant consideration in regard to the former factor is immediately clear in this context: where children are impacted a more ‘careful’ scrutiny and accompanying narrower margin of appreciation have been found to exist.<sup>526</sup> A narrower margin also generally exists where the nature of the application centres upon the legal relationship between a parent and child.<sup>527</sup> Indeed, whilst a wide margin is applicable in matters concerning who the child should live with,<sup>528</sup> stricter scrutiny exists where the relationship between a parent and child may be effectively curtailed.<sup>529</sup> Since the very focus of a case concerning the denial of automatic PR to unmarried fathers is the legal relationship between fathers and children, a narrow margin will likely be imposed.

A narrow margin is also indicated by the presence of various sensitive issues in this context. For example, in cases concerning Article 14, a narrower margin will exist when ‘suspect’ grounds are involved. Gerard states that sex and ‘illegitimacy’ are examples of such grounds, intrinsically linked to a case concerning unmarried fathers’ acquisition of PR; these grounds are so highly protected that an impact upon them in an application will ‘immediately raise a

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<sup>523</sup> *McMichael v United Kingdom* (n 29); *B v the United Kingdom* (n 50).

<sup>524</sup> *Ekimdzhev and Others v Bulgaria* (n 521).

<sup>525</sup> Helfer (n 360) 144.

<sup>526</sup> ‘Guide on Article 8 of the European Convention on Human Rights’ (n 188) 82; *C.E. and Others v France* (n 362), paras 85-90.

<sup>527</sup> *Mennesson v France* [2014] ECHR 664, para 80.

<sup>528</sup> *Pavel Shishkov v Russia* (n 213), para 78.

<sup>529</sup> *Elsholz v Germany* (n 315), para 49; *Sommerfeld v Germany* (n 318), para 63.



suspicion of unreasonableness and prejudice'.<sup>530</sup> In fact, a narrow margin has specifically been confirmed to exist where a policy treats married and unmarried fathers differently.<sup>531</sup>

Gender equality is another sensitive issue relevant in this context. Strasbourg has stated that 'the advancement of gender equality is today a major goal' and therefore, where policies facilitate gender-based discrimination, 'very weighty reasons' should be provided.<sup>532</sup> In regard to the denial of automatic PR to unmarried fathers in the UK, the law implicitly communicates that mothers, regardless of marital status, are expected to be the primary carer for their children whilst unmarried fathers are not expected to take *any* such responsibility other than child maintenance. Some scholars have argued in favour of placing different roles upon men and women: Sheldon points out mothers have a clear biological role in caring for the child during pregnancy and after birth, justifying the expectation that they act as primary carer.<sup>533</sup> However, these views could be perceived as outdated and potentially harmful to women. The UK Government has pointed out that by tackling these stereotypes through policies such as Shared Parental Leave the gender pay gap has fallen by a quarter in a decade.<sup>534</sup> Casting women as the primary carers contributes to a range of gender inequalities such as an increased prevalence of single parenting, a role widely shown to lead to other social issues

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<sup>530</sup> Janneke Gerards, 'Discrimination Grounds' in Dagmar Schiek, Lisa Waddington and Mark Bell (eds), *Cases, Materials and Text on National, Supranational and International Non-Discrimination Law* (Hart Publishing 2007) 36.

<sup>531</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 21; *Sahin v Germany* (n 240), para 94; *Zaunegger v Germany* (n 190), para 51; *Paparrigopoulos v Greece* (n 285); *Hoffmann v Germany* App no. no. 34045/96 (ECtHR, 26 March 1993), para 56; Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 39.

<sup>532</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 20 (*emphasis added*).

<sup>533</sup> Sally Sheldon, 'From "absent objects of blame" to "fathers who want to take responsibility": Reforming birth registration law' (n 58) 382; Also see Ruth Deech, 'The Rights of Fathers: Social and Biological Concepts of Parenthood' in John Eekelaar and Petar Sarcevic (eds) *Parenthood in Modern Society* (Martinus Nijhoff 1993), 30; Julie Wallbank, 'Clause 106 of the Adoption and Children Bill: legislation for the "good" father?' (n 75); Helen Reece, 'UK women's groups' child contact campaign: "So long as it is safe" ' [2009] CFLQ 538.

<sup>534</sup> Department for Business and Trade and Department for Business, Energy & Industrial Strategy, *Good Work Plan: Proposals to support families* (Consultation closed on 29 November 2019); Nicola J White, 'Gender pay gap in the UK: 2022' (*Office for National Statistics*, 26 October 2022) <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours/bulletins/genderpaygapintheuk/2022#:~:text=Image%20.csv%20.xls-.The%20gender%20pay%20gap%20has%20been%20declining%20slowly%20over%20time,up%20from%207.7%25%20in%202021.>

such as poverty.<sup>535</sup> Since the denial of automatic PR to unmarried fathers potentially accentuates these gender inequalities, a narrow margin may be imposed in a related case.

Despite the fact that a wider margin, the 'moral margin', may be employed where a case raises sensitive issues, this is unlikely where 'a particularly important facet of an individual's existence or identity' is at stake.<sup>536</sup> A father's ability to care for his child or have a meaningful relationship with them is likely to be encompassed by this category. Based on all aforementioned contextual issues, it is likely that a narrow margin of appreciation be imposed in an application concerning an unmarried father's acquisition of PR in the UK.

Levels of expert, legal and public consensus can also greatly impact the width of the margin: *X, Y and Z v United Kingdom* confirmed that, where *no* consensus exists regarding the 'relative importance of the interest at stake or as to the best means of protecting it', there will be a wider margin and vice versa.<sup>537</sup> Within the context of unmarried fathers' acquisition of PR, little evidence of expert opinion exists aside from those of the Committee of Experts on Family Law, a Council of Europe committee composed of family law experts from 43-member states. In their 2006 report it was suggested that the 'marital presumption', that is the automatic acquisition of PR by both parents if married, could also be applied to couples who are cohabiting.<sup>538</sup> Although advocating for greater rights to unmarried fathers, this suggestion appeared purely focused upon extramarital relationships which *mirrored marriage*; unmarried fathers who do not cohabit with the mothers would not be encompassed.

The committee presented more radical views in 2008, proposing a new European Convention where *all* parents would receive automatic PR even if there is evidence to suggest that this could be 'harmful to the child's interests', judicial powers to remove PR functioning as a safeguard.<sup>539</sup> The report noted that there now exists an uncomfortable situation where

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<sup>535</sup> Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (n 20) 107; Also see Shazia Choudhry and Helen Fenwick (n 314).

<sup>536</sup> Clare Ryan (n 365) 473; *Evans v United Kingdom* (n 364), para 77.

<sup>537</sup> *X, Y and Z v the United Kingdom* [1997] ECHR 20, para 44.

<sup>538</sup> Committee of Experts on Family Law (n 245), principle 5.

<sup>539</sup> Council of Experts on Family Law, *A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation* (CJ-FA (2008) 5, presented to Strasbourg on 21 September 2009), 52.

almost all European states view discrimination against the *children* born outside of marriage as unconscionable, though accept discrimination against their fathers.<sup>540</sup> The Committee found this to be contradictory, noting that:

‘Children do not live in a vacuum... it is as discriminating to the child to limit legal parenthood or to deny significant carers legal rights and responsibilities as to accord the child a different status and legal rights according to the circumstance of their birth or upbringing’.<sup>541</sup>

The Committee have thus presented a united opinion in favour of unmarried fathers’ automatic acquisition of PR. Since this committee is composed of family law experts from 43 European states, this may qualify as convincing evidence concerning expert consensus.

In regard to legal consensus, a clear domestic diversity is immediately noticeable: whilst fifteen member states of the European Union (EU) do *not* allow unmarried fathers to automatically acquire PR,<sup>542</sup> eleven *do* (equating to 42% of the union).<sup>543</sup> Whether 58% (the percentage of states who do not allow unmarried fathers automatic acquisition) qualifies as ‘consensus’ is unclear since no quantitative boundary exists, the Strasbourg Court merely describing consensus as issues where a ‘great number’ of states agree.<sup>544</sup> However, the fact that there are also great variations between the legal frameworks of Member States within each category suggests that *no* consensus exists at all.

Firstly, disparities exist between the states that do not permit automatic PR. In Austria, cohabitation is central: if the unmarried couple cohabit, the father can acquire full PR through mere agreement, if not, the father can still acquire PR *but* the couple must also submit a judicial agreement as to who the child will live with.<sup>545</sup> In contrast, in Italy *both* father *and* mother must acknowledge the child in order to acquire PR. Whoever acknowledges the child

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<sup>540</sup> Ibid, 3.

<sup>541</sup> Ibid.

<sup>542</sup> ‘Parental responsibility - child custody and contact rights’ (*European Justice*, last updated on 14 June 2023) [https://e-justice.europa.eu/302/EN/parental\\_responsibility\\_child\\_custody\\_and\\_contact\\_rights](https://e-justice.europa.eu/302/EN/parental_responsibility_child_custody_and_contact_rights).

<sup>543</sup> Ibid.

<sup>544</sup> *Johnston v Ireland* (n 372), para 30.

<sup>545</sup> Marianne Roth, ‘National Report – Austria’ (*Commission on European Family Law*) <http://ceflonline.net/wp-content/uploads/Austria-Parental-Responsibilities.pdf> 17.

first acquires the power to refuse the acknowledgement of the second parent.<sup>546</sup> The UK and Slovakia also differ, offering acquisition through registration on the child's birth certificate.<sup>547</sup> Equally, variations exist between the states who do allow automatic PR. In Spain, PR is only exercised by the parent with whom the child lives, therefore, although acquiring PR, an unmarried father who does not live with the mother must successfully apply for joint PR in order to exercise it.<sup>548</sup> In contrast, Estonia requires both unmarried fathers and mothers to submit a declaration of intention, accepting or denying PR, before they can exercise it.<sup>549</sup> The Commission on European Family Law nevertheless attempted to find common principles in a 2007 publication.<sup>550</sup> Scherpe criticises their attempt, pointing out that Principle 3.8, 'Persons, whose legal parentage has been established, should have parental responsibilities for the child', is not a common conception, ten European States not awarding PR in this way.<sup>551</sup>

Nevertheless, Margaria points out that *international* 'family laws are nonetheless unfolding in similar directions', European institutions such as the Strasbourg Court being instrumental in encouraging similar legislative change.<sup>552</sup> One of the first international expressions of support for automatic PR for unmarried fathers was the 1984 Council of Europe Recommendation in which states were asked to encourage both parents to have 'common responsibilities' for raising children regardless of marital status.<sup>553</sup> A more radical proposal

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<sup>546</sup> Liliana Rossi Carleo and Elena Bellisario, 'National Report – Portugal' (*Commission on European Family Law*) <http://ceflonline.net/wp-content/uploads/Portugal-Parental-Responsibilities.pdf> 19.

<sup>547</sup> Children Act s 4(1) and (1A); 'Parental responsibility for unmarried fathers: know your rights' (*gov.je*) <https://www.gov.je/LifeEvents/StartingFamily/AfterBirth/pages/parentalresponsibilityforunmarriedfathers.aspx>.

<sup>548</sup> 'Parental responsibility - child custody and contact rights – Spain' (*European Justice*, last updated on 29 March 2022) [https://e-justice.europa.eu/302/EN/parental\\_responsibility\\_child\\_custody\\_and\\_contact\\_rights?SPAIN&member=1](https://e-justice.europa.eu/302/EN/parental_responsibility_child_custody_and_contact_rights?SPAIN&member=1).

<sup>549</sup> 'Parental responsibility - child custody and contact rights – Estonia' (*European Justice*, last updated on 4 January 2022) [https://e-justice.europa.eu/302/EN/parental\\_responsibility\\_child\\_custody\\_and\\_contact\\_rights?ESTONIA&member=1](https://e-justice.europa.eu/302/EN/parental_responsibility_child_custody_and_contact_rights?ESTONIA&member=1).

<sup>550</sup> Scherpe J M, 'Establishing and Ending Parental Responsibility: A Comparative View' in Probert R, Gilmore S and Herring J (eds) *Responsible Parents & Parental Responsibility* (Hart Publishing 2009) 43; 'Principles of European Family Law Regarding Parental Responsibilities' (*Commission on European Family Law* 2007) <https://ceflonline.net/wp-content/uploads/Principles-PR-English.pdf>; See also Katharina Boele-Woelki, Frederique Ferrand, Beilfuss Cristina Gonzalez, Maarit Jäntherä-Jareborg, Nigel Lowe, Dieter Martiny and Walter Pintens, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia 2007).

<sup>551</sup> Jens M Scherpe (n 550) 46.

<sup>552</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) pp 9–10.

<sup>553</sup> Council of Europe Committee of Ministers, *Recommendation No. R (84) 4 of the Committee of Ministers to Member States on Parental Responsibilities* (adopted by the Committee of Ministers on 28 February 1984) art 18(1).

was published and accepted in a Committee Opinion in 2015, the Parliamentary Assembly urging member states to ‘remove from their laws any difference based on marital status between parents who have acknowledged their child’.<sup>554</sup> Such international legal consensus may eventually influence an alignment of domestic law.

Indeed, Lamont recently noted that heightening rates of European migration is influencing convergence in domestic law since there is a connected need for universal legal entitlements.<sup>555</sup> Pertinent to this thesis is the 2022 proposal for a Council Regulation which would aim to ‘provide legal certainty and predictability’ upon the ‘establishment’ and ‘recognition’ of parenthood across Member States.<sup>556</sup> Specifically, parents would be able to attain a certificate of parenthood which could be used as proof across Member States. Whilst this regulation does not propose to mandate changes in domestic law concerning the establishment of parenthood, it would introduce a consistent approach between Member States in cross-border disputes, potentially encouraging further future legal alignment.<sup>557</sup> Accordingly, despite current domestic legal diversity in the context of unmarried fathers’ acquisition of PR, the extent of such divergence may narrow over the next few decades due to the influence of international legal consensus.

Finally, evidence for public consensus in the context of unmarried fathers’ acquisition of PR is extremely limited. Although Chapter One noted that the majority of the UK public are united in their feelings in favour of automatic acquisition, there exist no European wide surveys concerning this issue.<sup>558</sup> Accordingly, public consensus cannot be accurately analysed and so assessment of overall consensus will focus solely upon expert and legal consensus. Although based on limited evidence, expert consensus and international legal consensus appear united in favour of unmarried fathers’ automatic acquisition of PR, suggesting a narrow margin.

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<sup>554</sup> Council of Europe Committee Opinion (n 295).

<sup>555</sup> Stephen Gilmore, Daniel Monk, Ruth Lamont and Jonathan Herring (n 509), 109.

<sup>556</sup> European Commission, *Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood* (COM(2022) 695, presented on 7 December 2022), 1.

<sup>557</sup> *Ibid*, 2.

<sup>558</sup> Dey and Wasoff (n 21) pp 228-229; Anne Barlow, Carole Burgoyne and Janet Smithson (n 153) 166; Bonnie Gardiner (n 152).

However, great disparities were found within domestic legal consensus. This issue could impact the margin in one of two ways.

Firstly, it may not impact the width of the margin at all, essentially being disregarded. For example, in *F v Switzerland* the Strasbourg Court concluded that, despite being the *last* European state to enforce a waiting period between a divorce and remarriage, Switzerland had not acted incompatibly. Specifically, the court stated that family law is so ‘closely bound up with the cultural and historical traditions’ that the approach of other states sometimes has minimal impact.<sup>559</sup> Alternatively, lack of domestic legal consensus may be disregarded where there exists international legal consensus, even before the potential resulting convergence of domestic law. This was the case in *Zaunegger* where, despite a lack of domestic consensus concerning unmarried fathers’ ability to apply for joint custody, the Strasbourg Court found a violation anyway, emphasising consensus concerning common principles.<sup>560</sup> Margaria described this as a ‘strategic use of European consensus in order to support a predetermined outcome’ potentially demonstrating judicial activism.<sup>561</sup> Since there exists considerable international legal consensus in the context of unmarried fathers’ acquisition of PR, there may be a similar activism here.

Lack of domestic consensus could equally, however, widen the width of the margin. In regard to issues which are closely linked to cultural and historical traditions, the court may choose to defer to the principle of subsidiarity.<sup>562</sup> Indeed, Gerards has pointed out that, in regard to applications concerning Article 8 where there is a lack of domestic consensus, the Strasbourg Court tends to act cautiously due to the complex moral and ethical issues usually raised by such cases.<sup>563</sup> The approach taken will ultimately depend upon the moral agenda of the Strasbourg Court. This will now be assessed alongside the speed and direction of societal evolution in the context of unmarried fathers’ acquisition of PR, Helfer’s third and final factor

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<sup>559</sup> *F. v Switzerland* (n 367), paras 16-17.

<sup>560</sup> *Zaunegger v Germany* (n 190).

<sup>561</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 84.

<sup>562</sup> Eva Brems, ‘Misunderstanding the margin? The reception of the ECtHR’s margin of appreciation at the national level’ (2023) 21(3) *International Journal of Constitutional Law* 884, 885-888.

<sup>563</sup> Gerards, ‘Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights’ (n 379) 13.

to consider.<sup>564</sup> Subsequently, a prediction concerning the impact of the lack of domestic legal consensus in this case can be made.

Since the convention is a 'living instrument', it must be applied flexibly over time in response to social changes. Where a legal rule conflicts with the direction of societal evolution, a narrower margin is likely to exist and vice versa. However, since no guidelines exist concerning how far society must change before legal reform is required, any judgment upon compatibility will depend on the Strasbourg Court's moral opinions upon the issue. Generally, should the Strasbourg Court desire to push forward a change, an approach characterised as 'judicial activism', the court may emphasize the conflict between the rule and the direction of evolution, applying a narrower margin. Alternatively, should the Strasbourg Court be morally opposed to the direction of societal evolution, the court may seek to find that evolution had not reached a point where the legal rule in question was incompatible, pushing for a wider margin.

Societal evolution regarding unmarried fathers' acquisition of PR will be considered through two lenses: demographics and European models of fatherhood. In regard to demographics, an increasing number of extramarital relationships, and children born in such contexts, have been recorded in the last few decades. Specifically, in 2020, the European Union reported that 42% of children born in 2018 in Europe were a product of extramarital relationships, 17% higher than that reported in 2000, and that eight countries personally experienced more extramarital births than within marriage.<sup>565</sup> Although some states reported opposite statistics, more than 70% of births occurring within marriage in some countries,<sup>566</sup> the total number of extramarital births in Europe has increased. The European Union themselves have stated that this 'signals new patterns of family formation' as extramarital relationships become more socially acceptable.<sup>567</sup> Similar results have been reported in the UK, more children now being born outside of marriage than within.<sup>568</sup> This demographical change is potentially significant: since the denial of automatic PR to unmarried fathers now affects a

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<sup>564</sup> Helfer (n 360) 154.

<sup>565</sup> '42% of births in the EU are outside marriage' (*Eurostat*, 17 July 2020) <https://ec.europa.eu/eurostat/web/products-eurostat-news/-/ddn-20200717-1>.

<sup>566</sup> *Ibid.*

<sup>567</sup> *Ibid.*

<sup>568</sup> Siân Bradford and Faiza Mohammad (n129).

larger portion of society, Strasbourg may be pushed towards a narrower margin, advocating for enhanced rights for this particular group. Whether societal views and the Strasbourg Court's responses have mirrored this prediction will now be assessed.

According to McGlynn and, more recently, Margaria, two competing models of fatherhood exist: 'conventional', where the father is heterosexual, married to the mother and the biological parent of the child;<sup>569</sup> and 'new fatherhood', encompassing those who do not meet the description of 'conventional'.<sup>570</sup> Margaria has argued that family life has recently faced 'unpredictable societal and technological shifts', potentially encompassing a shift towards 'new fatherhood' in Europe.<sup>571</sup> Should such a trend indeed be found, this may indicate a narrowed margin since the denial of automatic PR to unmarried fathers could be interpreted as being too closely aligned to the 'conventional' model. Accordingly, whether such a shift has indeed occurred and how the Strasbourg Court has responded to this shift, will be assessed in this section.

A clear shift towards 'new fatherhood' appears to have materialized in European political and legislative systems. Fundamentally, although a 'father' was traditionally defined through legal presumptions (for example, by acquiring PR through marriage)<sup>572</sup> or financial obligations (for example, the requirement to pay maintenance as a biological father),<sup>573</sup> the social role of fathers has recently become increasingly important.<sup>574</sup> The Committee of Experts on Family Law's suggestion that the marital presumption be extended to cohabiting couples is pertinent here, showing a recognition that these relationships can be just as committed as those formalised within marriages.<sup>575</sup>

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<sup>569</sup> Clare McGlynn, *Families and European Union* (Cambridge University Press 2009); Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 13.

<sup>570</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 15.

<sup>571</sup> *Ibid*, p22.

<sup>572</sup> Committee of Experts on Family Law (n 245), principle 3.

<sup>573</sup> Convention on the Rights of the Child (adopted 20 November 1989) UNGA Res 44/25, Arts 6 and 1.

<sup>574</sup> For an assessment of how the COVID pandemic affected perceptions of the social role of fathers see: Alice Margaria, 'When the personal becomes political: Rethinking legal fatherhood' (2022) 20 *International Journal of Constitutional Law* 1386; Also see Tim Bayne and Avery Kolers, 'Toward a Pluralist Account of Parenthood' in Stephen Gilmore (eds), *Parental Rights and Responsibilities* (Routledge 2017) 103.

<sup>575</sup> Committee of Experts on Family Law (n 245), Principle 5.



Legal frameworks around recent medical developments also provide relevant examples. Within the context of assisted reproductive technologies (ART), it is becoming understood that a child can have several father figures, for example, a biological father and a social father, departing from the ‘conventional’ understanding of fatherhood where fatherhood resides in one person.<sup>576</sup> In fact, because ARTs may involve a third-party in order to conceive, the importance of biological tie has diminished, the intention of the would-be father being more important. ARTs also allow for parenthood outside of marriage (since cohabiting couples can access these technologies) and outside of heterosexual relationships (LGBTQ+ couples can now access these technologies too).<sup>577</sup> A wider shift towards social parenting is also demonstrated through recent developments in surrogacy. Specifically, the Law Commission of England and Wales have recommended a ‘new pathway to legal parenthood’ whereby intended social parents of the child will acquire PR automatically.<sup>578</sup> Granted, there are limits to these developments: in *Re TT and YY*, a transgender man who gave birth to his child was not able to be registered as ‘father’ despite having acquired a Gender Recognition Certificate.<sup>579</sup> This demonstrates the continued entrenchment of some traditional legal principles such as that the person who gives birth to the child is that child’s legal mother, an issue which appears out of keeping with the practice of surrogacy and developments in the rights of transgender people. Nevertheless, the overarching trend in the context of *fatherhood* indicates movement towards new, more pluralistic, conceptions.

The manner in which Article 8 has been applied by the Strasbourg Court in recent years could also indicate a correlating shift towards ‘new fatherhood’ in judicial settings. Crucially, Margaria points out that when determining the existence of a ‘personal tie’ the Strasbourg Court now focuses more on the ‘nature and purpose’ of the relationship rather than its ‘form’, consequently becoming more inclusive of relationships outside of traditional relational

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<sup>576</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 49; Claire Fenton-Glynn, (n197) 251.

<sup>577</sup> Gilmore and Glennon (n 68) 3.6.

<sup>578</sup> ‘Surrogacy laws to be overhauled under new reforms – benefitting the child, surrogate and intended parents’ (*Law Commission*, 29 March 2023) <https://www.lawcom.gov.uk/surrogacy-laws-to-be-overhauled-under-new-reforms-benefit-the-child-surrogate-and-intended-parents/>.

<sup>579</sup> *Re TT and YY* [2019] EWHC 2384 (Fam) [279]; Gilmore and Glennon (n 68) 3.1.1; See also Claire Fenton-Glynn, (n197) 250; and *X, Y and Z v the United Kingdom* (n 537).

paradigms.<sup>580</sup> Specifically, should the father have no legal or social relationship with the mother, evidence of his commitment, motivations and attachments towards his child can facilitate his acquisition of PR. In fact, even if limited evidence exists here too, *potential* social relationships may now be protected.<sup>581</sup> Furthermore, Margaria argues that an ‘anti-stereotyping approach’ has developed under Article 14, the Strasbourg Court having developed an ‘increased sensitivity and awareness of the implications of stereotyping on the enjoyment of human rights’.<sup>582</sup> Traditionally, the Strasbourg Court appeared to implicitly reject generalisations as justifications for differences in treatment,<sup>583</sup> however, recently, the court has begun to explicitly name and criticise stereotypes embedded in national legislation.<sup>584</sup> One such stereotype is that unmarried fathers are irresponsible and uninterested in their children, expressly rejected by the Strasbourg Court in *Sahin*.<sup>585</sup>

However, other evidence suggests that the Strasbourg Court has *not* kept pace with the shift towards ‘new fatherhood’ seen in the political and legislative sphere. In many cases, the court has chosen to align with traditional perceptions of fathers. For example, in 2017 the court found no violation where the Romanian legal system denied fathers the right to apply for a stay of execution of sentence in order to care for a new-born child whilst granting this right to mothers.<sup>586</sup> Specifically, the Strasbourg Court justified their decision based on a ‘special’ social and biological bond between mother and child, simultaneously undermining fathers’ social role.<sup>587</sup> *Chavdarov v Bulgaria* is another relevant example here: the Strasbourg Court found no violation where a father who had cared for his children for 12 years complained of his inability to acquire PR due to the mother’s husband’s acquisition of PR through marital presumption.<sup>588</sup> Since the father was still able to access his children, the court found there to be no real need for his acquisition of PR.

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<sup>580</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 26.

<sup>581</sup> *Anayo v Germany* (n 214).

<sup>582</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 34.

<sup>583</sup> *Zaunegger v Germany* (n 190), paras 56–57.

<sup>584</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 34.

<sup>585</sup> *Sahin v Germany* (n 240), para 58.

<sup>586</sup> *Alexandru Enache v Romania* (n 232).

<sup>587</sup> *Ibid*, para 71.

<sup>588</sup> *Chavdarov v Bulgaria* App no. 3465/03 (ECtHR 21 November 2010).

The influence of the 'conventional model' is also evident through the legal requirements of Article 8. Specifically, when determining the existence of a personal tie between an unmarried father and his child, the court will consider how closely his relationship with the mother mirrors marriage. For example, cohabitation and intention to be in the relationship long-term are considered to be important factors. Accordingly, KilKelly has argued that the Strasbourg Court does not recognise all types of relationships,<sup>589</sup> particularly when it opposes 'conventional' ideas.<sup>590</sup> Draghici has recently revived this criticism, stating that the continuing focus upon the relationship with the mother demonstrates that the Strasbourg Court 'is out of step with the realities of present-day family life'.<sup>591</sup>

Crucially, evidence for a slower pace of change is also evident within the specific context of unmarried fathers' acquisition of PR. In *Sommerfeld* and *Zaunegger* the Strasbourg Court found violations where unmarried fathers' acquisition of PR was prevented by the need to have the mother's consent.<sup>592</sup> However, the Strasbourg Court has never held that the fundamental denial of automatic acquisition of PR vis à vis unmarried fathers is incompatible with the Convention. Instead, the Strasbourg Court continues to support the ability of married fathers to acquire PR automatically whilst unmarried fathers are not, demonstrating their ultimate 'endorsement of a marital understanding of fatherhood'.<sup>593</sup> Thus, whilst clear shifts towards 'new fatherhood' can be identified in the political and legislative spheres, the Strasbourg Court appears to be evolving at a slower pace, remaining markedly entrenched in 'conventional' fatherhood. Accordingly, assessment of evolution indicates a wide margin of appreciation with the Strasbourg Court remaining hesitant to truly advocate for equal rights for unmarried fathers.

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<sup>589</sup> Ursula KilKelly, 'Protecting Children's Rights under the ECHR: The Role of Positive Obligations' (2010) 61(3) Northern Ireland Legal Quarterly 252, 254.

<sup>590</sup> *Ibid*, pp 251-253.

<sup>591</sup> Carmen Draghici, 'Unplanned fatherhood is not sperm donation: the unduly moralistic approach to natural fathers in European Convention case law' [2022] Child and Family Law Quarterly 123, 123.

<sup>592</sup> *Sommerfeld v Germany* (n 318); *Zaunegger v Germany* (n 190).

<sup>593</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 160.

Each of the preceding assessments indicated different widths of the margin. Whilst contextual considerations, expert consensus and international legal consensus indicated a narrow margin, assessment of evolution pointed towards a wide margin. The issue which remains is what impact the lack of domestic legal consensus may have. Since the Strasbourg Court does not appear to be currently motivated towards awarding equal rights to unmarried fathers in the context of acquisition of PR, the court is likely to push for a wider margin by emphasising the fact that this issue is embedded in cultural traditions and values, relying upon the principle of subsidiarity.<sup>594</sup>

### 3.4 Conclusion

It has been argued that, whilst the first two stages of the four-stage test may be successfully surpassed by an applicant, the UK Government may struggle to advance acceptable arguments at the latter stages. However, considering precedent and the wide margin likely to be imposed by the Strasbourg Court, it is predicted that an incompatibility would not be found should a relevant case arise in 2024. Specifically, the court may hold that, despite issues with providing a 'legitimate aim' and/or demonstrating proportionality, the UK falls within a wide margin of appreciation and so there exists lenience for this.

Despite this, a shift towards what Margaria terms 'new fatherhood', and a connected growing intolerance for unequal abilities to acquire PR depending on marital status was detected within European political and legislative bodies.<sup>595</sup> Should this shift continue and consensus towards this viewpoint strengthen, the margin of appreciation may narrow over the next few decades as the Strasbourg Court modifies its interpretation of the Convention in line with its characterisation as a 'living instrument'. As a result, this may set the scene for a future finding of incompatibility should a relevant case arise in a few decades time.

Specifically, this future narrower margin may demand the equal treatment of all fathers regardless of marital status as well as an ensuring of gender equality, already noted to be a 'major goal' of the Strasbourg Court.<sup>596</sup> Such a standard would align with proposals from

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<sup>594</sup> Brems (n 562) pp 885-888.

<sup>595</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30).

<sup>596</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 20 (*emphasis added*).

European bodies, such as the Council of Europe Parliamentary Assembly's encouragement of states to 'remove from their laws any difference based on marital status between parents who have acknowledged their child' in 2015.<sup>597</sup> Chapter Four will consider this issue further, advising the UK Government to proactively design a new legislative scheme for the acquisition of PR *before* a potential future conflict with the Convention occurs.

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<sup>597</sup> Ibid, para 5.3.

## Chapter Four: Alternative Strategies for Recognising the Rights of Unmarried Fathers

The previous chapter predicted that, although unlikely to occur in 2024, an incompatibility with Articles 8 and 14 may be found in the future should a relevant case concerning unmarried fathers' acquisition of PR then arise. This result would depend upon whether increasing consensus at an international level towards 'new fatherhood' reaches a point where the Strasbourg Court are forced to align their interpretation of the Convention, narrowing the margin of appreciation accordingly. In light of this finding, this Chapter will recommend that the UK take heed of this future likelihood and proactively begin designing suitable legislation to award unmarried fathers automatic PR. Being *proactive* rather than *reactive* to a future possible case could allow the UK more time to draft appropriate remedial legislation without the pressure of intermittent monitoring by the Committee of Ministers.<sup>598</sup>

This chapter will analyse the suitability of two original models for such a framework. These are termed the Conditional Automatic Acquisition Model and the Equality Model. It will be shown that, although both would prove more compatible with the Convention than the current UK framework, the 'Equality Model' is preferable. This is because it not only meets Convention standards but also introduces enhanced equality between parents regardless of gender or marital status and more accurate alignment with modern developments such as surrogacy.

As a preliminary issue it is important to note the definition of 'automatic' in this context. In most countries, a mother's PR is bestowed after childbirth, an act which is interpreted as evidencing her maternity. Logically, a 'proving act' must also exist for the unmarried father or else ambiguity may arise over which father-figure the PR has attached to. This act, in both models, will be the acknowledgement of paternity demonstrated through an explicit step such as the signing of the child's birth certificate.

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<sup>598</sup> 'The Supervision Process' (n 356).

#### **4.1 The Conditional Automatic Acquisition Model**

The first model would reform UK law concerning acquisition of PR solely in regard to unmarried fathers. A new legislative framework would hence be introduced for this group whilst the current law concerning mothers and married parents' acquisition would remain valid: all mothers would acquire PR immediately through the act of giving birth; married fathers will acquire PR automatically through their marriage to the mother and retain it should they divorce. Key aspects of this model will now be outlined.

##### **Acquisition through Acknowledgment**

The basic premise of this model is that all unmarried fathers would acquire PR simply through acknowledging paternity, with PR automatically flowing from such a declaration. In this way, it would be based upon the reforms to the Children Act 1989, which introduced the ability for unmarried fathers to acquire PR through signing the child's birth certificate.<sup>599</sup> Chapter One noted that this method of acquisition required the mother's consent, raising issues such as the mother's ability to act as a gatekeeper to father's acquisition and the potential for 'unmeritorious' fathers to use this as an avenue for coercion and harassment. For these reasons, this model does not require the mother's consent.

Should the father who acquires PR in this way not be cohabiting with the mother, a Child Arrangements Agreement would be required in addition to his acknowledgement to confirm the child's living arrangements.<sup>600</sup> Alternatively, in instances where the mother or father wish for the child to know the identity of their father but do not desire PR to be bestowed upon him, either can submit an application to the court requesting this. Where the mother submits such an application unilaterally, the court may contact the father to ensure he agrees to this outcome. Three underlying safeguards within this framework will now be considered.

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<sup>599</sup> Children Act s 4(1) and (1A).

<sup>600</sup> 'Making child arrangements if you divorce or separate' (GOV.UK) <https://www.gov.uk/looking-after-children-divorce/if-you-agree>.

## Time Limitation

A time limitation would be embedded within this model meaning that if a year passes since the birth of the child without the father having acknowledged paternity the father's PR would be suspended. If a father wishes to acquire PR after this year has passed, they would require judicial permission for this, lifting the aforementioned suspension. The intention of this safeguard is to protect mothers who conceived their child through a fleeting sexual encounter, or 'one-night stand', from the interference of a stranger who had been absent thus far.

However, the way in which a father could acquire PR after the year has passed will not be onerous. He would submit a judicial application for an out-of-time acquisition which would be granted to him provided he is not currently involved in any trials or detention for the rape of the mother who conceived the disputed child (this bar will be considered further in due course). The mother would be notified as soon as he applies, allowing her the chance to initiate proceedings to terminate his PR, hence acting as a safeguard for her benefit. There would be no assessment of his merit aside from this fact since discussion of such assessments in Chapter One, for example through the *Re H* criteria, have proven misleading in some circumstances.<sup>601</sup>

This contrasts to the approach of French legislation. Here, should the father not acquire PR within the one-year time limit, they have two options: to acquire PR through a statutory agreement with the mother, requiring her consent, or pursue a Parental Responsibility Order which would involve a judicial assessment of his character in alignment with the child's best interests.<sup>602</sup> The purpose of the Conditional Automatic Acquisition Model is to remove obstacles to unmarried fathers' acquisition which can be manipulated by mothers or may be used to misrepresent the fathers' true merit and hence does not take this approach.

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<sup>601</sup> *Re H (Minors) (Local Authority: Parental Rights) (No 3)*3 (n 86).

<sup>602</sup> French Civil Code, art 372.



## Exclusion Clause

In addition to the time limitation, an exclusion clause would be embedded into this model's framework. This would automatically prevent the acquisition of PR, or remove existing PR, from certain fathers. Two categories of men would be encompassed by this tool, the first being unmarried fathers who have been convicted of, or are on trial for, rape which led to the conception of the disputed child. In this scenario, the father would still be able to acknowledge paternity, thereby allowing the child to know the identity of their father, but would not acquire PR through this act.

The second category of men included within this clause would be those who have been convicted of, or are on trial for, rape of a woman who already has a child they share PR for. The reason for the addition of this second category is to protect mothers who already have a child with the unmarried father from being required to notify or obtain his permission for certain decisions concerning the child.<sup>603</sup> This would give the mother space from the father during his trial and/or detention where tensions between them are likely to be heightened. If he did indeed rape her, she is also protected from possible emotional harassment and coercion from the father through contact with him during the trial.

In both scenarios, the exclusion clause would immediately protect the mother and child from potential further harm. All fathers which fall within this clause can judicially apply for an exception to be made in their case and the court may override their exclusion should they deem this to be appropriate. Equally, should they be found innocent of the charge or come to the end of their detention and their child still be under the age of 18, they may apply for PR.

It is important to note the intentional rejection of an alternative method to exclusion clauses, considered in the 1982 Law Commission report: a positively defined clause which defines all who are deemed 'meritorious', only automatically conferring PR on those who fit this description. For example, legislation in New Zealand automatically confers PR upon

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<sup>603</sup> FPR (436) r 12.8(1).

unmarried fathers who lived with the mother ‘as husband and wife’ at the time of the child’s birth.<sup>604</sup> The Conditional Automatic Acquisition Model has rejected this approach for several reasons. Firstly, it is arguably more difficult to define what type of man is ‘meritorious’ than delimit those that are ‘unmeritorious’. Fathers can be meritorious for a multitude of reasons and so the constructing a list of those who should automatically acquire PR will inevitably exclude some ‘meritorious’ fathers. Equally, it is difficult to equate certain factors with being ‘meritorious’. Simply because a father cohabits with the mother does not mean he is suitable for fatherhood. Even if a list of appropriate categories was designed, the Law Commission have emphasized difficulty in defining these categories with enough clarity. For example, New Zealand’s category of ‘living together as husband and wife’, could be interpreted in many ways depending on how one defines a relationship which mirrors ‘husband and wife’.<sup>605</sup> It is for these reasons that an exclusion clause has been opted for instead.

However, it is important to note that the use of an exclusion clause was recently rejected in a UK petition, undermining the likelihood that a similar clause within this model would prove politically acceptable.<sup>606</sup> Whilst receiving over 130,000 public signatures, the Government rejected a petition to automatically terminate the PR of parents who are convicted of murdering the other parent, stating that the termination of PR under section 4(2A) and (3) of the Children Act 1989 already provided a reasonable safeguard.<sup>607</sup>

However, the Government’s defence here may prove unconvincing the strength of the exclusion clause being that it would *immediately* prevent the father’s ability to exercise legal powers associated with PR which could facilitate further abuse of the child or mother. In contrast, the termination of his PR would delay this result until the conclusion of litigation. Statistically, 30% of rape victims will suffer from major depressive episodes<sup>608</sup>, with 75% of

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<sup>604</sup> New Zealand Guardianship Act 1968, s 6.

<sup>605</sup> *Family Law: Illegitimacy Final Report* (n 10) 36.

<sup>606</sup> UK Government and Parliament, ‘Automatically suspend PR rights of parent guilty of murdering the other parent’ (2 November 2022) <https://petition.parliament.uk/petitions/614893>.

<sup>607</sup> *Ibid*.

<sup>608</sup> Dean G Kilpatrick, ‘The Mental Health Impact of Rape’ (National Violence Against Women Prevention Research Center (2000) <https://mainweb-v.musc.edu/vawprevention/research/mentalimpact.shtml#:~:text=Rape%20victims%20were%20three%20times,health%20problems%20are%20life%20threatening>).

victims whose case goes to trial suffering additional mental distress.<sup>609</sup> The added pressure of having to apply for the termination of the father's PR and handle possible interactions with the father whilst this case proceeds on top of navigating a trial for rape may accentuate this trauma. Hence, this thesis supports the introduction of an exclusion clause, finding the Government's argument to be unconvincing.

### Termination Principles

The third safeguard embedded into this model would be the ability of the mother, child or other legal guardian to apply for the termination of a father's PR. As discussed in Chapter Three, several issues have been identified with the current UK framework governing this issue, most notably the high threshold of evidence it requires.<sup>610</sup> For this reason, this model proposes to reform the current framework. Such reform would be based on French legislation since, according to the Commission on European Family Law, between 450 and 600 terminations of PR occur in France each year due to their comprehensive legislation governing this issue.<sup>611</sup> Specifically, French legislation stipulates specific justifications for the termination including 'usual and excessive consumption of alcoholic beverages', drug addiction and 'lack of care or lack of guidance' when these behaviours endanger the child's 'security, health or morality'.<sup>612</sup> Such an explicit list may be beneficial in UK legislation considering that, as an overall trend, only exceptionally serious behaviours such as murdering the children's mother have led to termination.<sup>613</sup> By presenting the judiciary with clear legal authority to terminate PR for other less extreme reasons, termination of PR may become better utilised as a safeguard. This list would also be unexhaustive, allowing for appropriate responses to behaviour not foreseen by statute.

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<sup>609</sup> Hamish Armstrong, 'Three in four rape and sexual assault survivors' mental health harmed during police investigation, research reveals' (*City University of London*, 21<sup>st</sup> September 2023) <https://www.city.ac.uk/news-and-events/news/2023/09/three-in-four-rape-and-sexual-assault-survivors-mental-health-harmed-during-police-investigation-research-reveals#:~:text=Poor%20police%20responses%20to%20rape,to%20do%2C%20in%20their%20case.>

<sup>610</sup> Karen Lennon and Shannon Woodley (n 453) 1300.

<sup>611</sup> Frédérique Ferrand, 'National Report – France' (*Commission on European Family Law*) <http://ceflonline.net/wp-content/uploads/France-Parental-Responsibilities.pdf> para 51.

<sup>612</sup> French Civil Code, arts 378-1 and 1.

<sup>613</sup> *Nottingham CC v Farmer* (n 465).

As well as improving termination as a safeguard, this reform would further clarify the principles within this area of law, an issue identified within the current UK framework in Chapter Three.<sup>614</sup> As argued by Douglas and Gilmore, a delicate balance between discretion and statutory provision must be achieved in private family law: statute must be detailed enough to allow some consistency between judgments but flexible enough to facilitate judicial freedom to interpret statute within changing social climates and arrive at just outcomes in individual cases.<sup>615</sup> The latter reform would strike an appropriate balance here, encouraging consistency between judgments by providing specific statutory reasons which may warrant removal, but also maintaining some flexibility since the list would be unexhaustive.

Other reforms would include a removal of the applicability of the no order principle under section 1(5) CA, lowering the threshold of evidence required. This would reduce pressure upon mothers and also better protect them from ‘unmeritorious’ fathers where limited evidence exists for their abuse. This model would also enable mothers to make an application for termination before the birth of the child, preventing the father’s exercise of PR from the outset. After receiving an application, the court would assess the father’s merit and pre-emptively remove his ability to acquire PR should this be deemed appropriate. Without this reform, mothers who wish to protect themselves and their child from an ‘unmeritorious’ father would have to wait until the child’s birth, and the father’s acquisition of PR before initiating proceedings. Given the delays in the family justice system, litigation could take months to conclude and so there would inevitably be a period where the ‘unmeritorious’ father has access to both parties.

Additionally, enhanced support would be provided for mothers including legislating for: opportunities for mothers to meet with a social worker or legal adviser, who can advise on issues such as seeking alternative temporary housing, and a similar scheme to the EX160 Form would be introduced, waiving court fees for mothers who are on low income or benefits.<sup>616</sup>

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<sup>614</sup> Stephen Gilmore, ‘Withdrawal of Parental Responsibility: Lost Authority and a Lost Opportunity’ (n 474), 1053; Lauren Stocks (n477).

<sup>615</sup> Gillian Douglas and Stephen Gilmore (n 91) 90.

<sup>616</sup> GOV.UK, ‘How to apply for help with fees (EX160A)’ <https://www.gov.uk/government/publications/apply-for-help-with-court-and-tribunal-fees/how-to-apply-for-help-with-fees-ex160a>.

These legislative changes would aim to make termination litigation more accessible and less daunting for mothers. Finally, this reformed framework would have the addition of an emergency suspension power for mothers who can demonstrate that their child is in immediate danger. Should such evidence be presented and accepted by the court, the father's PR would be immediately suspended prior to a full hearing at a later date to determine whether to terminate his PR.

### **Compatibility of the Conditional Automatic Acquisition Model with Articles 8 and 14 of the Convention**

In order to assess whether this model would be an acceptable piece of proactive legislation designed to render UK law compatible with the Convention for the foreseeable future, it must be assessed alongside the legal framework under Articles 8 and 14. Since this model would impose a unique system for acquiring PR upon unmarried fathers there would still be a potential for discrimination. After demonstrating a family tie for the purposes of Article 8, the unmarried father would be able to demonstrate this difference in comparison to an unmarried mother or married father.

Analysis henceforth will focus upon proportionality of the legislative model in accordance with the Government's dual aim of facilitating the access of 'meritorious' unmarried fathers to PR whilst excluding those who are 'unmeritorious'. Several issues will be considered here, mirroring the structure of Chapter Three: whether this model would meet the Government's legitimate aim will be first assessed followed by how effectively it would balance the rights and freedoms of the community with those of unmarried fathers. Lastly, whether this model fits within the relevant margin of appreciation will be considered.

### **Whether this Model Would Meet the Government's Legitimate Aim**

By allowing acquisition through unilateral acknowledgement of paternity, 'meritorious' fathers would be able to acquire PR with an ease not facilitated by the current framework. Currently, the easiest ways in which an unmarried father can acquire PR is through signing

the birth certificate<sup>617</sup> or making a statutory agreement with the mother.<sup>618</sup> However, both require the mother's consent. As discussed in previous chapters, since there is no objective assessment of the mother's reasoning, this 'gatekeeping' function can lead to 'meritorious' fathers being denied PR for reasons unrelated to their merit or the best interests of the child.<sup>619</sup> By removing the need for the mother's consent, this model abolishes this barrier, better ensuring the access of 'meritorious' fathers.

Another issue which was noted in regard to the current framework in Chapter One and Chapter Three is that those without the mother's consent are forced to pursue litigation in order to acquire PR. This acts as a further barrier to some 'meritorious' fathers who do not have the financial resources required for such action. Equally, for those who can afford it, analysis of court proceedings in Chapter Three has demonstrated that mothers are able to frustrate applications for PROs by preventing contact between the father and child, impeding his ability to prove commitment and attachment.<sup>620</sup> Since *this* model allows unmarried fathers to acquire PR without the mother's consent, fewer 'meritorious' fathers would be forced to pursue litigation, removing this barrier for some. Only those who fall outside the time limitation, are encompassed by the exclusion clause or are facing action to terminate their ability to acquire PR, may be required to take such action. Accordingly, this new and original model is likely to much better meet the Government's aim of facilitating the access of 'meritorious' fathers to acquisition of PR than the current framework.

Whilst this model's ability to improve the access of 'meritorious' fathers is fairly straightforward, its ability to exclude those who are 'unmeritorious' requires deeper investigation. Crucially, due to the lack of objective assessment of the father's merit prior to granting PR, this model may better facilitate the access of fathers who present a danger to the mother and child. Indeed, the risk of this happening is one of the main arguments against automatic acquisition of PR vis à vis unmarried fathers.<sup>621</sup> *Re H* supports this point.<sup>622</sup> Here,

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<sup>617</sup> Children Act s 4(1) and (1A).

<sup>618</sup> The Children Act, 4(1)(b).

<sup>619</sup> *Re L* (n 19).

<sup>620</sup> *Re S (Parental Responsibility: Jurisdiction)* (n 85).

<sup>621</sup> Julie Wallbank, 'Clause 106 of the Adoption and Children Bill: legislation for the "good" father?' (n 75) pp 285-287.

<sup>622</sup> *Re H (Parental Responsibility)* (n 106).

the mother had allowed the unmarried father to visit his child until she noticed that the 15-month-old had bruises on his inner ear, penis and scrotum after a visit. Since the father had not acquired PR, the mother could easily stop contact between him and the child. It could be argued that, by allowing fathers to acquire PR more easily, this model would lead to increased situations like this, but where the mother cannot easily prevent contact between the father and child since he has legal rights.

However, such an issue depends on how many unmarried 'unmeritorious' fathers are aware of their legal rights and so acknowledge paternity before the one-year time limitation. Since the DWP have shown that most people are ignorant of the law concerning acquisition of PR, it is possible that some fathers will not have taken such action.<sup>623</sup> Furthermore, whether the current UK framework is any better able to avoid this issue is questionable. Since the current framework allows unmarried fathers to acquire PR through the consent of the mother, Chapter Three demonstrated that some 'unmeritorious' fathers may easily acquire PR through coercion and manipulation of the mother.

A difference, nevertheless, remains: whilst the current framework embeds an immediate safeguard of requiring the mother's consent before an unmarried father can acquire PR, this model allows unmarried fathers to acquire PR without *any* barriers. Sheldon points out that, automatic acquisition could particularly detriment the most vulnerable mothers such as those fleeing domestic abuse: an 'unmeritorious' father in such a scenario could acknowledge paternity, acquire PR, and subsequently coerce her into allowing him access to her and their child.<sup>624</sup> It is for this reason that this model incorporates overlapping safeguards, two being particularly important here.

Firstly, the use of the exclusion clause, a tool used in other European countries such as Spain, would automatically prevent the acquisition of, or remove, some 'unmeritorious' fathers' PR.<sup>625</sup> In the context of this model, it would be applicable to men who have been convicted of, or are on trial for, rape which led to the conception of the disputed child or of the rape of

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<sup>623</sup> Department for Work and Pensions (n 59) 7.

<sup>624</sup> Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (n 20) 110.

<sup>625</sup> Spanish Civil Code, art 111.

a woman who has a child they share PR for. This would immediately protect mothers and children from further potential abuse from such men.

It must be acknowledged that exclusion clauses were rejected in the Law Commission report on Illegitimacy in 1982 for several reasons thereby potentially undermining its suitability as a safeguard.<sup>626</sup> A perceived difficulty in defining the bounds of 'unmeritorious' behaviour was raised. For example, although high levels of consensus may support the exclusion of men whose rape of the mother led to the conception of the disputed child, conflicts may arise over where protection should end, some arguing that those who have been convicted of sexual assault should be excluded too.<sup>627</sup> Furthermore, the extent to which this would actually protect women and children is questionable considering not all men who rape, or commit other violent crimes, will be convicted.<sup>628</sup>

This model would circumvent these issues in two ways. Firstly, it proposes to encompass only two types of 'unmeritorious' fathers who will be identifiable with certainty on the basis of a conviction or indictment for the rape of a woman who consequently conceived the disputed child or already had a child with the father. Hence, there will be a clear boundary between those encompassed by the clause and those who are not. This leads to the second issue raised; how mothers will be protected from those who are 'unmeritorious' but do not fit into this category. Under this model, all 'unmeritorious' fathers who are not encompassed by the exclusion clause may still be prevented from acquiring PR through its reformed framework for terminating PR.

As mentioned previously, this model would reform the framework for terminating one's PR in several ways in order to make it more accessible and effective. For example, the insertion of a list of acceptable reasons for termination into the relevant legislation is hoped to present the judiciary with clear legal authority to terminate PR for less extreme reasons than currently appear to be required.<sup>629</sup> An important issue remains though. By placing the burden upon

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<sup>626</sup> *Family Law: Illegitimacy Final Report* (n 10) 35.

<sup>627</sup> *Ibid*, p36.

<sup>628</sup> *Ibid*.

<sup>629</sup> *Nottingham CC v Farmer* (n 465).



mothers to remove PR rather than upon fathers to acquire it, the Conditional Automatic Acquisition Model places potentially significant pressure upon mothers, especially should there be a risk of reprisal from the father. This issue may be accentuated for mothers who require pre-emptive removal of the father's ability to acquire PR since they would need to proceed with legal action quickly. It is for these reasons that this model has also suggested further reforms designed to support mothers such as the opportunity to meet with a social worker and the introduction of a fee waiver for those on low income or benefits. The latter reform may prove more difficult to achieve politically since it would require the Government to support the Family Justice System with more funding. However, should this be realised, such reforms could greatly improve this framework, making it a reasonable and accessible safeguard for mothers and children.

Lastly, an issue which was raised in Chapter One in regard to the 2003 amendment to the Children Act 1989 was that, since the DWP have demonstrated that most people are ignorant of the law regarding acquisition of PR, some mothers may inadvertently consent to 'unmeritorious' fathers' acquisition of PR should they believe the birth certificate to be merely a record of biological parentage.<sup>630</sup> A similar issue may arise in regard to this model. Mothers may prompt fathers to sign the certificate, not realising that this would lead to his acquisition of PR. Options would exist for such a mother under this model though, for example, she could submit a judicial application for the father's acknowledgement to merely remain a record of biological heritage. Alternatively, the aforementioned reformed model of termination of PR could be utilised.

In summary, this model is likely to effectively meet the Government's dual aims identified in Chapter One. 'Meritorious' fathers will be able to easily acquire PR by acknowledging paternity; most 'unmeritorious' fathers would be either excluded through the exclusion clause or have their PR terminated through a court judgment. This far improves upon the current legislative system, analysed in Chapter Three, which has been found to fall short at fulfilling both aims. This model would also simplify the law. Although an increase in termination proceedings may occur, the administrative burden of five overlapping forms of

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<sup>630</sup> Children Act s 4(1) and (1A); Department for Work and Pensions (n 59) 7.

acquisition (two of which involve litigation) would be removed and replaced by a more streamlined system with built-in safeguards. Indeed, Lowe points out that, since most unmarried fathers are acquiring PR easily through the current UK system anyway, there is 'little point in making him go through legal hoops'.<sup>631</sup> Never before has simplifying this system become more important with the judiciary facing an unprecedented backlog of family law cases.<sup>632</sup>

### **Whether this Model Reasonably Balances the Rights and Freedoms of the Community with Those of Unmarried Fathers**

Within this assessment, at a minimum, any detriment caused to the applicant must be countered by an equal and opposite benefit to the community.<sup>633</sup> Nilsson's three factors will again be considered in this assessment: the effects of the policy, the basis of the discrimination and the social position of the group impacted.<sup>634</sup>

In regard to the first factor relating to the effects of this policy, several benefits to the community as a whole may arise. First, this model would remove an avenue through which some mothers may otherwise have suffered coercion and manipulation from 'unmeritorious' fathers. Under the current framework unmarried fathers can acquire PR through the consent of the mother, an approach which the Law Commission have described as facilitating some 'unmeritorious' fathers who are skilled manipulators.<sup>635</sup> By removing the mother's monopoly over unmarried fathers' acquisition of PR and instead allowing unilateral acquisition through acknowledging paternity, this avenue for abuse would be removed. Arguably, mothers may still become subject to pressure and coercion in regard to not making applications for the

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<sup>631</sup> Nigel Lowe (160) 205.

<sup>632</sup> 'Family court backlog climbs to 110,000' (*Coram Child Law Advice*) <https://childlawadvice.org.uk/family-court-backlog-climbs-to-110000/#:~:text=he%20government%20has%20been%20urged,Courts%20%26%20Tribunals%20Service%20figures%20reveal>.

<sup>633</sup> *Belgian Linguistic case (No. 2)* (n 292), para 10.

<sup>634</sup> Nilsson (n 293) 130.

<sup>635</sup> *Family Law: Illegitimacy Final Report* (n 10) para 4.39.

termination of the unmarried father's PR. However, it is unlikely that many unmarried fathers will know the law in such detail.<sup>636</sup>

The three overlapping safeguards incorporated in this model would also benefit the mother and child. Whilst the exclusion clause would automatically protect from some 'unmeritorious' fathers, the reformed ability to terminate PR would allow mothers to protect themselves from others who do not fall under this clause. The incorporated time limitation could also be harnessed to protect mothers and children, specifically from a father suddenly appearing and exercising PR after having been absent for a long period of time. Such an interference, if exercised without the mother's prior notification, could be very disruptive and harmful to the mother and child who have thus far lived independently. However, a balance would be struck within these safeguards between protection of women and the upholding of the fathers' rights. For example, the time limitation would protect mothers from such interference only after a year has passed since the child's birth. Before this point a father can acquire PR automatically, hence protecting their Article 8 right to respect for family life. Even after the time-limit has passed the unmarried father can apply for PR through a judicial application which will be granted unless he falls within the exclusion clause.

A further benefit which may result for children is that an increasing number of unmarried fathers may become motivated to exercise PR since they would have freely made the choice to accept it by acknowledging paternity. The social contract theory, described in Chapter One, would support such an argument.<sup>637</sup> Vopat's writing is particularly relevant in this context: he argues that a social contract exists between the state and parents which encourages appropriate care of one's offspring. Specifically, through registering on the birth certificate, he argues that a parent 'implicitly agrees to take responsibility for the child'<sup>638</sup> and that, following this event, 'normative devices' will become activated which encourage socially and legally expected standards of care of the child.<sup>639</sup> Accordingly, by requiring that fathers acknowledge their child by signing the birth certificate, more fathers may feel contractually

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<sup>636</sup>Department for Work and Pensions (n 59) 7.

<sup>637</sup> Celeste Friend (n 65).

<sup>638</sup> Vopat (n 66) pp 58-59.

<sup>639</sup> Ibid, 59.

bound to care for their child. As mentioned in Chapter One, this outcome is not certain though, the social contract theory simply being a *theory*.

Moreover, it was noted in Chapter Three that some children may be negatively impacted under the current law due to the negative stereotypes placed upon unmarried fathers. Gilmore demonstrated that this may impact their self-esteem,<sup>640</sup> and Ward LJ found that it led to children suffering from identity issues.<sup>641</sup> In contrast, this model would remove this negative stereotype, hence potentially reducing the likelihood that children born outside of marriage would suffer from these issues.

However, an issue with this model is that, since PR can be acquired unilaterally, there is a risk that a man who is not the biological father could acquire PR. This is known as paternity fraud. Should this individual be someone unknown to the mother, or someone she knows but has an acrimonious relationship with, this could put the mother and child in considerable danger. In some countries, such as Estonia,<sup>642</sup> this has been avoided by requiring the mother's consent that the man acknowledging the child is indeed the child's biological father. An immediate issue here is that the mother may refuse to provide consent, essentially acting as a gatekeeper to PR, an issue shown to exist in the UK's current framework too.

Other countries have attempted to avoid this issue in another way: still requiring the mother's consent but putting the mother under considerable pressure to provide it. Article 67 of the Croatian Family Law Act states that, if there is no father identified on the birth certificate, the registrar will contact the mother to inform her of her child's right to know their paternity.<sup>643</sup> If the mother still does not provide information as to the identity of the father, the registrar contacts the Centre for Social Welfare responsible for the mother's area of residence, who will then ask the mother again to identify the father,<sup>644</sup> or, with the mother's permission, start proceedings to establish paternity themselves.<sup>645</sup> Essentially, this system attempts to avoid

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<sup>640</sup> Gilmore, 'Parental Responsibility and the unmarried father – a new dimension to the debate' (n 99) 26.

<sup>641</sup> *Re S (A Minor) (Parental Responsibility)* (n 108) [657H].

<sup>642</sup> Family Law Act 2009 (Estonia), para 89.

<sup>643</sup> Family Law Act 2015 (Croatia), arts 67(1) and 84(4).

<sup>644</sup> *Ibid*, Article 68(1).

<sup>645</sup> *Ibid*, Article 68(2).

the mother becoming a gatekeeper by putting her under considerable pressure to acknowledge the father's paternity.

A similar legislative reform to the Croatian model was proposed in the UK Welfare Reform Bill 2009, but not implemented.<sup>646</sup> This legislation would make joint-registration on the birth certificate the default position with unmarried mothers being mandated to provide information concerning the father's identity. If they provide wrong information they would risk a custodial sentence. The father would then be contacted to confirm paternity and subsequently encouraged to agree to their registration on the child's birth certificate. Alternatively, the father could voluntarily provide information to register, the mother then being asked to respond by either confirming the paternity of the man, providing the real father's details or proving an exemption. Noticeably, the ability to raise an exemption recognised the fact that some women may have 'good cause' not to register the father's name.<sup>647</sup> According to section 2B (4) of the Bill, the mother would be exempted in the following contexts: 'the father has died'; 'she does not know his identity or whereabouts'; 'he lacks legal capacity'; 'the child is legally fatherless as a result of conception following donor insemination'; 'she has reason to fear for her own or her child's safety if the father is contacted'.<sup>648</sup>

Nevertheless, this proposal was met with overwhelming criticism.<sup>649</sup> In particular, the DWP stated that a coercion of mothers into providing details of the father is 'intrusive for vulnerable mothers'.<sup>650</sup> This was supported by the Family Justice Council who pointed out that, 'mothers are in a better position to assess whether including the father on the birth certificate will advantage their child than the Government', hence they should not be coerced into action they deem inappropriate.<sup>651</sup> The latter response is debatable. Indeed, case law discussed in Chapter One demonstrated the existence of 'unmeritorious' mothers who do not always act in the best interests of their child or make decisions based on an assessment of

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<sup>646</sup> Welfare Reform HC Bill (n 146).

<sup>647</sup> *Joint Birth Registration: Promoting Parental Responsibility* (n 140) 3.

<sup>648</sup> Welfare Reform HC Bill (n 146), cl 2B(4).

<sup>649</sup> Fortin (n 145) 336; Leanne Smith, 'Clashing symbols? Reconciling support for fathers and fatherless families after the Human Fertilisation and Embryology Act 2008' [2010] CFLQ 46.

<sup>650</sup> Department for Work and Pensions (n 59) 4.

<sup>651</sup> Family Justice Council, *Response to the DWP consultation on joint birth registration* (2007).

the father's merit.<sup>652</sup> Nevertheless, due to the immense pressure this approach would put upon mothers, this model has not incorporated this into its framework.

Instead, fathers will be able to unilaterally acknowledge paternity, the reformed framework for termination of PR and ability of the real biological father to judicially challenge paternity being sufficient to protect mothers from those committing paternity fraud. In fact, it is for this reason that this model suggests a further reform to the ability to terminate PR: the addition of an emergency suspension power for mothers who feel their child is in immediate danger. This scheme could have the effect of immediately suspending the father's PR until judicial assessment can be conducted where the mother can provide evidence that the father is not the biological father of the child or may present an immediate risk of harm to the mother or child. With this system in place, the risk posed by those committing paternity fraud could be significantly reduced. Some may argue that an alternative solution would be to require evidence of paternity from all who acknowledge paternity. However, requiring DNA tests from all who acknowledge paternity would not only be administratively challenging, especially considering the fact that more children are now born outside of marriage than within in the UK, but would also raise a multitude of complex issues explored in Chapter Two.<sup>653</sup> For example, the requirement for consent from a guardian for samples to be taken from a child under the age of 16 potentially allows mothers to act as a gatekeeper, preventing the access of 'meritorious' fathers to their children.<sup>654</sup>

It is also noticeable that the same issue, that is the acquisition of PR by someone who is not the biological parent of the child, could arise in regard to the current UK framework. Since medical advances have now allowed for the viability of surrogacy, there is a risk that PR be conferred upon a woman who gives birth to the child but is not, in fact, that child's biological mother. Should the surrogate then decide to keep the child, the biological mother is left powerless since UK law treats the woman who gave birth to the child as the legal mother and does not always enforce surrogacy agreements.<sup>655</sup> Furthermore, simply because a child is

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<sup>652</sup> *Re L* (n 19).

<sup>653</sup> Siân Bradford and Faiza Mohammad (n 129).

<sup>654</sup> Human Tissue Act 2004, ss 3 and 2(3).

<sup>655</sup> 'Surrogacy: legal rights of parents and surrogates' (GOV.UK) <https://www.gov.uk/legal-rights-when-using-surrogates-and-donors#:~:text=Pay%20and%20leave-,Overview,be%20enforced%20by%20the%20law>.

born into a marriage does not mean that the husband is their biological father. Due to the marital presumption, the husband would automatically acquire PR, leaving the biological father without it.<sup>656</sup> Consequently, the risk that someone who is not the biological parent of the child acquires PR also exists under the current law, undermining the strength of this argument against the Conditional Automatic Acquisition Model.

In order to accurately assess the effects of this model, positive and negative impacts which could result for unmarried fathers will also be considered. For unmarried fathers who wish to exercise PR, this model provides a straightforward method through which they can acquire it, merely through acknowledging paternity. Simultaneously, those who do not wish to exercise PR are not forced to do so. Pryor and Rodgers have argued that forcing PR upon unmarried fathers is not necessarily beneficial for the child because it may bestow powers upon a father who has no intention of engaging in 'active' parenting.<sup>657</sup> Similarly, Bainham argues that acknowledgement of paternity should be treated as showing biological fact rather than disguising itself as a testament to parents' commitment to the welfare of the child.<sup>658</sup> For this reason, this model allows for a separate form to be completed by an unmarried father who, although wishing for his child to know his identity, does not wish to acquire PR. This form could also be designed so that a mother can request this as well. In these circumstances, the court would then contact the father for his consent. This particular reform would also remedy an issue raised in response to the 1998 Law Commission proposal to amend the birth certificate so that unmarried fathers could acquire PR by signing the birth certificate.<sup>659</sup> Lisa Saffron, one of the respondents, wrote that some lesbian couples may wish for the father to be recorded on the birth certificate so that the child knows their biological heritage, but would not wish for him to consequently acquire PR.<sup>660</sup> Under this model, such a couple would be able to do so and hence represents a potential improvement upon the current UK framework.

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<sup>656</sup> The Children Act, s 2(1); Gilmore and Glennon (n 68) 2.1.

<sup>657</sup> Jan Pryor and Brian Rodgers, 'Children in changing families: life after parental separation' [2009] Social Policy Journal of New Zealand 35.

<sup>658</sup> Andrew Bainham, 'What is the point of birth registration?' [2008] 20 Child and Family Law Quarterly 449, p449.

<sup>659</sup> 'press notice 201/98' (n 136).

<sup>660</sup> Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (n 20).

However, the time limitation has the potential to negatively impact upon unmarried fathers. Specifically, a father who is unaware that he has impregnated the mother and may not discover the existence of his child within a year of its birth, especially should the mother be actively withholding this information from him. In this scenario, their ability to acquire PR automatically through acknowledging paternity would no longer exist. Accordingly, this model embeds a safeguard for such individuals: the ability to apply to court for this right. It would operate in a similar way to Croatian law which suspends PR where one of the parents is absent or their identity or location is unknown.<sup>661</sup> This suspension can then be lifted through a court judgment should the father submit an application and not fall within the exclusion clause.

A potential complaint may arise for some unmarried fathers due to the exclusion clause's encompassing of fathers on *trial* for rape. One may argue that the operation of this framework conflicts with the protection of individuals from premature judgements of guilt. Should he have exercised PR previously, the removal of his PR may implicitly label him as 'guilty' in society, greatly affecting his self-esteem and reputation. Despite this, a potentially acceptable justification exists here: rape trials can take years to conclude, therefore the exclusion clause would protect the mother and child from the father's acquisition and exercise of PR whilst awaiting a conviction.<sup>662</sup> Should the father not be convicted, the exclusion clause would become inactive and they would be able to apply to court for PR. Furthermore, the exclusion clause would only operate from the point of *indictment*, not during police investigations. Since false accusations are likely to be dismissed before this point, not presenting the required level of evidence for a conviction, the risk of wrongly labelling a man as 'guilty' is arguably reduced.

Nilsson's other factors, namely discrimination and the social position of the impacted group, will now be considered before concluding on the merits of this model.<sup>663</sup> Fundamentally, since

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<sup>661</sup> 'Parental responsibility - child custody and contact rights - Croatia' (*European Justice*, last updated on 15 April 2022) [https://e-justice.europa.eu/content\\_parental\\_responsibility-302-hr-en.do?member=1](https://e-justice.europa.eu/content_parental_responsibility-302-hr-en.do?member=1).

<sup>662</sup> 'Rape and sexual assault statistics' (*Rape Crisis England and Wales*) <https://rapecrisis.org.uk/get-informed/statistics-sexual-violence/#:~:text=After%20being%20reported%20to%20the,years%20to%20complete%20in%20court.>

<sup>663</sup> Nilsson (n 293) 130.



a difference in treatment between unmarried mothers and unmarried fathers would exist within this model, based on a 'suspect' ground (gender), there exists possible discrimination within this framework.<sup>664</sup> A difference would also exist between unmarried fathers and married fathers; notably, although an unmarried father who rapes the mother will be prevented from exercising PR, a married father who rapes his wife and consequently conceives a child will not experience this consequence. Indeed, the fact that unmarried fathers would be subject to restrictions when other parents would not could indicate a mistrust towards this group, as has been found to exist under the current UK framework. This would lend weight to a judgement of discrimination since negative perceptions towards social groups cannot be used to justify differences in treatment.<sup>665</sup> The latter issue is also key when considering the social position of the group. The Strasbourg Court emphasizes that any differences in treatment must not be based upon stereotypical beliefs about the group since this could enhance the group's social exclusion.<sup>666</sup>

However, the fact that this model awards unmarried fathers with automatic PR where they do not fall within the exclusion clause or time limitation could be interpreted as encouraging and valuing fatherhood far more than the current legislative framework. Whilst the current framework denies *all* unmarried fathers PR and thus implicitly communicates that *all* are untrustworthy in their suitability and motivations, this model only casts this stereotype upon discrete categories of fathers. Most fathers should feel supported by the law in actively taking on the role of father and experience higher levels of self-esteem in this context. As a result, more children may then have a father figure in their lives, a factor which psychologists have shown to be vitally important for development.<sup>667</sup>

The Strasbourg Court may also consider whether the safeguards embedded in this model are adequate, with 'stricter scrutiny' being exercised where measures effectively curtail relationships between children and their parents.<sup>668</sup> As mentioned in Chapter Three, the

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<sup>664</sup> Ibid.

<sup>665</sup> *Konstantin Markin v Russia* (n 193), para 143.

<sup>666</sup> Nilsson (n 293) 131.

<sup>667</sup> 'Fathers - Understanding the Vital Role That Fathers, & Father Figures, Play in Children's Emotional Development' (*Association of Child Psychotherapists*) <https://childpsychotherapy.org.uk/resources-families/understanding-childhood/fathers-understanding-vital-role-fathers-father-figures>.

<sup>668</sup> 'Guide on Article 8 of the European Convention on Human Rights' (n 188) 79.

Strasbourg Court has previously found safeguards to be inadequate where the mother's lack of consent cannot be overridden<sup>669</sup> and where litigation to do so incorporates a starting presumption that the father's involvement is not in the child's best interests.<sup>670</sup> Neither issue would exist in regard to this model and, according to the assessment of its safeguards throughout this section, no clear issues have been identified.

Drawing all these points together, the Conditional Automatic Acquisition Model represents a framework which would far better meet the Government's aims as well as more effectively balance the rights and freedoms of the community with unmarried fathers. Whilst Nilsson's factors have shown that there still remains an inequality towards unmarried fathers, the system as a whole balances rights more equally by awarding unmarried fathers with much more personal agency whilst still providing safeguards against 'unmeritorious' behaviour. Consequently, it is likely that this model would be found to be proportionate by a court if assessed today and, perhaps, to a better degree than the current system.

### **The Margin of Appreciation**

Chapter Three found that the margin of appreciation in this area was currently wide, the Strasbourg Court remaining loyal to 'conventional' understandings of fatherhood.<sup>671</sup> However, due to shifts in European legislative and political views towards a favouring of 'new fatherhood' it has been predicted that the margin may narrow considerably over the next few decades as the Strasbourg Court modifies its judgments accordingly.<sup>672</sup> Although it is difficult to predict the specific bounds of such a margin, legal and expert opinions may provide indications. Notably, in 2008 the Committee of Experts on Family Law proposed a framework where *all* parents would acquire PR automatically with the ability to judicially remove PR acting as a safeguard.<sup>673</sup> This could indicate the acceptance of the Conditional Automatic Acquisition Model within a future narrower margin since it follows this very structure.

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<sup>669</sup> *Zaunegger v Germany* (n 190), para 33.

<sup>670</sup> *Sommerfeld v Germany* (n 318), para 77.

<sup>671</sup> Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n 30) 15.

<sup>672</sup> *Ibid.*

<sup>673</sup> Council of Experts on Family Law (CJ-FA) (2008) 5 on 'A Study into the Rights and Legal Status of Children Being Brought up in Various Forms of Marital or Non-Marital Partnerships and Cohabitation' [2008] 52.

However, the Strasbourg Court themselves have stated that gender equality is now a ‘major goal’ and that where legal frameworks differentiate between genders, ‘very weighty reasons’ would be required to justify them.<sup>674</sup> Should the Strasbourg Court fully embrace this approach under a narrower margin, this model may fall short. It may also be viewed as at odds with scientific developments. In particular, by equating maternity with the act of giving birth, the law would still be ignoring the fact that an increase in rates of surrogacy may soon make this method of identification redundant. Therefore, although it would likely fit within the margin today, its longevity within this framework is, perhaps, ambiguous.

### **The Overall Compatibility of the Conditional Automatic Acquisition Model with Articles 8 and 14**

Analysis in this section has demonstrated a likelihood that this model would be judged as proportionate within the current legal framework for assessing compatibility with Articles 8 and 14. It has been shown to better meet the Government’s legitimate aims and more effectively balance the rights and freedoms of the community with those of unmarried fathers when compared to the current UK framework. However, longevity of this compatibility appears doubtful since there is a possibility that it would be found incompatible within a future narrowed margin of appreciation. Accordingly, this thesis will instead advocate for an alternative model which it has termed the ‘Equality Model’.

#### **4.2 The Equality Model**

The Equality Model is based upon, and represents an extension of, the previous model, the Conditional Automatic Acquisition Model. The only difference is that this framework would be extended to govern the acquisition of PR by all parents, not just unmarried fathers. The basis of this model, therefore, is that all parents acquire PR through acknowledgement of maternity or paternity through signing the birth certificate. Mothers would no longer acquire

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<sup>674</sup> ‘Guide on Article 8 of the European Convention on Human Rights’ (n 188) 20 (*emphasis added*).

PR through the act of giving birth and married fathers would no longer acquire PR through the mere fact of their marriage to the mother.

The three safeguards introduced in the Conditional Automatic Acquisition Model would all feature in the Equality Model too, though applicable to all parents rather than just unmarried fathers. Only one minor difference will exist between the applicability of these frameworks upon each type of parent. The exclusion clause, whilst applicable to married fathers as well as unmarried ones, would not apply to mothers since women are not treated as able to commit rape under UK law.<sup>675</sup>

This model is inspired by French and Lithuanian legislation, both of which require unmarried fathers *and* unmarried mothers to acknowledge paternity in order to acquire PR, with neither needing the other's permission.<sup>676</sup> The difference between these frameworks and the Equality Model is that the latter would introduce an equal position for *married* parents too. The following analysis will assess whether the Equality Model would prove compatible with Articles 8 and 14 of the Convention. In reality, the entire consideration of this model under a discrimination framework would be negated since there would be no embedded difference in treatment. Nevertheless, this section will assess this model under the same framework in order to accurately compare its operation with that of the Conditional Automatic Acquisition Model.

### **Whether this Model Would Meet the Government's Legitimate Aim**

Since this model is based upon the Conditional Automatic Acquisition Model, the same reasons support its effective meeting of the Government's dual aim. Specifically, 'meritorious' unmarried fathers would be able to easily acquire PR by acknowledging paternity whilst the overlapping safeguards of the exclusion clause, time limitation and reformed ability to

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<sup>675</sup> UK Government and Parliament Petitions, 'Change the Sexual Offences Act so women can be charged with rape against males' (31 March 2020) <https://petition.parliament.uk/petitions/300270>.

<sup>676</sup> Frédérique Ferrand (n 611) paras 22(a) and (b); 'Parental responsibility - child custody and contact rights – Lithuania' (*European Justice*, last updated 3 January 2023) [https://e-justice.europa.eu/302/EN/parental\\_responsibility\\_child\\_custody\\_and\\_contact\\_rights?LITHUANIA&member=1](https://e-justice.europa.eu/302/EN/parental_responsibility_child_custody_and_contact_rights?LITHUANIA&member=1).

terminate PR are expected to exclude most ‘unmeritorious’ unmarried fathers. But the Equality Model would go further than this, protecting children from *all* ‘unmeritorious’ parents, recognising that this description can characterise mothers and married fathers too.<sup>677</sup> The Equality Model would achieve this whilst vastly simplifying the law. No longer would there exist a complex framework with different entitlements and rights depending on one’s marital status and gender, an issue which exists both under the current framework and the Conditional Automatic Acquisition Model. Instead, one streamlined system which is applicable to all parents would exist, making it much easier for the general public to navigate and understand.

A potential issue exists concerning the practicability of this model though: the Equality Model would require significant legislative reform, demanding a considerable amount of time and financial resources. The Government would need to invest, particularly into the reformed system for termination of PR, ensuring there are substantial resources of financial support and access to social workers for *all* parents who need it. Such efforts would, however, prove invaluable since the law would better meet their aforementioned aims and potentially evade the possibility of future litigation at the Strasbourg Court.

### **Whether this Model Reasonably Balances the Rights and Freedoms of the Community with Those of Unmarried Fathers**

Since all parents would be subject to the same framework under the Equality Model, when assessing this model’s ability to balance freedoms and rights under Nilsson’s three factors, this thesis will first holistically consider the impact upon children, mothers and fathers.<sup>678</sup> This model represents a better framework for protecting those at the centre of PR: children. As mentioned previously, the presence of the three overlapping safeguards would not only protect children from ‘unmeritorious’ *unmarried fathers*, but *all* parents who are ‘unmeritorious’. In contrast, by awarding all mothers and married parents with automatic PR, the current UK framework automatically places some children under the responsibility of ‘unmeritorious’ guardians until/if action is taken to remove or restrict it. Similarly, the

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<sup>677</sup>John Flatley (n 71); *F v M* (n 28).

<sup>678</sup>Nilsson (n 293) 130.

Conditional Automatic Acquisition Model, whilst introducing the three overlapping safeguards, only supports their operation upon unmarried fathers.

However, by subjecting all parents to a system where PR is acquired after acknowledging maternity or paternity, the Equality Model also allows *all* parents to refuse PR. Specifically, by choosing not to acknowledge the child, parents could evade PR for their child. As such, there is a risk that an increasing number of children will be left in the care of the state, a system which is already 'overstretched and overwhelmed'.<sup>679</sup> But whether such an increase would actually occur in reality is debatable, all parents being able to put their child up for adoption under the current framework. Indeed, as mentioned previously, Pryor and Rodgers have pointed out that conferring PR upon parents without the requirement to acknowledge maternity or paternity does not automatically mean they will engage in 'active' parenting'.<sup>680</sup>

But an opposing outcome may also result from this model. By allowing parents a choice in accepting PR, more parents may feel motivated to accept PR and engage in it appropriately. This prediction is based upon the social contract theory which theorizes that the ability to *choose* to enter into a legal contract is more appealing and more likely to encourage behaviour which aligns with this contract than coercion.<sup>681</sup> That said, as mentioned previously, this is simply a *theory* and so there is no certainty in this outcome. A more obvious way in which the Equality Model may encourage higher standards of parenting is due to its extension of the ability to terminate PR to encompass all parents. All parents may be implicitly held to a higher standard since there is a risk of their PR being removed should their parenting fall short. Neither the current framework nor the Conditional Automatic Acquisition Model encompass this motivating factor since these frameworks do not allow for mothers and married fathers to have their PR removed.

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<sup>679</sup> Alex Turner, 'Children's services 'overwhelmed' and permeated by 'blame, shame and fear', major review finds' (*Community Care*, 13 June 2018) [https://www.communitycare.co.uk/2018/06/13/childrens-services-overwhelmed-permeated-blame-shame-fear-major-review-finds/#:~:text=Social%20workers%20have%20told%20a,\"overstretched%20and%20overwhelmed\"%20system.](https://www.communitycare.co.uk/2018/06/13/childrens-services-overwhelmed-permeated-blame-shame-fear-major-review-finds/#:~:text=Social%20workers%20have%20told%20a,\)

<sup>680</sup> Pryor and Rodgers (n 657).

<sup>681</sup> Vopat (n 66).

Nevertheless, even if this model does lead to an increase in the numbers of parents evading PR for their children, a connected benefit may arise. Both the Conditional Automatic Acquisition Model and the current UK framework may automatically place some children into homes where the parents are not motivated to, or able to, care for them properly. In contrast, by allowing all parents to refuse PR, the Equality Model could be argued to better ensure that all children are cared for by guardians who genuinely wish to care for them albeit if for some children this occurs through adoption. This argument aligns with the views of Marshall, who recently suggested that a child's 'mother' or 'father' should be *socially* formed rather than based on biology.<sup>682</sup> This followed her earlier publication with O'Donovan which advocated that the term 'birth giver' be used to describe the woman who *gives birth* to the child, with 'mother' describing the woman who *cares* for the child.<sup>683</sup> The Equality Model would still, however, allow for the identities of the biological parents to be known to the child since this model allows parents to opt to be registered on the birth certificate without acquiring PR. This freedom potentially benefits many children who may not otherwise have been aware of their biological parents' identities, an issue which Terwogt et al have found can have negative psychological impacts upon children.<sup>684</sup>

However, with a system reliant upon acknowledgement of parenthood, without need for evidence of this fact, there is a potentially increased risk of acquisition of PR by those who are not the child's biological parents. Whilst this was also an issue raised in regard to the Conditional Automatic Acquisition Model, the Equality Model would extend this issue to mothers and married fathers too. Various solutions were considered and rejected when discussing the former model: the use of the mother's consent as a safeguard would allow mothers to act as 'gatekeepers' to fathers' PR; exerting pressure upon mothers to identify the father was judged as too harmful to vulnerable women; requiring DNA tests from all who acknowledge would prove too administratively complex. Ultimately, as argued in regard to the Conditional Automatic Acquisition Model, the three overlapping safeguards, as well as

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<sup>682</sup> Jill Marshall, 'Secrecy in births, identity rights, care and belonging' [2018] *Child and Family Law Quarterly* 167.

<sup>683</sup> Katherine O'Donovan and Jill Marshall, 'After birth: decisions about becoming a mother' in Alison Diduck and Katherine O'Donovan (eds) *Feminist Perspectives on Family Law* (1st edn, Routledge-Cavendish, 2006).

<sup>684</sup> Meerum Terwogt, Meerum Terwogt-Reijnders, and Van Hekken, 'Identity problems related to an absent genetic father' (2002) 14(3) *Zeitschrift für Familienforschung* 257.

the freedom for the real biological parents to contest parenthood, are expected to act as sufficient safeguards.

Viewed from a different perspective, the Equality Model may actually reduce the likelihood of a non-biological parent acquiring PR in certain contexts. Firstly, it may reduce the chances that a biological mother using a surrogate finds herself in such a situation. As mentioned previously, due to medical advances in the viability of surrogacy, a woman who gives birth to a child may not always be the biological mother. Occasionally, surrogates decide they would like to keep the child, and, since PR is bestowed upon women through the act of childbirth in the UK, they can legally withhold the child from the biological mother. This issue is accentuated by the fact that surrogacy agreements are not per se enforceable by UK courts prior to the making of a parental order.<sup>685</sup> As Black and Hopkins argue, the continuing applicability of such law often causes ‘great stress and uncertainty for all parties’ and consequently, the Law Commission have considered introducing a new framework which would bestow legal parentage upon the biological parents subject to the surrogate’s consent.<sup>686</sup> But the enactment of the Equality Model may also minimize this issue. By requiring an act of acknowledgment from mothers, rather than automatically bestowing PR upon the individual who gives birth to the child, the surrogate would no longer hold this advantage. In this way, the Equality Model potentially circumvents the need to implement the Law Commission’s reform proposal.<sup>687</sup>

The second scenario in which the Equality Model may reduce the likelihood of a non-biological parent acquiring PR is within the context of a marriage. Simply because a child is born within a marriage, does not mean the husband is their biological father. By removing the marital presumption, men who impregnate a woman married to another man, are more likely to be able to acquire PR for their child by declaring this fact. Should this declaration lead to a paternity dispute, the court may order DNA tests in order to resolve the issue. Some may argue that allowing a man outside of a marriage to share responsibility for the raising of a

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<sup>685</sup> ‘Surrogacy: legal rights of parents and surrogates’ (n655).

<sup>686</sup> Gillian Black and Nick Hopkins, ‘Building families through surrogacy: placing the child at the heart of surrogacy law’ [2023] CFLQ 3, 3; ‘Surrogacy: legal rights of parents and surrogates’ (n655).

<sup>687</sup> ‘Surrogacy: legal rights of parents and surrogates’ (n655).



child within it could be disruptive to the marital unit. However, the uncomfortableness which could result upon the married couple arguably does not justify a man's inability to care for his biological child should he wish to do so.

Other benefits would also arise under the Equality Model. For example, the removal of the requirement for the mother's consent when acquiring PR would allow unmarried fathers easier access to acquisition of PR and protect mothers from harassment in this context. This benefit as well as others relating to the specific structure of this framework have already been described in detail in regard to the Conditional Automatic Acquisition Model and so will not be discussed any further here.

Finally, the Equality Model may not be welcomed by some mothers and married couples who view this framework as introducing an unnecessary administrative burden upon them. In particular, mothers may feel that having to acknowledge maternity before acquiring rights over a child that she carried for nine months and gave birth to is pedantic. This argument could be countered by the fact that acknowledging maternity would not be a complicated process under the Equality Model, merely requiring the mother to sign the birth certificate. Indeed, this is something she must do under the current legal framework anyway albeit not in connection to her acquisition of PR. The same argument exists in regard to married fathers.

Hence, multiple benefits to children, mothers and fathers have been identified within the context of the Equality Model, whilst all possible issues appear to pose limited risk. This already indicates an acceptable balancing of the rights and freedoms of different social groups. Nilsson's second and third factors will nevertheless be considered, bolstering this conclusion.<sup>688</sup> Firstly, in regard to discrimination, this issue would be absent under the Equality Model since all parents are encompassed by the same legislative framework regardless of their personal characteristics. As noted previously, the only difference would be the applicability of the exclusion clause solely upon men since women cannot commit rape under UK law. This is a potential issue of discrimination with wider criminal law in the UK rather than specific to the Equality Model.

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<sup>688</sup> Nilsson (n 293) 130.

The social position of the group is relevant though. As discussed, both the current UK framework and the Conditional Automatic Acquisition Model maintain a negatively framed attitude towards unmarried fathers, albeit to different extents. By denying automatic acquisition of PR to *all* unmarried fathers, the current framework implicitly labels *all* as untrustworthy in their merit and suitability for parenthood. The Conditional Automatic Acquisition Model would improve this situation, only denying automatic acquisition to discrete categories of unmarried fathers. Contrastingly, by encompassing all parents within the same legislative framework, the Equality Model treats all parents as equals. Not only would this better reflect the social reality that there are ‘meritorious’ and ‘unmeritorious’ parents in all demographic groups, but it may also improve unmarried fathers’ levels of self-esteem. By placing equal expectations upon unmarried fathers in regard to childcare, this group may feel that they are more highly valued than under the current law.<sup>689</sup> That said, whether this impact arises in regard to individual fathers may depend upon how far they judge their value according to the letter of the law.

Overall, the Equality Model appears to balance the rights and freedoms of social groups much more effectively than both the current UK framework and the Conditional Automatic Acquisition Model. Multiple benefits have been extrapolated and only a few, minor, risks. Furthermore, the removal of a difference in treatment would eliminate the risk of discrimination within this system and improve the social position of unmarried fathers in society.

### **The Margin of Appreciation**

By introducing a new framework which treats all parents equally regardless of marital status or gender, the Equality Model would correlate with the shift towards ‘new fatherhood’ observed at a European level. Support for this assertion arises from the fact that the Equality Model would closely correlate with recent views from European political bodies. For example, in 2014 the Council of Europe argued that equal acquisition of PR between parents regardless

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<sup>689</sup> Gilmore and Glennon (n 68) 453.

of gender is a 'necessary step in order to progress towards a fully egalitarian society'.<sup>690</sup> This was followed by a similar sentiment in 2015, the Parliamentary Assembly of the Council of Europe stating that policies regarding the acquisition of PR which are based upon gender stereotypes did not reflect sociological reality.<sup>691</sup> This report further encouraged states to 'remove from their laws any difference based on marital status between parents who have acknowledged their child'.<sup>692</sup> Considering the fact that these views were expressed over eight years ago, the Equality Model may be perceived by some as a desirable long-awaited reform.

This model would also represent a modernising of the acquisition of PR to better reflect the realities of today's society: it recognises that *all* parents have the potential to be 'unmeritorious', not just unmarried fathers; it embraces the fact that the act of childbirth can no longer always equate to biological maternity. In fact, it may be argued that this model has never before been so pertinent in society when considering recent statistics showing that more children are now being born outside of marriage than within in the UK.<sup>693</sup> Ultimately, the Equality Model provides a framework which is more likely to fit effectively, and longer-term, within a possible future narrowed margin of appreciation.

### **The Overall Compatibility of the Equality Model with Articles 8 and 14**

The Equality Model appears to produce a higher degree of compatibility with Articles 8 and 14 than both the Conditional Automatic Acquisition Model and the current UK framework. Firstly, it not only meets but extends beyond the aims of the UK Government, protecting children from *all* 'unmeritorious' parents rather than just 'unmeritorious' unmarried fathers. Consequently, many benefits have been found to arise for children, mothers and fathers under this framework with the few issues identified proving minor. For these reasons, as well as the fact that this model would remove potential discrimination against unmarried fathers, this model is likely to be judged as proportionate. On top of this, the Equality Model is likely to effectively fit within the margin of appreciation and continue to do so as it potentially

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<sup>690</sup> Council of Europe Parliamentary Assembly (n 435).

<sup>691</sup> Council of Europe Parliamentary Assembly (n 265) 4.

<sup>692</sup> *Ibid*, para 5.3.

<sup>693</sup> Siân Bradford and Faiza Mohammad (n 129).

narrows in the next few decades. Indeed, it could be seen as bringing much needed reform, finally satisfying the views of bodies of the Council of Europe published in 2014 and 2015.

An issue, however, remains: whether there is enough political appetite for such an extensive reform. The Equality Model would not only require extensive reform, but it could be perceived as inappropriately interfering with the marital unit as well as the position of mothers. In regard to the former, a recent family law reform offers insights. Whilst introducing a new framework for divorce in 2022 which arguably makes the dissolution of marriage easier, Parliament retained some aspects of the 'old' law in an attempt to maintain a perception of the importance of marriage. Specifically, the Ministry of Justice stated that the one-year time bar, which requires the parties to have been married for at least one year before initiating a divorce, was retained because it was viewed as a 'measure that underlines the importance of marriage'.<sup>694</sup> This opinion endured even when respondents to the consultation for reform suggested that an exception should be made for those suffering from domestic abuse.<sup>695</sup> Similar sentiments have been expressed by the judiciary. In the previously discussed case of *Re A (Parental Responsibility)*, McFarlane P stated that the inability to terminate the PR of married fathers was justified under a 'long standing principle' whereby 'priority' is given to the 'establishment, and maintenance, of stable family life by commitment through marriage or civil partnership'.<sup>696</sup> Consequently, it appears unlikely that in the political climate of 2024 there would exist enough political support for a reform which would remove the marital presumption in the context of the acquisition of PR.

Similarly, there may not currently exist enough political appetite to interfere with the rights of mothers. Indeed, a large proportion of the narrative concerning PR in the UK thus far has concerned the protection of the position of mothers. For example, the original rejection of automatic PR to unmarried fathers, discussed in the 1982 Law Commission Report, centred upon the protection of mothers and children from 'unmeritorious' unmarried fathers.<sup>697</sup>

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<sup>694</sup> 'Reducing family conflict' Government response to the consultation on reform of the legal requirements for divorce' (*Ministry of Justice*, Presented to Parliament in April 2019) <https://consult.justice.gov.uk/digital-communications/reform-of-the-legal-requirements-for-divorce/results/reducing-family-conflict-consult-response.pdf>, 32.

<sup>695</sup> *Ibid*, 33.

<sup>696</sup> *Re A (Parental Responsibility)* (n 28) [101].

<sup>697</sup> *Family Law: Illegitimacy Final Report* (n 10).

Later, within the Welfare Reform Bill 2009, a proposal to embed a system whereby mothers would be pressured into providing information as to the identity of their child's father was not implemented within the eventual Act due to concerns over the impact of such coercion upon vulnerable mothers.<sup>698</sup> Essentially, political bodies appear to display paternalistic attitudes towards mothers, heavily concerned with the protection of their position vis à vis their children. Consequently, political resistance may also emerge in response to the Equality Model on the basis that it would remove mothers' automatic acquisition of PR on the birth of their child.

Despite these present judicial attitudes, opinions may shift as 'new fatherhood' becomes further embraced in Europe. Specifically, should the Strasbourg Court narrow the margin of appreciation accordingly, achieving legal equality between all parents may increasingly become an issue which could impact a state's international reputation. Thus, whilst the Equality Model could prove politically unpalatable in 2024, it may become more acceptable over time.

### **4.3 Conclusion**

Although Chapter Four has considered the introduction of two different models to replace the UK's current framework concerning the acquisition of PR, the Equality Model would be recommended as the most suitable. Both models improve the ability of unmarried fathers to acquire PR, however, only the Equality Model would truly place them on equal footing with other parents and prove compatible with a potentially narrowing margin of appreciation. Although there may currently be a limited political appetite for such a model, this is predicted to change as European attitudes shift further towards 'new fatherhood', the Equality Model ultimately proving both desirable and imperative.

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<sup>698</sup> Welfare Reform HC Bill (n 146); Welfare Reform Act 2009; Department for Work and Pensions (n 59) 4.

## Conclusion

This thesis has argued that, although UK law concerning the acquisition of PR vis à vis unmarried fathers would likely be found compatible with Articles 8 and 14 of the Convention in 2024, an incompatibility may be found should a case arise in the not too distant future. When that might occur is difficult to predict and contingent upon a range of factors such as the speed by which ‘new fatherhood’ becomes further embraced across Europe and the attitude of the Strasbourg Court towards such evolution as time progresses.

Chapter One set the scene for this issue, identifying multiple issues within the current UK framework. It was found that the very dichotomy upon which the UK framework is based, that is the distinction between ‘meritorious’ and ‘unmeritorious’ fathers, is ambiguous. It is curious that legislators would base an entire framework upon such an uncertain basis, particularly in the context of an issue which directly impacts an important aspect of individuals’ lives. The result of this complex framework is that some fathers may find themselves in positions where, despite their motivation and commitment to care for their biological child, they are prevented from doing so. This is not only traumatic for the father, but can negatively impact upon the child should it result in the prevention of their father’s care for them, as was the outcome in *Re L*.<sup>699</sup> The thesis, from this point, investigated the compatibility of this framework with Articles 8 and 14 of the Convention in 2024.

After a comprehensive discussion of the relevant legal tests for such litigation in Chapter Two, Chapter Three applied this framework to UK law concerning unmarried fathers’ acquisition of PR at both a domestic and international level. Analysis suggested that the Government may find it difficult to provide a legitimate aim and demonstrate that the UK framework designed to meet this aim is proportionate. Crucially, in regard to the latter, Chapter Three argued that the current UK framework did not effectively meet the UK’s legitimate aim, evidence suggesting that some ‘unmeritorious’ fathers are likely to be able to manipulate the system and some ‘meritorious’ fathers may be prevented access. In particular, the reliance of four of the six methods of acquisition upon the consent of the mother was found to be an issue. The

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<sup>699</sup> *Re L* (n 19).

lack of objective assessment of the mother's reasoning and decision-making means that a mother could deny a 'meritorious' father's acquisition of PR for reasons unrelated to the child's best interests and an accurate assessment of his merit. Equally, some 'unmeritorious' fathers may easily coerce the mother into providing consent, facilitating their access.

Despite this, it was concluded that a finding of incompatibility is unlikely to be found should a case arise in 2024. In domestic courts, a minimalist approach to their 'discretionary area of judgment' was found to be likely since judicial approaches to cases in family law concerning Articles 8 and 14 have historically proven to be cautious. Equally, at the Strasbourg Court a wide margin of appreciation was predicted to exist due to a lack of domestic legal consensus as well as the Strasbourg Court's notable resistance to fully embrace 'new fatherhood', a model seemingly being pushed forward by European political and legislative bodies. This position may, however, change over time. Since the Convention is characterised as a 'living instrument', the Strasbourg Court must interpret its content in alignment with societal opinions and realities. Should 'new fatherhood' continue to be embraced by European political and legislative bodies, the Strasbourg Court would eventually be mandated to narrow the margin of appreciation to reflect these views. In this context, perhaps in a few decades time, a finding of incompatibility may result should a case concerning unmarried fathers' acquisition of PR in the UK arise.

Chapter Four proposed an alternative way in which the difference in treatment experienced by unmarried fathers may be removed: through reform. Two original models for a UK framework which would award unmarried fathers with automatic PR were discussed. Although these models could be introduced *in response* to future litigation and an adverse ruling, it was recommended that the UK Government instead be *proactive* and begin drafting in the near future. By pre-empting future litigation and introducing a new framework ahead of this event, the UK may save itself from considerable legal expenses and, should an incompatibility be found, the pressure of designing and introducing reform within a strict timeframe monitored by the Committee of Ministers.<sup>700</sup>

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<sup>700</sup> 'The Supervision Process' (n 356).

Two novel models were discussed: the Conditional Automatic Acquisition Model and the Equality Model. Both models were similar, being based upon automatic acquisition of PR through the acknowledgement of the child. The key difference between the two was that the Equality Model expanded the scope of the Conditional Automatic Acquisition Model to encompass *all* parents rather than just unmarried fathers, harmonising the entire framework. Through comprehensive analysis it was concluded that the Conditional Automatic Acquisition Model, although proving more politically palatable, is potentially short-sighted since it only modifies the law in regard to unmarried fathers. Unmarried fathers would still be subject to a different framework, potential discrimination existing. In a climate where European institutions are increasingly embracing 'new fatherhood' and emphasizing the importance of equality between all parents, this model may prove incompatible with the Convention in the future. This model would also retain the marital presumption and automatic acquisition of PR by mothers through the birth of the child. Both mechanisms have been argued to be inconsistent with the realities of modern society.

For these reasons, the Equality Model has instead been recommended by this thesis. This model would entirely remove inequality from the UK framework concerning acquisition of PR, harmonizing the process for all parents regardless of marital status or gender. Hence, it is more likely to prove compatible with Articles 8 and 14 of the Convention in the long-term. This model also aligned more appropriately with modern developments. For example, the fact that mothers would also be required to acknowledge maternity in order to acquire PR recognises the fact that childbirth is no longer a reliable indicator of maternity due to advances in surrogacy. Although the 'Equality Model' may evoke political resistance if proposed in 2024, as 'new fatherhood' becomes further embraced and the Strasbourg Court narrows their margin of appreciation accordingly, this model may soon prove desirable.

Nevertheless, this thesis only intended to consider reform in a broad-brush manner, future research being necessary in order to refine possible alternative legal frameworks. What this thesis has made clear is that the UK has an opportunity. This represents a chance to improve the effectiveness of UK law, better promote and entrench gender equality, and avoid the



possibility of future litigation. In a country where, for the first time, more children are being born outside of marriage than within, it is perhaps time to seize this opportunity.

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