

## **FAMILY LAW BILL**

### **SUBMISSION OF THE NORTHERN IRELAND HUMAN RIGHTS COMMISSION**

The Northern Ireland Human Rights Commission (hereinafter the “Commission”) is an independent statutory body that was established on 1 March 1999 under the Belfast (Good Friday) Agreement and section 68 of the Northern Ireland Act 1998.

Pursuant to section 69(1) of the Northern Ireland Act 1998, the Commission has duties, *inter alia*, to monitor the adequacy and effectiveness of the law and practice in Northern Ireland in relation to the protection of human rights and to advise the Northern Ireland Assembly whether a Bill is compatible with human rights.

The Commission has prepared this submission in relation to the Family Law Bill as introduced in the Northern Ireland Assembly on 2 October 2000 (Bill 4/00). For further information concerning any of the points made, please contact the Commission at Temple Court, 39 North Street, Belfast BT1 1NA, telephone: 028 90243987, fax: 028 90247844, e-mail: nihrc@belfast.org.uk, website: <http://www.nihrc.org>.

#### **Clause 1 - Acquisition of parental responsibility**

##### **Unmarried fathers**

1. Article 8 of the European Convention on Human Rights requires that there are sufficient opportunities for the development of the relationship between an unmarried father and his child and the Commission therefore welcomes the provision in Clause 1 to facilitate further the acquisition of parental responsibility by unmarried fathers.

Article 8 protects *inter alia* the right to respect for family life. The European Court of Human Rights has interpreted the scope of family life broadly. While it seems that the blood tie is not in itself sufficient to establish ‘family life’ between father and child the Court has stated in a number of cases, such as *Keegan v Ireland* [1994] 18 EHRR 342, that:

*“The notion of ‘family life’ is not confined solely to marriage-based relationships and may encompass other de facto ‘family’ ties where the parties are living together outside of marriage. A child born out of such a relationship is ipso iure part of that ‘family’ unit from the moment of his birth and by the very fact of it. There thus exists between the child and his parents a bond amounting to family life even if at the time of his or her birth the parents are no longer cohabiting or if their relationship has then ended.”*

In the recent case of *Soderback v Sweden* [1999] 1 FLR 250 the Court went further and held that family life could be established between an unmarried father

and his child despite the fact that he had never cohabited with the mother and had only limited contact with his child.

According to the Court in *Kroon v Netherlands* [1994] 19 EHRR 263, where the existence of a family tie has been established:

*“The State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible as from the moment of birth or as soon as practicable thereafter the child’s integration into the family.”*

1. Even with the enactment of the Family Law Bill an unmarried father would still not automatically have parental responsibility (one of the options put forward in the consultation paper which preceded the introduction of the Bill) and would therefore remain in a disadvantageous position as compared to a married father and an unmarried mother. The Commission observes that registration as the child’s father, like the parental responsibility agreement, depends on the father having the consent of the child’s mother, so an unmarried father would still have to convince either the child’s mother or a court that he deserves parental responsibility. The Commission is however satisfied that the legal status of the unmarried father is for the time being compatible with the European Convention on Human Rights with the proviso that the European Court of Human Rights has not directly considered whether the legal status of unmarried fathers is compatible with Article 8. It has, however, considered the relevance of Article 14. Each of these Articles is considered in turn below.

#### Article 8

In *Re W; Re B (Child Abduction: Unmarried Father)* [1998] 2 FLR 146 Hale J held that:

*“The cases so far do not indicate that Contracting States are required to [afford completely equal parental responsibility to unmarried parents], as long as there are sufficient opportunities of developing the relationship between father and child... Our law gives fathers ways of acquiring parental responsibility for their children... Our law also gives them the right to seek orders about any aspect of their children’s upbringing, including an order prohibiting the removal of the child from the country... In my judgment, therefore, there has been no breach of Article 8.”*

In *Keegan* the European Commission of Human Rights held that Irish law did not give an unmarried father sufficient recognition and protection of his relationship with his child and was not compatible with the respect due to him under Article 8. Irish law did not automatically give an unmarried father guardianship of his child although he could apply to the court for an order to appoint him guardian. Unfortunately the Court did not find it necessary to decide this point and in *Re W; Re B Hale J* only referred to the judgment of the Court. The Commission is of the opinion that there is some inconsistency between Hale J's statement and the European Commission of Human Rights decision in *Keegan* and the compatibility of the legal status of unmarried fathers with Article 8 is therefore not certain.

#### Article 14

The European Court of Human Rights has directly considered whether the legal status of unmarried fathers as compared with married fathers is compatible with Article 14 of the ECHR, which protects the right not to be discriminated against in the enjoyment of Convention rights.

In *McMichael v UK [1995] 20 EHRR 205* the European Court of Human Rights considered the Scottish legislation which, similarly to the current law in Northern Ireland, provides that a child's father automatically acquires parental rights only if married to the child's mother. Under Scots law the father of a child born out of wedlock has to acquire parental rights by application to a court, although the application will be dealt with expeditiously if the mother consents. The applicant complained *inter alia* that he had been discriminated against contrary to Article 14 of the Convention taken in conjunction with Article 6 (right to a fair trial) or Article 8 because his lack of parental rights meant that he had no right to participate in care proceedings in relation to his child. The Court considered that the applicant's complaint was essentially directed against his status as a natural father under Scots law and held that there was an objective and reasonable justification for the difference in treatment between the applicant and a married father:

*"It is axiomatic that the nature of 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 indistinguishable from the conventional matrimonial based family unit at the other. The aim of the relevant legislation is to provide a mechanism for identifying 'meritorious' fathers who might be accorded parental rights, thereby protecting the interests of the child and the mother. In the Court's view this aim is legitimate and the conditions imposed on natural fathers for obtaining recognition of their parental role respect the principle of proportionality."*

The Court considered the issue again most recently in *B v UK [2000] 1 FLR 1*. The applicant was an unmarried father without parental responsibility whose application under the Hague Convention on the Civil Aspects of Child Abduction 1980 had been dismissed by the English Courts on the basis that he did not have any formal rights of custody. He complained that unmarried fathers were discriminated against in the protection given to their relationships with their children by comparison with the protection given to married fathers. The Court

declared the application inadmissible because there was an objective and reasonable justification for the difference in treatment between married and unmarried fathers with regard to the automatic acquisition of parental rights which related to the range of possible relationships between unmarried fathers and their children.

The European Court has not yet considered a complaint under Article 14 in relation to the difference in legal status between unmarried mothers and unmarried fathers although similar reasons are likely to be advanced to justify the difference.

The decisions cited above may be contrasted with the decision of the European Court of Human Rights in relation to the legal status of unmarried mothers. In *Marckx v Belgium* [1979] 2 EHRR 330 the Court held that the failure of Belgian law to automatically recognise from birth the relationship between the child and her unmarried mother breached the mother's rights under Article 8 and Article 14.

2. The Commission emphasises that the European Court of Human Rights has approached the situation of unmarried fathers on a case by case basis and there are areas of disadvantage to unmarried fathers without parental responsibility which may potentially breach the Convention. In *Keegan* the Court held that the placement of the child for adoption by the mother without the natural father's knowledge violated his rights under Article 6 and Article 8. The Court did not find it necessary to decide whether there was also a breach of Article 14. However in the case of *Soderback* the Court held that although adoption of the unmarried father's child by her step-father would interfere with his right to respect for his family life under Article 8, on the facts the effects on the father's relationship with the child were not disproportionate.

Articles 16 and 18 of the Adoption (Northern Ireland) Order 1987 do not require the consent of an unmarried father before the court makes an adoption or freeing for adoption order and the Commission advises that this could, depending on the facts, breach the father's rights under Article 6 and Article 8 of the Convention.

In relation to other areas of disadvantage, the Court has found no breach of the Convention in relation to the inability of an unmarried father to establish rights of custody within the meaning of the Hague Convention on the Civil Aspects of International Child Abduction (see *B v UK* above). However some key issues, such as the compatibility with the Convention of the court's power to revoke a parental responsibility order in the case of an unmarried man, remain untested and a breach of the Convention might be established depending on the facts.

3. The Convention is a 'living instrument which must be interpreted in the light of present day conditions' (*Tyrer v UK* [1978] 2 EHRR 1) and the Commission encourages the Assembly to keep the issue of the legal status of unmarried fathers under review. As Hale J stated:

*"There may come a time when the Parliament of this country, having considered the policy matters further, decides to eliminate those differences. Or there may be a time when so many of the Contracting States to the*

*Convention decide to do so that the currently wide margin of appreciation allowed in this area obliges us to do so.”*

The Commission highlights the following points for consideration by the Assembly:

- (a) The Commission has already noted that the Court has interpreted the scope of family life broadly and it considers that the *Soderback* decision is of particular significance because it disregards the nature of the parents’ relationship, focusing on the relationship between the father and child and comes close to recognising the natural tie as sufficient to establish family life between father and child. Arguably it also recognises the value of *potential* as well as *existing* family life.
- (b) The differences in the treatment of unmarried fathers have been justified by reference to the diversity of relations and varying level of commitment. In the *Marckx* case where the Court addressed the differences in treatment between the situations of the unmarried and the married mother under Belgian law, the Government argued that the differences were justified *inter alia* because there is no certainty that the unmarried mother will be willing to bear the responsibilities of motherhood; that by leaving the unmarried mother the choice between recognising her child or dissociating herself from it, the law was prompted by a concern for protection of the child, for it would be dangerous to entrust to the custody and authority of someone who has shown no inclination to care for it and that many unmarried mothers do not recognise their child. Notably the Court did not find these arguments persuasive and held that the fact that some unmarried mothers do not wish to take care of their child could not justify the rule of Belgian law whereby the establishment of their maternity is conditional on voluntary recognition or a court declaration and that such an attitude was not a general feature of the relationship between unmarried mothers and their children. The Court observed that it might happen that a married mother might not wish to bring up her child and yet as far as she was concerned the birth alone will have created the legal bond of affiliation. The Commission considers that the arguments that the Court found persuasive in *Marckx* apply equally in the case of unmarried fathers.

In relation to the need to protect the child and the mother, the Commission notes that the Court of Appeal has held in the context of applications for parental responsibility that, while a father must show commitment to the child, an application should not be refused on the ground that it would give the father power to interfere with the arrangements for the child. The leading case is *Re S (Parental Responsibility)* [1995] 2 FLR 648 where the Court of Appeal emphasised that the granting of parental responsibility is the granting of a status and it is wrong to place undue emphasis on the rights and duties and powers comprised in parental responsibility and not to concentrate on the fact that what is at issue is the conferring on a father of the status of parenthood for which nature had already ordained that he must bear responsibility. The Court observed that all too frequently there was a failure to appreciate that any abuse of the exercise of parental responsibility which was adverse to the child’s welfare could be controlled by the wide exercise of section 8 powers.

- (c) The vast majority of applications to the European Court of Human Rights concerning the status of unmarried fathers have been brought by unmarried fathers and the Court has given less consideration to this issue from the perspective of the child.

In *Re W; Re B*, Hale J distinguished between the position of the child and that of his or her father:

*“Our law now gives full recognition to the child’s relationship with his family and their obligations towards him, from the moment of birth. The child is automatically entitled to be supported by both parents and to participate in an inheritance or other disposition from each side of the family. The law no longer distinguishes automatically between natural relationships traced through or outside marriage. The question is whether our law is required automatically to afford completely equal parental responsibility and authority to the parents...”*

However the Commission takes the view that the legal status of the father cannot be completely divorced from the legal status of the child and that any legal distinctions between fathers must necessarily amount to legal distinctions between children. The non-automatic granting of parental responsibility to unmarried fathers means that many children have no legal relationship with their father.

In *Johnston v Ireland* [1986] 9 EHRR 203 the European Court of Human Rights considered Irish law, under which there were considerable differences in treatment between legitimate and illegitimate children. These differences included the natural father’s lack of parental rights in relation to the illegitimate child although the Court considered the child’s legal situation in general and did not examine the various differences separately. It held that:

*“The normal development of the natural family ties between the [parents] and their daughter requires that she should be placed legally and socially in a position akin to that of a legitimate child...The absence of an appropriate legal regime reflecting the [child’s] natural family ties amounts to a failure to respect her family life. Moreover the close and intimate relationship between the [child] and her parents was such that there was of necessity also a resultant failure to respect the family life of each of the latter.”*

The *Johnston* case emphasises that the parents’ relationship should not be determinative of the child’s legal and social position, that the legal recognition of family ties in enabling the child to be integrated into the family is important and that the interests of parent and child are inextricably linked.

In *Marckx* the child brought an application as well as the mother. The Court found a violation of the child’s right to respect for her family life under Article 8 as the only method open to her to establish a legal relationship with her mother was through court proceedings. It is to be noted that in Northern Ireland a child must seek a declaration of parentage through the courts if he or she wishes to have a man registered as his or her father. In relation to Article 14 the Court held that the interest of an illegitimate child in having a legal bond of affiliation established is

no less than that of a legitimate child and yet under the Belgian law the illegitimate child was likely to remain motherless. The same could be said of the child's relationship with his unmarried father under the law in Northern Ireland.

Despite the different factual contexts, on the basis of the principles applied in the above cases it could be argued that the lack of legal recognition of the relationship between the unmarried father and his child fails to respect the child's right to family life contrary to Article 8 and constitutes discrimination contrary to Article 14.

- (d) A number of provisions of the UN's Convention on the Rights of the Child (1989), ratified by the UK in 1991, are relevant to the legal relationship between a child and his or her parent and may be viewed as supporting the automatic granting of parental responsibility to an unmarried father:

*Article 7(1)*

*The child...shall have...as far as possible the right to know and be cared for by both his parents.*

*Article 8(1)*

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

*Article 18(1)*

*States Parties shall use their best efforts to ensure recognition of the principle that both parents have common responsibilities for the upbringing and development of the child. Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern.*

The Commission is conscious, however, that in many instances an unmarried father may not in fact have much of a role in the care of the child. On the facts of a particular case it may not therefore be in the best interests of a child to grant parental responsibility to such a father. And yet the Bill would allow such a father to acquire parental responsibility merely by registering the birth of the child along with the mother (albeit with her consent). At this point Article 3 of the UN Convention on the Rights of the Child comes into play, because it provides that "[i]n all actions concerning children...the best interests of the child shall be a primary consideration" and that governments "shall ensure the child such protection and care as is necessary for his or her well-being". We are of the view that, in accordance with this provision, no person – mother, father or other – should acquire, or continue to hold, parental responsibility over a child unless it is in that child's best interests for this to occur. The Family Law Bill should be amended to make this explicit.

Article 12 of the UN Convention is also relevant because it says that governments "shall assure to the child who is capable of forming his or her own view the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the

child...” The Commission recommends that the Bill be amended to reflect this principle too, which is entirely consistent with existing domestic law as represented by the *Gillick* case some years ago.

4. In conclusion, the Commission reiterates its view that the Family Law Bill leaves the law relating to the legal status of unmarried father compatible with the Convention *for the time being*. Challenges in the domestic courts to the legal status of unmarried fathers can be anticipated under the Human Rights Act 1998 and it is likely that some of these challenges will succeed as social trends continue to evolve and the issues are re-examined accordingly.

The increasing readiness of the European Court of Human Rights to find that family life exists between an unmarried father and his child reflects the increasing willingness of the European Court of Human Rights to treat this relationship as deserving of protection under the Convention and to examine the merits of claims by unmarried fathers that their Convention rights have been violated. In some cases this has already resulted in a decision in the father’s favour.

The Commission advises that the policy reasons underlying the differential treatment of unmarried fathers should be evaluated for their continuing validity as in any challenges these reasons will be fundamental to clarifying the extent of the State’s positive obligations under Article 8 and in establishing objective and reasonable justification for any differential treatment under Article 14.

The Commission also advises the Assembly to approach the legal status of unmarried fathers as an issue concerning the rights of the child as well as the father. The compatibility of the legal status of the unmarried father with the Convention from the perspective of the child’s rights remains untested but given the general trend towards eliminating differences between children based on their parents marital status and the growing emphasis on children’s rights it may be difficult to defend denying many children a full legal relationship with their father.

The Commission is of the opinion that some areas where breaches have already been identified such as adoption without consent must be reviewed immediately and that further legislation making more radical changes to the status of unmarried fathers is likely to be necessary in the future to ensure the continuing compatibility of the law in this area with the Convention.

The Bill should, however, be amended so as to take account of the requirements of Articles 3 and 12 of the UN Convention on the Rights of the Child in relation to the best interests of the child and the views of the child.

### **Step-parents**

1. The Commission considers that the provision in Clause 1 for a step-parent to apply to the court for an order conferring parental responsibility on him or her in relation to a child of his or her spouse is compatible with the European Convention on Human Rights and may even be necessary to meet this country’s positive obligations under Article 8.

2. The European Court of Human Rights has not directly considered the position of step-parents. However it has interpreted the scope of family life under Article 8 to include parental relationships without a blood tie where otherwise distinguishable from the traditional family, for example, ‘family life’ has been held to include the relationship between an adopted child and adoptive parents (*X v France*, Application No. 9993/82) and between a foster parent and a foster child. (*Frette v France*, Application No. 36515/97) Moreover, as already noted above, once the existence of a family tie with a child has been established the State must act in a manner calculated to enable that tie be developed. (see *Kroon* above)
3. The Commission is of the view that respect for the family life of the step-parent and the child requires the law to enable formal legal family ties to be established between them.
4. The Commission considers that acquisition of parental responsibility by a step-parent would not interfere with the right of the natural parent without residence to respect for their family life as it would not affect the legal or social relationship between the natural parent without residence and the child. Indeed acquisition of parental responsibility by the step-parent would seem a better safeguard of the rights of the natural parent without residence than adoption which severs the natural parent’s relationship could violate their right to respect for their family life under Article 8.
5. A step-parent who has acquired parental responsibility will not be able to consent or refuse to consent to the making of an application with respect to the child under Article 17 of the Adoption order or to agree or refuse to agree to the making of an adoption order under Article 57 of the Adoption Order with respect to the child. The Commission considers that this could be incompatible with the step-parent’s rights under Articles 6 and 8 of the Convention in view of the decision in *Keegan* cited above. Whilst the position of a step-parent is in many respects different from that of a natural parent it is nevertheless likely that a step-parent with parental responsibility will be able to establish the existence of family life and an interference with their right to respect for family life given the nature of adoption. In most cases it is accepted that adoption is in accordance with the law and pursues a legitimate aim so that the main issue would be whether the interference is proportionate on the facts.

## **Clause 2 - Presumption of parentage**

1. The Commission is satisfied that the presumption proposed in Clause 2 that a man is the father of a child if he was married to the mother of the child or has been registered as the child’s father is compatible with the European Convention on Human Rights.
2. In *Kroon and others v The Netherlands* [1994] 19 EHRR 263 the European Court of Human Rights considered that a presumption of paternity in favour of the mother’s husband breached the right of her partner to respect for his family life under Article 8 because it could only be rebutted by the husband. It was not the

*“Respect for family life requires that biological and social reality prevail over a legal presumption which flies in the face of both established fact and the wishes of those concerned without actually benefiting anyone.”*

The statutory presumption proposed would not prevent biological and social reality from prevailing as the clause provides that the presumption may be rebutted and there is no restriction on who can rebut the presumption.

### **Clause 3 - Tests for determining parentage**

1. The Commission is satisfied that Clause 3 is compatible with the Convention in so far as adults are concerned. The taking of bodily samples from adults for the purposes of resolving questions of parentage is compatible with the Convention as long as it is not done compulsorily (*X v Austria Application No. 8278/78*).
2. The Convention may, however, require that the court have the power to enforce a direction that a bodily sample is taken from a child. At present Article 9(3) of the Family Law Reform (NI) Order 1997 gives the person with care and control of the child the absolute right to refuse to allow a blood sample to be taken from the child for the purpose of determining paternity. In the case of *MB v UK Application No. 22920/93* the European Commission of Human Rights did not find that the domestic court’s refusal to order blood tests on the child of a married woman, in respect of whom the applicant claimed to be the father, breached his right to respect for his private life under Article 8. The Commission considered that it is justifiable for domestic courts to give the greater weight to the interests of the child and the family in which it lives than to the interests of the applicant in obtaining verification or otherwise of a biological fact. The applicant also asked the Commission to consider that the refusal to order blood tests breached the child’s right to respect for her family life, but he did not have the right to represent the child in domestic law and the Commission only considered the case from the perspective of the applicant. However, in *Re O & J (Paternity: Blood Tests) [2000] 1 FLR 418* Wall J commented, in relation to the English equivalent of Article 9(3), that the current state of the law did not serve the best interests of children who were deprived of the means of acquiring knowledge about their paternity. He indicated that reform might be achieved by the point being taken that the law was not human rights compliant. Moreover, the principle that children have so far as possible the right to know their parents is enshrined in Article 7 of the UN Convention on the Rights of the Child.
3. The Family Law Bill does not deal with the issue of the child’s consent to a blood test. Here again the guiding principle should be the best interest of the child, as required by Article 3 of the UN Convention. If a child refuses consent to a blood test, and has the age and maturity to take such a decision, the responsibility for requiring a blood test to be conducted should be that of a court, at which the child should be represented separately by a lawyer (to comply with Article 6 of the ECHR). No adult should be able to veto such a test or to demand such a test. To physically restrain a child who has refused consent to a blood test would raise

