

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

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Abstract

This article investigates the compatibility between the UK's current position regarding unmarried fathers' acquisition of parental responsibility with the Government's obligations under the European Convention on Human Rights. It argues that, though it may not be found to violate Articles 8 and 14 of the Convention in 2024, the UK may soon find itself in this position. Thus, the UK is presented with an opportunity, a chance to reform the law proactively and in a well-thought-out manner, avoiding a potentially pressured and rushed mandate to reform in response to a future Strasbourg Court ruling. Drawing upon the practice of other European states, the author recommends a novel model for such reform which would render UK law compatible with the European Convention on Human Rights whilst also improving its cohesion with modern society.

Key words: Parental Responsibility, unmarried fathers.

1. 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,¹ Bainham accurately describes England and Wales as having left 'things rather vague'.² 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'.³ 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

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1 Children (Scotland) Act 1995 c 36.

2 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.

3 Children Act 1989 s 3(1).

within compulsory school ages,⁴ and to obtain the child's required medication,⁵ as well as the *right* to give the child a religious upbringing,⁶ to consent or refuse consent to some medical treatment,⁷ 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.⁸

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.⁹ Indeed, the Law Commission has listed several liberties that a parent *cannot* perform without PR:¹⁰ Parents without PR have no automatic right to 'live with' or 'spend time with' the child,¹¹ no authority to prevent the adoption of the child should this be the wishes of those holding PR,¹² no ability to remove or challenge the child's care by a local authority,¹³ and no power to prevent a change in the child's name.¹⁴ It is, therefore, no surprise that Sir James Munby has described PR as 'the very essence of the relationship of parent and child'.¹⁵

However, a key issue, and the core focus of this article, is that whilst married parents, civil partners,¹⁶ and unmarried mothers acquire PR automatically on the birth of their child in the UK, *unmarried* fathers do not.¹⁷ 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.¹⁸

The 1984 case of *Re L* provides a poignant example of the difficulties this can pose for unmarried fathers.¹⁹ Here, the unmarried father lost access to his child despite having independently cared for him for the majority of his first year of life

4 Education Act 1996 s 7.

5 John Eekelaar, 'Rethinking Parental Responsibility', (2001) 31 *Family Law* 426.

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

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

8 Child Support Act 1991.

9 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).

10 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.

11 Children Act 1975 s 85(7).

12 Adoption and Children Act 2002 s52(1), (6).

13 Child Care Act 1980 s 3(1), (2).

14 Children Act 1989 s 13(1).

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

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

17 Children Act 1989 s 2(2).

18 Ros Pickford, *Fathers, Marriage and the Law* (Cambridge: Family Policy Studies Centre 1999).

19 *Re L (A Minor)* (EWCA, 1984).

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 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',²⁰ some unmarried fathers wrongly assume they have acquired PR automatically and therefore have a shock when disputes arise and they find themselves 'powerless'.²¹ Clifton concurs and, writing in the context of adoption, adds that fathers often feel 'complicated grief, guilt and shame', and that when they tried to challenge proceedings, they felt 'intimidated' and 'disempowered'.²²

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'.²³ Whilst no definition exists to distinguish the 'meritorious' from the 'unmeritorious', it is generally understood that the latter category includes 'rapist' fathers,²⁴ those whose child was born through a 'casual encounter',²⁵ those who may subject the mother to 'harassment',²⁶ and those whose parenting would not be in the 'child's interests'.²⁷ Accordingly, the Government has constructed a unique legal framework to govern unmarried fathers comprising 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 article, 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 in 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. 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 2023.²⁸ Some have also reached international courts, such as the 1995 landmark case of *McMichael v. UK*.²⁹ This case is particularly relevant to this article since it concerned an unmarried father who attempted to demonstrate that the denial of automatic PR to unmarried fathers in the UK was a

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

21 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; also see John Eekelaar, 'Rethinking Parental Responsibility' (n. 5).

22 J. Clifton, 'Birth Fathers and Their Adopted Children: Fighting, Withdrawing or Connecting', (2012) 36(2) *Adoption and Fostering* 43.

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

24 *Family Law: Illegitimacy Final Report* (n. 10) para. 4.30.

25 *Ibid.*, para. 4.30.

26 *Ibid.*, para. 4.39.

27 *Ibid.*, para. 4.38.

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

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

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 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 2025 or 2026. Thus, the focus of this article can be summarised as an assessment of the compatibility of UK law concerning acquisition of PR by unmarried fathers with Articles 8 and 14 of the Convention. The analysis will be undertaken in three parts.

Part One outlines and critiques 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. This discussion will be crucial to an assessment of the current framework’s compatibility with Articles 8 and 14 of the Convention in Part Two.

Part Two sets out the legal framework through which a claim under Articles 8 and 14 of the Convention would proceed, considering whether the law set out in Part One proves compatible with this framework at each stage. After considering whether an unmarried father could surpass the relevant four-stage test, the differing context of UK domestic courts will be discussed before considering the potential treatment by the Strasbourg Court. It will be argued that, although it is unlikely that a finding of incompatibility would result in the very near future, political and legislative bodies at the European level are shifting towards favouring of ‘New Fatherhood’, which is a modern understanding presenting fatherhood as separate to a particular marital status.³⁰ On this basis, it is predictable 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.

Due to this prediction, Part Three argues that the UK 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 article recommends 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 by 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 Part One, and align more effectively with the challenges posed by modern scientific developments

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

such as surrogacy. Owing to space limitations, both models will, however, only be outlined in a broad-brush manner. The intention of this article is to demonstrate the possibility of a future framework that functions more effectively and more compatibly with the Convention in the long term, thus setting the scene for possible further research.

Before proceeding to Part 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’.³¹ Subsequently, these terms were replaced by Child Arrangements Orders (CAOs) through the Children and Families Act 2014.³² Hence, the new language of ‘live with’ and ‘spend time with’ orders will be referred to in the majority of this article. The old phrases will, however, be occasionally referred to when 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 the analysis.

2. Part One: Domestic Law

The focus of this section is to analyze the current state and evolution of the law concerning acquisition of PR by unmarried fathers, setting the scene for an investigation into its compatibility with the Convention in Part Two. This section tackles 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.³³ As a result of this standpoint, six methods have developed through which unmarried fathers may acquire PR in England and Wales. These will consequently be outlined 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.

A. *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.³⁴ 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

31 Children Act 1989 s 8.

32 Children and Families Act 2014 sch 2 para. 3.

33 *Working Paper No 74: Illegitimacy* (n. 23).

34 *Ibid.*

distinction between ‘meritorious’ and ‘unmeritorious’ unmarried fathers.³⁵ 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.³⁶ This was contrasted to ‘other fathers who have lived with the mothers for perhaps many years,’ described as ‘meritorious.’³⁷

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.³⁸ In response, the Law Commission outlined three methods through which this result could hypothetically be achieved, eventually concluding that none were realistic.³⁹

First, it was suggested that, through defining who 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.’⁴⁰ 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.⁴¹ 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.⁴² 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.⁴³

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

35 *Ibid.*, paras 3.12-3.13.

36 *Ibid.*, paras 4.3, 4.38 and 4.39.

37 *Ibid.*, para. 2.11.

38 *Family Law: Illegitimacy Final Report* (n. 10) para. 4.27.

39 *Ibid.*, para. 4.8.

40 *Ibid.*, 35.

41 *Ibid.*, para. 4.32.

42 *Ibid.*, para. 4.34.

43 *Ibid.*, para. 4.35.

44 *Ibid.*, para. 4.38.

45 *Ibid.*,

46 *Ibid.*, para. 4.39.

fathers would be able to manipulate such a system, gaining the mother's consent by exposing her to pressure and harassment.⁴⁷

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.⁴⁸ Unsurprisingly, this was also rejected, the Law Commission feeling that it interfered too much with the family unit.⁴⁹

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 Part Two.⁵⁰ While initially excluding all unmarried fathers, the Government has developed six methods through which unmarried fathers can acquire PR. Together, these methods attempt to create a system that 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.

B. *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.⁵¹ These will be discussed first, before the options for those who do not have the mother's consent are outlined: Parental Responsibility Orders (PROs) and Child Arrangements Orders (CAOs).

In addition, the current system will be evaluated. 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.

1. *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.⁵² Both the unmarried father and mother

47 *Ibid.*

48 *Ibid.*, para. 4.41.

49 *Ibid.*, 41.

50 *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.

51 Children Act 1998 s 2(2)(1)-(5); s 4(1) and (1A).

52 Children Act 1998 s 4(1)(b).

must complete the C(PRA1) HM Courts and Tribunal Service Form⁵³ compliant with the Parental Responsibility Agreement Regulations 1991.⁵⁴ 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.⁵⁵ 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.⁵⁶ 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.⁵⁷

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 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 about 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.⁵⁸

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.⁵⁹ 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 judgment 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.' One 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

53 '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.

54 Parental Responsibility Agreement Regulations 1991, SI1991/1478.

55 'Parental Responsibility Agreement' (n. 53) 2.

56 *Ibid.*

57 *Ibid.*

58 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.

59 Department for Work and Pensions, *Joint Birth Registration: Recording Responsibility* (Cm 7293, 2008) 24.

in their 1982 'Illegitimacy' report,⁶⁰ and highlighted in the recent case of *D v. E*.⁶¹ 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.⁶²

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 of PR because she required help with childcare, already supporting five other children whilst suffering from depression.⁶³ 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.⁶⁴

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 children appropriately since they have freely entered into accepting PR. Social contract theory interprets social order as created through freely entering into contracts.⁶⁵ 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'.⁶⁶ When this event happens, 'normative devices' are theorized to begin acting upon the mother, encouraging her to care for the child in a manner that is socially and legally expected of her.⁶⁷ Based on this theory, it could be argued that the signing of a statutory agreement with the father 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.⁶⁸

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

60 *Family Law: Illegitimacy Final Report* (n. 10) para. 4.39.

61 *D v. E (Termination of Parental Responsibility)* [2021] EWFC 37.

62 *Ibid* [9].

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

64 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.

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

66 Mark Vopat, 'Contractarianism and Children', (2003) 17(1) *Public Affairs Quarterly* 49, pp 58-59.

67 *Ibid.*, 59.

68 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.

exist here, including personal dislike of the father, or revenge for what they may consider insufficient financial support. 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.⁶⁹

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.⁷⁰ 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 [was] physically threatened'.⁷¹ Mothers also made up over a quarter of the perpetrators of physical abuse of children (29%), second only to biological fathers (39%).⁷² Hence, it is not merely 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.

2. *Registration on the Birth Certificate*

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' pursuant to 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 1976.⁷³ 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.

69 *Re L* (n. 19).

70 *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.

71 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>.

72 *Ibid.*

73 Children Act s 4(1) and (1A); Adoption and Children Act 2002 s 111.

Accordingly, the same issues concerning reliance upon the consent of the mother described above apply to this method.⁷⁴ 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.⁷⁵

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.⁷⁶ 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 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.⁷⁷ 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.

3. *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.⁷⁸ Usually, this will happen through a testamentary will dictating that when the parent with PR has died, a named individual will become the legal guardian for the child.⁷⁹ 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.⁸⁰

Again, although proving fairly straightforward and cost-effective, this method also relies upon the mother’s consent and, as such, the same issues described above apply here. An additional issue with this method of acquisition is that the

74 Gilmore and Glennon (n. 68) 436.

75 Julie Wallbank, ‘Clause 106 of the Adoption and Children Bill: Legislation for the “Good” Father?’, (2002) 22(2) *Legal Studies* 276, 280.

76 Department for Work and Pensions (n. 59) 7.

77 Vopat (n. 66) 59.

78 Children Act 1998 s 5.

79 *Ibid.*, s 5(3).

80 *Ibid.*, s 14A(2)(b).

acquisition of PR is delayed. Hence, it would not be a method appropriate for a father who wishes to exercise PR immediately.

4. *Marriage to the Mother*

The last method reliant upon the mother's consent is marriage to the mother.⁸¹ However, this is only appropriate for unmarried fathers who desire to be in a formalized relationship with the mother and for cases when the mother agrees to the marriage. Those who do not wish for a relationship with the mother, or simply do not wish for it to be formalized, would not benefit from this method. Furthermore, since it relies on the consent of the mother, the same issues connected with consent arise.

5. *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.⁸² The father must complete forms C1 and FM1 and attend a Mediation Information & Assessment Meeting (MIAM) before a court hearing is organized. The process through which a court decides whether a PRO may be granted can be summarized in three steps: paternity must be proven;⁸³ the applicant's 'merit' as a father must be determined; the relevant people must be informed of the outcome. A presumption that involvement of the father will further the child's welfare overlays this process.⁸⁴

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 completed without difficulty, to the extent that courts even entertain an application for a child before paternity is proven.⁸⁵ The second stage is where issues may arise.

Relying upon the judgment of *Re H*,⁸⁶ 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 the child; and (3) the reasons of the father for applying for the order'.⁸⁷ 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,⁸⁸ persistent applications to court, or payment of child maintenance.⁸⁹ 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

81 *Ibid.*, s 2(1).

82 *Ibid.*, s 4(1)(a).

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

84 Children Act 1998 s 1(2A).

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

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

87 *Ibid.* [158-D]; Gilmore and Glennon (n. 68) 439-441.

88 *Re J (Parental Responsibility)* [1999] 1 FLR 784.

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

in order to further harass and interfere with the mother's exercise of PR.⁹⁰ 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.⁹¹ 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.⁹² 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.'⁹³ 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. Moreover, there is no data to tell how many unmarried fathers may have been discouraged from even trying this route to PR by its complexity or cost or by the real or perceived risk of failure.

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'.⁹⁴ Since the dichotomy upon which this test is based is uncertain, the test is also unlikely to prove anywhere near 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.⁹⁵ 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 categories who are unable to afford a PRO at all.

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

91 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.

92 WhatDoTheyKnow, 'Statistics on Fathers' Applications for Parental Responsibility Orders' (11 January 2021), https://www.whatdotheyknow.com/request/statistics_on_fathers_applicatio.

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

94 *Family Law: Illegitimacy Final Report* (n. 10) 35.

95 Children Act 1998 s 1(2A).

i) '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.⁹⁶ 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.⁹⁷ 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.⁹⁸

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.⁹⁹ 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.¹⁰⁰ It is likely that the cost and length of proceedings are greater obstacles to 'meritorious' fathers, an issue which will be returned to shortly.

ii) '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.¹⁰¹ The former may be motivated by a desire to distress and manipulate the mother; the latter may be due to a commitment to fulfil

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

97 *Re S (Parental Responsibility: Jurisdiction)* (n. 85).

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

99 Stephen Gilmore, 'Parental Responsibility and the Unmarried Father – a New Dimension to the Debate', [2003] *Child and Family Law Quarterly* 21, 30.

100 Children Act 1998 s 1(2A).

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

legal obligations. Neither of these activities may have anything to do with a genuine commitment to care for the child.

An ‘unmeritorious’ father may also benefit from the presumption that involvement of the parent in the child’s life will further their welfare.¹⁰² 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’ behavior, the threshold of evidence required to override the presumption is high.¹⁰³ 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.’¹⁰⁴ The following evidence has been found to meet this threshold: past refusal to give the child back to their mother after a contact visit,¹⁰⁵ sadistic abuse of a child,¹⁰⁶ and having committed a crime whilst on home leave from prison.¹⁰⁷ 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.¹⁰⁸ 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 actually advantage the ‘unmeritorious’ father.

iii) 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 £215,¹⁰⁹ the MIAM costs £120 per person,¹¹⁰ and the court order itself costs £232, directly payable to the court.¹¹¹ 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.¹¹² Accordingly, obtaining a PRO is a lengthy and costly process, one that not all unmarried fathers will be able to afford.

102 CA 1998 s 1(2A).

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

104 *Ibid.*

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

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

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

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

109 ‘Application for an order’ (GOV.UK, Form C1), https://assets.publishing.service.gov.uk/media/64214db332a8e0000cfa94d4/C1_0722_save.pdf.

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

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

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

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.¹¹³ Therefore, although the most economically disadvantaged fathers may be able to receive financial support, those who do not quite reach this threshold but 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 biggest issue, however, is the expense and length of proceedings, meaning that many fathers will not be able to afford to apply for a PRO at all.

6. *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.¹¹⁴ CAOs are orders sought by parties who wish to change the current arrangements for the care of the child, for example, to transfer the child from another person's care into their own. If successful, and the applicant does not already have PR, the Court will award him PR under section 4 of the Act.¹¹⁵ The process involves a legally required MIAM;¹¹⁶ the filing of a C1 form to court;¹¹⁷ and 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 paramouncy principle and welfare checklist.¹¹⁸

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.¹¹⁹ 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

113 '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>.

114 Children Act 1998 ss 8 and s 12(1).

115 *Ibid.*, s 12(1).

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

117 'Application for an order' (n. 109).

118 Children Act 1998 ss 1 and 1(3).

119 *Ibid.*, s 1(5).

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.¹²⁰ 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 £215.¹²¹ 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, legal aid is only available for CAOs should there be evidence of child abuse, domestic abuse or a *risk* of either.¹²² 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 the applicant's 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.¹²³ 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 who do not meet the required thresholds, but still cannot afford this process, will not be able to apply for a CAO.

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.¹²⁴ 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 minimizing their own deficiencies as a carer. If they possess a manipulative and controlling character, they may even be able to coerce the mother into supporting their case. 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

120 'What is a MIAM?' (n. 110).

121 'Application for an order' (n. 109).

122 '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.

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

124 Children Act 1998 s 1(5).

continued denial of automatic PR to unmarried fathers sits within the context of current position in the UK.

C. Modern Developments

This section will assess three aspects of society in the UK in order to evaluate the context within which the above legal framework sits in 2024: demographics; legal perspectives and public opinion. This analysis will be crucial to an assessment of whether UK law operates within the relevant margin of appreciation in this area in Part Two.

1. Demographics

Statistics demonstrate that current rates of the formalization of relationships, as well as of births outside of marriage, are significantly different to those during the late 20th 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 1862.¹²⁵ Another report, in 2021, found that rates of Civil Partnerships had also decreased, by 19.4% since 2020.¹²⁶ 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’.¹²⁷ 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.¹²⁸ 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.

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*

125 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>.

126 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>.

127 Faiza Mohammad, Nina Mill and Kanak Ghosh (n. 125).

128 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>.

than within in the UK.¹²⁹ This is an entirely different demographic makeup to the late 20th century. Indeed, in 1978 less than one out of ten children were recorded to have been born outside of marriage.¹³⁰ Interestingly, with the Law Commission reports concerning automatic PR being published in 1979 and 1982,¹³¹ 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,¹³² rising to 44.3% by the judgment of *Re Z* (2008), a domestic case reaffirming the decision of *B v. UK*; larger minorities, but minorities nonetheless.¹³³ 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 fathers are potentially being placed in vulnerable positions in regard to acquiring PR. 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.¹³⁴ 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.

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.

2. 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

129 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>.

130 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.

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

132 *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, 32.

133 *Re Z (Children)* (n. 50); 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.

134 Department for Work and Pensions (n. 59) 7.

the means through which PR can be acquired.¹³⁵ 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.¹³⁶ 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.¹³⁷ 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.¹³⁸ 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'.¹³⁹

Almost a decade later another proposal for reform arose: the 2007 Green Paper entitled 'Joint Birth Registration: Promoting Parental Responsibility'.¹⁴⁰ 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.¹⁴¹ Furthermore, it was noted that without registration of the father, difficulties often arise concerning child support liability and the transference of nationality.¹⁴² 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.¹⁴³ Hence, by introducing mandatory joint registration, the green paper aimed to 'embed a new culture...

135 *Family Law: Illegitimacy Final Report* (n. 10).

136 Lord Chancellor's Department (LCD), 'Press Notice 201/98' (1998).

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

138 *Ibid.*, 99.

139 'Press Notice 201/98' (n. 136) [51], *insertion added*.

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

141 *Ibid.*, 3.

142 Sheldon, 'From "Absent Objects of Blame" to "Fathers Who Want to Take Responsibility": Reforming Birth Registration Law' (n. 58) 375.

143 *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.

which places much more equal weight on the relationship of both parents with their children’.¹⁴⁴

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.¹⁴⁵ Although this proposal, contained within the 2009 Welfare Reform Bill,¹⁴⁶ was not implemented in the eventual Act,¹⁴⁷ due to concerns over the pressure this framework would exert upon mothers to provide sensitive information, Sheldon argues that this paper demonstrated a ‘shift in attitudes’ with unmarried fathers becoming seen as a group who were *discriminated* against.¹⁴⁸

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.¹⁴⁹ Despite the fact that his behaviour would 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.¹⁵⁰ 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.¹⁵¹ 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 based 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.

3. *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

144 *Joint Birth Registration: Promoting Parental Responsibility* (n. 140) 2.

145 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.

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

147 Welfare Reform Act 2009.

148 Sheldon, ‘From “Absent Objects of Blame” to “Fathers Who Want to Take Responsibility”’: Reforming Birth Registration Law’ (n. 58) 381.

149 *F v. M* [2023] (n. 28).

150 *Ibid.* [7].

151 *Ibid.*

believed ‘parents should share responsibility for bringing up their children’.¹⁵² 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’.¹⁵³ 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 ten years should have the same rights as the mother in regard to making decisions about the child’s medical treatment.¹⁵⁴

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, Fathers4Justice was set up in 2001, stating on their website that they ‘look forward to the day when gender does not matter and all parents are treated equally’.¹⁵⁵ 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.¹⁵⁶ This support is reported to come from all sectors of society, with almost as many women supporting it as men.¹⁵⁷ 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.¹⁵⁸ That said, it should be acknowledged that this petition has only achieved a modest number of signatures thereby undermining its perceived popularity. However, explicit support was almost certainly impacted by the fact that 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 public that ‘an unmarried father has the same legal rights and obligations as the mother’.¹⁵⁹ 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 1991.¹⁶⁰ 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

152 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>.

153 Anne Barlow, Carole Burgoyne and Janet Smithson, ‘The Living Together Campaign – The Impact on Cohabitants’ (2007) 37 *Family Law* 165, 166.

154 Dey and Wasoff (n. 21) pp 228-229.

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

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

157 *Ibid*.

158 ‘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.

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

160 *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.

UK law regarding acquisition of PR vis à vis unmarried fathers neither meets the expectations of the public today, nor satisfies their demands.

D. Conclusion to Part One

Part One has set the context for this article: it 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 over the last few decades.

In summary of its findings in relation to the first issue, 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/or the consent of the mother may find the system straightforward to navigate. Others may find acquiring PR to be difficult and potentially inaccessible especially 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, making acquiring PR almost impossible for some.

This system also 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 fathers in the UK.¹⁶¹ 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'. Overlaying all of these issues is the curious fact that there is no universal, or clear, definition of either terms, 'meritorious' or 'unmeritorious', an issue which the Law Commission themselves have admitted.¹⁶²

In recognition of these issues, legal, political and public opinions appear to be increasingly in favour of a reform to UK law to allow unmarried fathers to acquire PR automatically, on an equal footing with other parents. This is supported by evolution in demographics, showing that the number of fathers negatively impacted by this law is ever widening.

This evidence will now be considered alongside Articles 8 and 14 of the Convention in Part Two, allowing for a focused analysis upon whether the UK's framework fits within the Convention's margin of appreciation relevant to cases concerning acquisition of PR in 2024.

¹⁶¹ *Family Law: Illegitimacy Final Report* (n. 10) para. 4.39.

¹⁶² *Ibid.*

3. Part Two: Prediction of a Successful Legal Challenge to UK Law through the Lens of Articles 8 and 14 of the Convention in 2024

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 applications were filed at the Strasbourg Court claiming that the denial of automatic PR to unmarried fathers in the UK violated Articles 8 (the ‘right to respect for his private and family life, his home and his correspondence’)¹⁶³ and 14 (the right to have all convention rights secured without discrimination)¹⁶⁴ of the Convention.¹⁶⁵ 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.¹⁶⁶

The first of these cases was *McMichael v. UK* in 1995.¹⁶⁷ 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 the case under Article 6 of the Convention.¹⁶⁸ However, pertinent to this thesis, an additional claim was included, that Mr McMichael’s right to custody of his child had been refused in violation of Articles 8 and 14 when he was unmarried. A subsequent case arose in 2001: *B v. UK*.¹⁶⁹ 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* PR. 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 their acquisition of PR. In both cases no violation was found, the court instead accepting the UK’s justification that this policy was necessary to protect mothers and children from ‘unmeritorious’ men.¹⁷⁰ However, since Part One found that societal views, demographics and legal frameworks have evolved significantly in the last few

163 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Art 8.

164 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Art. 14.

165 *McMichael v. United Kingdom* (n. 29); *B v. the United Kingdom* (n. 50).

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

167 *McMichael v. United Kingdom* (n. 29).

168 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Art. 6.

169 *B v. the United Kingdom* (n. 50).

170 *McMichael v. United Kingdom* (n. 29), para. 98; *Family Law: Illegitimacy Final Report* (n. 10).

decades, it seems fair to assume that whilst these cases were rejected in 1995 and 2000, a violation may now be found in similar cases in the future.

At the outset it is important to note that there is an alternative basis upon which an unmarried father could make an application: 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.

Part Two will assess the likelihood of a violation of Article 8 in conjunction with Article 14 being found, should a relevant application be made in the foreseeable future by an unmarried father. First, the four-stage test relevant to assessing whether there has been a violation of Articles 8 and 14 of the Convention will be considered. This test is applicable in both domestic courts and the Strasbourg Court. Since a requirement for admissibility at the Strasbourg Court is that all domestic remedies have been exhausted, the likelihood of success in domestic courts will then be determined, in Section Two, before predicting the outcome at an international level. Finally, Section Three will consider the likely outcome should the application prove unsuccessful in domestic courts and consequently be appealed to the Strasbourg Court.

A. *The Four Stages*

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 will then shift to Article 14, the second stage requiring a difference in treatment between the applicant and a comparator in a 'similar position' to be found.¹⁷¹ The third and fourth stages concern justification: whether the state can provide a legitimate aim for the difference in treatment, and whether the means taken to achieve this aim are proportionate.

1. *Stage One: 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,¹⁷² must be established as soon as possible after a child's birth to ensure smooth integration into their family.¹⁷³ Accordingly, it is essential that the applicant demonstrates that a 'personal' (or 'family') tie exists between himself and his child which

171 *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 17.

172 *McMichael* (n. 29); *B v. the United Kingdom* (n. 50).

173 '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 78; *Kroon and Others v. the Netherlands* (1994) ECHR 35, para. 32.

should be protected.¹⁷⁴ 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’,¹⁷⁵ the child becoming ‘ipso jure part of that “family”’.¹⁷⁶ 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;¹⁷⁷ and/or the father’s ‘demonstrable interest in and commitment by the natural father to the child both before and after birth’.¹⁷⁸ Both have developed in an *ad hoc* manner through case law and so relevant precedent will now be discussed, enabling predictions on the likelihood of an applicant surpassing this stage.

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 or more.¹⁷⁹ 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”’.¹⁸⁰ 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.¹⁸¹ Unfortunately though, *Kroon* left these ‘other factors’ ambiguous, thereby requiring subsequent caselaw to develop this further.¹⁸²

For example, *L v. the Netherlands* suggested that a romantic long-term relationship is sufficient, here, three years proving long-term enough.¹⁸³ A long-term *friendship* of two years has also been accepted,¹⁸⁴ but a purely sexual relationship has not.¹⁸⁵ Accordingly, it appears that an emotional bond, romantic or platonic, is required to exist between the parents, physical intimacy alone not proving enough. However, such a generalization 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

174 *Konstantin Markin v. Russia* (2012) ECHR 514, para. 132.

175 *Keegan v. Ireland* (1994) ECHR 18, para. 42.

176 *Ibid.*, para. 44.

177 *Ibid.*, para. 45.

178 *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).

179 *Keegan v. Ireland* (n. 175), para. 45.

180 *Kroon and Others v. the Netherlands* (n. 173), para. 30.

181 *Ibid.*, para. 30.

182 *Ibid.*, para. 30.

183 *L v. Netherlands* App no. 45582/99 (ECtHR, 1 June 2004), para. 38.

184 *Söderbäck v. Sweden* App no 24484/94 (ECtHR, 22 October 1997), para. 16.

185 *Ahrens v. Germany* App no. 45071/09 (ECtHR, 22 March 2012).

and commitment by the natural father to the child both before and after birth' must also be evaluated.¹⁸⁶ 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'.¹⁸⁷

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',¹⁸⁸ been present at the child's birth¹⁸⁹ and changed the child's nappy and babysat a few times.¹⁹⁰ In *Söderbäck*, merely visiting the child 'a couple of times' and attending their christening was deemed sufficient.¹⁹¹ However, there is a limit to the flexibility of this threshold.

For example, the persistent making of applications to court seeking rights regarding the child did not meet this threshold in *Katsikeros v. Greece*, crucially because the father had never exercised his contact rights with the child.¹⁹² 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;¹⁹³ in the latter, the father's last contact with the daughter was so long ago that she had no memory of him.¹⁹⁴ Despite this, if the father can provide justification for a lack of contact, the court may overlook this issue: 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.¹⁹⁵ This was accepted as having been outside of the applicant's control and so his repeated efforts to make contact was deemed sufficient.¹⁹⁶ Indeed, this correlates with judicial comment in *Nylund*: Article 8 does not simply protect 'established' relationships, but also 'potential' relationships.¹⁹⁷

Even if the applicant can demonstrate the required level of interest and commitment, this fact 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.¹⁹⁸ Similarly, in *Paradiso and Campanelli v. Italy*, the parents' violation of adoption legislation and

186 *L v. Netherlands* (n. 183), para. 14.

187 *Ibid.*, para. 37.

188 *Ibid.*, para. 38.

189 *Ibid.*, para. 39.

190 *Ibid.*, para. 39.

191 *Söderbäck v. Sweden* (184), para. 36.

192 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 85.

193 *Ilya Lyapin v. Russia* [2020] ECHR 501, para. 54.

194 *Pavel Shishkov v. Russia* [2021] ECHR 172, para. 91.

195 *Anayo v. Germany* [2010] ECHR 2083, para. 60.

196 *Ibid.*, para. 62.

197 *Nylund v. Finland* (n. 178).

198 *Evers v. Germany* [2020] ECHR 356.

charge for ‘misrepresentation of civil status’ contributed to a finding that no family tie existed.¹⁹⁹ 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 have such a negative impact. 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 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.²⁰⁰ 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.²⁰¹

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 proceed with their claim under article 8.²⁰² This has been permitted in cases concerning the recognition of paternity²⁰³ 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’.²⁰⁴ However, despite being branded a ‘catchall’, the Strasbourg Court has stated that such cases only occur ‘exceptionally’.²⁰⁵ 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*.²⁰⁶

Ultimately, as long as the unmarried father can provide evidence for *either* of the aforementioned factors, and he does not possess a criminal record which may extinguish this tie, he should be able to surpass this stage of the test.²⁰⁷ Therefore, although the above predictions based on caselaw must be treated tentatively, none having been firmly articulated at the Strasbourg level, caselaw *does* show that it is

199 *Paradiso and Campanelli v. Italy* [2017] ECHR 96.

200 *Söderbäck v. Sweden* (184) para. 36.

201 *Nylund v. Finland* (n. 178) 14.

202 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.

203 *Nylund v. Finland* (n. 178) 14.

204 *Katsikeros v. Greece* [2022] ECHR 587, para. 48.

205 *Ibid.*, para. 47.

206 *Rasmussen v. Denmark* [1984] ECHR 17, para. 33.

207 *Evers v. Germany* (n. 198).

possible for an unmarried father to demonstrate the necessary 'bond' in order to proceed to stage two of the test.

2. *Stage Two: 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'.²⁰⁸ 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.²⁰⁹ For example, in regard to conjugal visits, remand prisoners and convicted prisoners have been said to be in similar positions despite differing legal statuses.²¹⁰ Following this, a tangible difference in treatment must be identified. This can be based on direct discrimination, indirect discrimination or discrimination by association²¹¹ 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'.²¹² Marital status is an acceptable characteristic, having been confirmed as encompassed by 'other status' within caselaw.²¹³ 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: unmarried mothers and married or divorced fathers.

Firstly, an unmarried father could rely upon comparison with an unmarried mother, claiming discrimination on the basis of sex. Specifically, the applicant could demonstrate a tangible difference in treatment by reference to relevant provisions of UK legislation which stipulate that unmarried mothers will acquire PR automatically,²¹⁴ whilst unmarried fathers will not.²¹⁵ Since this difference is explicitly embedded in legislation, this would qualify as potential direct discrimination.

Historically, comparison between unmarried fathers and unmarried mothers has been challenged by two views. Firstly, 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 for

208 *Zaunegger v. Germany* (n. 171) 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. 171) 17.

209 *Ibid.*, 17.

210 *Varnas v. Lithuania* [2013] ECHR 647.

211 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No. 12 to the Convention' (n. 171) 18.

212 Art. 14 (n. 164).

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

214 Children Act, s 2(2)(a).

215 *Ibid.*, s 2(2)(b).

a stay of execution of sentence in order to care for a child aged under one, where mothers could.²¹⁶ 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.²¹⁷ 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.²¹⁸ 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’.²¹⁹ 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’.²²⁰ 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 2025 and beyond.²²¹

A different argument was pursued in *Zaunegger v. Germany*: the German 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’.²²² 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 the 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 swiftly 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 future cases. Therefore, since neither argument appears to have retained legitimacy, it is likely that unmarried fathers and unmarried mothers would be found to be ‘similarly placed’ in regard to issues concerning the acquisition of PR in a case arising in 2024 and beyond.

Alternatively, an unmarried father could rely upon comparison with a divorced or married father. A tangible difference in treatment could be evidenced again using relevant UK legislation which awards automatic acquisition of PR to married fathers,²²³ but not unmarried fathers.²²⁴ Such a difference could qualify as direct

216 *Alexandru Enache v. Romania* [2018] ECHR 825.

217 *Ibid.*, para. 14.

218 *Ibid.*, paras 14 and 15.

219 *Ibid.*, para. 68.

220 *Ibid.*, para. 16.

221 *Konstantin Markin v. Russia* (n. 174) para. 132; *Petrovic v. Austria* [1996] ECHR 21, para. 36; *Weller v. Hungary* [2009] ECHR 530, para. 33.

222 *Zaunegger v. Germany* (n. 171), para. 31.

223 Children Act, s 2(2)(4); The Civil Partnership (Opposite-Sex Couples) Regulations 2019, SI2019/1458, regs 1(2) and 15(2).

224 Children Act, s 2(2)(b).

discrimination on the ground of marital status,²²⁵ a characteristic found to fall within 'other status' in Article 14.²²⁶ Indeed, 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.²²⁷ 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.²²⁸ 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.

Overall, it is likely that an unmarried father would be able to surpass stage two by relying on comparison with either an unmarried mother or a married or divorced father in their position.

3. *Stage Three: The Presence of a Legitimate Aim*

At this stage of the test the burden of proof is shifted to the Government²²⁹ to demonstrate that an objective and reasonable justification exists for the Convention interference.²³⁰ 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'.²³¹ 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 would soon become socially unacceptable.²³² 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'.²³³ However, three alternative justifications relevant to claims concerning unmarried fathers and their acquisition of PR exist and will now be assessed.

225 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n. 171) 18.

226 *Şerife Yiğit v. Turkey* (n. 213); *Petrov v. Bulgaria* (n. 213).

227 *Ibid.*, para. 48.

228 *Sahin v. Germany* [2003] ECHR 340, para. 55.

229 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n. 171) 78.

230 *Alexandru Enache v. Romania* (n. 216), para. 70.

231 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 20.

232 *Marckx v. Belgium* [1979] ECHR 2, para. 41.

233 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.

i) 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.²³⁴ 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.²³⁵

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.²³⁶ The Strasbourg Court subsequently 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'.²³⁷

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 unmarried fathers should be denied automatic PR when married fathers, and indeed mothers, can be 'unmeritorious' too.²³⁸ 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*,²³⁹ if the aim was truly to identify *meritorious* fathers, then Branchflower questions the characterization of this aim as 'legitimate' since it suggests that legal rights should only be available to those who *deserve* them. This is not the nature of UK law. 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'.²⁴⁰ In fact, 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.²⁴¹ This legitimate aim was again successfully raised by the UK in *B v. UK*.²⁴²

234 *Working Paper No 74: Illegitimacy* (n. 23); *Family Law: Illegitimacy Final Report* (n. 10).

235 *Working Paper No 74: Illegitimacy* (n. 23) paras 3.12-3.13.

236 *McMichael* (n. 29), para. 98.

237 *Ibid.*

238 Branchflower G, 'Parental Responsibility and Human Rights' [1999] *Fam Law* 34.

239 *McMichael* (n. 29), para. 98.

240 Branchflower (n. 238).

241 *Keegan v. Ireland* (n. 175), para. 12.

242 *B v. the United Kingdom* (n. 50), paras 4-5.

However, interestingly, these cases appear to conflict with the earlier judgment of *Marckx v. Belgium*, a case concerning unmarried mothers' acquisition of PR.²⁴³ Instead of acquiring PR automatically, unmarried mothers had to formally recognise and adopt their child.²⁴⁴ 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.²⁴⁵ 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 mothers²⁴⁶ since 'such an attitude is not a general feature of the relationship between unmarried mothers and their children'.²⁴⁷ 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'.²⁴⁸ 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.²⁴⁹

Regardless of whether *McMichael* was indeed judged appropriately, post the 2000 case of *B v. UK*,²⁵⁰ 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'.²⁵¹ 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.²⁵² Since 2009 the justification has not been raised.

Against this background it appears unlikely that this justification will resurrect and succeed beyond 2024. However, 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 other words, two options appear to exist based on caselaw. One is that this justification is found to be unreasonable since it relies upon a blanket stereotype about a social group, relying upon *Marckx* and *Sahin*.²⁵³ Alternatively, relying on *McMichael*, *B v. UK*, *Keegan* and *Zaunegger*, the court may accept this justification and the veracity of its claims.²⁵⁴

243 *Marckx v. Belgium* (n. 232).

244 *Ibid.*, para. 14.

245 *Ibid.*

246 *Ibid.*, para. 39.

247 *Ibid.*

248 *Ibid.*

249 Branchflower (n. 238).

250 *B v. the United Kingdom* (n. 50).

251 *Sahin v. Germany* (n. 228), para. 58.

252 *Zaunegger* (n. 180), para. 56, emphasis added.

253 *Marckx v. Belgium* (n. 232), para. 39; *Sahin v. Germany* (n. 228), para. 58.

254 *McMichael v. United Kingdom* (n. 29); *B v. the United Kingdom* (n. 50); *Keegan v. Ireland* (n. 175); *Zaunegger v. Germany* (n. 171).

Considerations upon the accuracy of this justification may persuade the court to take the former approach. By denying all unmarried fathers automatic PR, UK law essentially paints the entire group as untrustworthy and potentially ‘unmeritorious’. Indeed, Eekelaar and Bainham confirmed that in the UK unmarried fathers were collectively stereotyped as social deviants who are ‘interfering’ and represent ‘a threat to the security of the mother...[and] the welfare of the child’ when the 1979 and 1981 reports were published.²⁵⁵ Some may argue that this generalization is largely accurate: 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 women occurring from cohabiting partners (9%) than spouses (3.4%).²⁵⁶ 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.²⁵⁷ 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 does not encapsulate *all* unmarried fathers, perhaps not even the majority. Indeed, 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’.²⁵⁸

Another issue with this justification’s accuracy is its focus on marital status as a determining factor of one’s merit. As demonstrated in *F v. M*, married fathers can be ‘unmeritorious’ too: here, the court found the married father to be coercive and controlling.²⁵⁹ 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.²⁶⁰ The choice not to

255 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.

256 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/yearending-march2019#marital-status>.

257 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,%20father%20families%20\(48%25\)](https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/families/bulletins/familiesandhouseholds/2022#:~:text=While%20the%20majority%20of%20lone,%20father%20families%20(48%25)).

258 ‘Statistics on Fathers’ 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*).

259 *F v. M* [2023] (n. 28).

260 Andrew Bainham, ‘Reforming Scottish Children Law – Sense from North of the Border’ (1993) 5(1) *Journal of Child Law* 3, 6.

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.²⁶¹ Overlaying all of this, is this justification's basis upon the ambiguous dichotomy between 'meritorious' and 'unmeritorious' fathers, terms which even the Law Commission themselves were unable to define in their 1982 report.²⁶²

Recent judicial comments and judgments may also indicate a rejection of this justification in 2024. At a European Level, in 2015 the Council of Europe Parliamentary Assembly raised concerns that blanket generalizations 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.²⁶³ 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.²⁶⁴ Opinions at a domestic level in the UK appear less streamlined. 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.²⁶⁵ However, other prominent voices are simultaneously emerging in opposition to such stereotypes, notably Lady Hale and Russell J.²⁶⁶ All in all, gradual shifting of judicial views against unequal treatment of mothers and fathers may persuade a court to reject this justification in a relevant case in the future.

Ultimately, whether this justification will be accepted will depend upon the measures of discretion allowed by domestic courts and the Strasbourg Court in this legal area, an issue which will be returned to in due course. On the basis of the above discussion, it appears that views are shifting towards a rejection of this justification. However, such evolution has not yet reached a point where this can be predicted with certainty, especially considering that in the last European case in which this justification was raised, it was accepted.²⁶⁷ There is, therefore, a possibility that it would still be accepted, and the case has to proceed to the final stage of the four-stage test.

261 John Clifton, 'The Long Road to Universal Parental Responsibility: some Implications from Research into Marginal Fathers' [2014] *Fam Law* 858, 861.

262 *Family Law: Illegitimacy Final Report* (n. 10).

263 Council of Europe Parliamentary Assembly, Report on *Equality and Shared Parental Responsibility: the Role of Fathers* (Doc. 13870, 14 September 2015), 5.

264 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) pp 35 and 39.

265 *Re A (Parental Responsibility)* [2023] (n. 28) [101].

266 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].

267 *Zaunegger v. Germany* (n. 171), para. 56.

ii) 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.²⁶⁸ 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.²⁶⁹

Interestingly, this justification has been undermined by modern scientific developments. DNA testing now means that paternity can be established with near certainty and in a very swift procedure. 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'.²⁷⁰ Margaria also agreed with this statement, noting that there is an 'increasingly widespread resort to DNA testing'.²⁷¹ 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.

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.²⁷² 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. Furthermore, 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.²⁷³ A bigger issue still is that, per the Human Tissue Act 2004, consent is required from all parties providing samples for the test.²⁷⁴ 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.²⁷⁵ A mother who does not wish for the involvement of the biological father may, therefore, refuse consent to their child's sample being

268 *Ibid.*, para. 29.

269 *Ibid.*, para. 52.

270 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.

271 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) pp 5 and 11.

272 Sally Sheldon, 'Fragmented Fatherhood: The Regulation of Reproductive Technologies' (2005) 68(4) *The Modern Law Review* 523, 550.

273 Siân Bradford and Faiza Mohammad (n. 129).

274 Human Tissue Act 2004 s 3.

275 *Ibid.*, s 2(3).

taken for a test. In this event, it would be down to the court to order a test if they determine that this would be in the child's best interests.²⁷⁶

Despite these concerns, the system for DNA testing in the UK has strengthened in recent years, becoming more efficient and is easier to navigate.²⁷⁷ Indeed, an estimate of just 30 days is provided by the Child and Family Court Advisory and Support Service (CAFCASS) for the time between the ordering of the test and the results being released.²⁷⁸ It is also unlikely that all unmarried fathers would require such tests, and so, depending on demand, DNA testing may nevertheless prove a viable safeguard in 2024 and beyond, undermining the success of justification based on legal certainty.

Evidence of modern *medical* advances is also likely to weaken confidence in this justification. Data released by CAFCASS has demonstrated a 350% increase in international and UK-based surrogacy in the last twelve years.²⁷⁹ This means that there is 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 in the UK too.

Accordingly, since justification based on legal certainty appears to conflict with modern scientific and medical advances, and has not been raised as a justification since the 2009 case of *Zaunegger*, it appears unlikely to be successful if raised in 2024.²⁸⁰

iii) Recognizing 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.²⁸¹ In support of this argument, several European and international instruments which emphasize the need to protect women's roles during pregnancy

276 Family Law Reform Act 1969 s 21(3)(b).

277 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>.

278 '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>.

279 '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-surrogacy/>; see also Sarah Williams, 'The Legal Status of Surrogacy in Europe' [2022] *International Family Law* 57.

280 *Zaunegger v. Germany* (n. 171), para. 29.

281 *Alexandru Enache v. Romania* (n. 216), para. 71.

and motherhood were raised.²⁸² 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’.²⁸³ 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 because of their special biological and psychological bonds with their children.²⁸⁴ 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.²⁸⁵ 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 stereotypes²⁸⁶ such that women should be the child-carers and men, the breadwinners.²⁸⁷ Justification based on the relative importance of motherhood and fatherhood was again rejected in the 2022 case of *Paparrigopoulos v. Greece*.²⁸⁸ 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.²⁸⁹

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.²⁹⁰ 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.²⁹¹

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

²⁸² *Ibid.*

²⁸³ *Ibid.*, para. 77.

²⁸⁴ *Konstantin Markin v. Russia* (n. 174), para. 132.

²⁸⁵ *Ibid.*, para. 139.

²⁸⁶ *Ibid.*, para. 141.

²⁸⁷ *Ibid.*, para. 143.

²⁸⁸ *Paparrigopoulos v. Greece* [2022] ECHR 538, para. 39.

²⁸⁹ *Ibid.*, para. 40.

²⁹⁰ *Alexandru Enache v. Romania* (n. 216), para. 72.

²⁹¹ *Ibid.*, para. 67.

that gender equality was a 'major goal' of the Council of Europe²⁹² and that allowing fathers equal rights 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'.²⁹³ 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 and beyond.

This conclusion is supported by recent 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'.²⁹⁴ The Council of Europe also began emphasizing the benefits of equal parenting²⁹⁵ and the 'important role of fathers',²⁹⁶ 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'.²⁹⁷ 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,²⁹⁸ and called all states to 'remove from their laws any difference based on marital status between parents who have acknowledged their child'.²⁹⁹ Thus, it would be strange and inconsistent with prevailing trends for the Strasbourg Court to rely on justifications based on a special bond between mother and child.

This justification would appear even more strange in the context of UK law since 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, this justification, if raised, would conflict with the very law it is supposed to support.

iv) Conclusion

Ultimately, whether any particular justification is successful will depend upon the specific discretionary area of judgment, or margin of appreciation, employed by the court. This is an issue which will be returned to in due course. What is clear is that the latter two justifications, legal certainty and the 'special bond' between mothers and their children respectively, are particularly unlikely to be accepted by a court in the future due to their stark contrast with the realities of scientific development and public opinion in the 21st century. For this reason, these justifications will not

292 *Ibid.*, 16.

293 *Ibid.*, para. 5.

294 Committee of Experts on Family Law (n. 233), Principle 19(1) (*emphasis added*).

295 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.

296 *Ibid.*, point 6.

297 Council of Europe Parliamentary Assembly, Motion for Resolution on *Equality and Shared Parental Responsibility: the Rights of Fathers* (Doc. 13443, 18 March 2014).

298 Council of Europe Parliamentary Assembly (n. 263) 4.

299 *Ibid.*, para. 5.3.

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. As well as being the most likely of the three to be accepted by the court, it is also the most likely to be raised by the UK Government since this has been its main defence since 1979.

4. Stage Four: 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’.³⁰⁰ Firstly, this entails an assessment of whether the employed means do indeed *meet* the legitimate aim. Secondly, to assess whether the means reasonably balance the rights and freedoms of the community as a whole with those of the individual,³⁰¹ the rights of the unmarried father must be assessed. 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 be outlined: the importance of proving social fatherhood; the interests of mothers and children; and the necessity of appropriate safeguards. Each issue will now be considered in turn.

i) Whether the Employed Means Meet the Legitimate Aim

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’.³⁰² Firstly, Part 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 being withheld by the mother for no good reason.³⁰³ For these applicants, two options remain: a PRO or a CAO. In regard to the former, 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.³⁰⁴ In regard to the latter, 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.³⁰⁵ On top of this, both methods are only accessible to those who can afford them. Clifton emphasises this issue, advocating for meri-

300 ‘Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention’ (n. 171) 20.

301 *Belgian Linguistic case* (No. 2) [1968] 1 EHRR 252, para. 10.

302 *Family Law: Illegitimacy Final Report* (n. 10) para. 4.39.

303 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.

304 *Re H (Minors) (Local Authority: Parental Rights)* (No 3)3 (n. 86); *Re S (Parental Responsibility: Jurisdiction)* (n. 85).

305 The Children Act, s 1(5).

torious ‘poor and marginal’ fathers, who, if they do not have the consent of the mother, cannot otherwise pursue PR.³⁰⁶

Part One also presented evidence 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.³⁰⁷ For ‘unmeritorious’ fathers who are unsuccessful here but have the means to hire a lawyer, they may be able to easily acquire PR through a PRO 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.³⁰⁸ Accordingly, this legal framework appears estranged from the aims of the Government; the employed means do not meet their legitimate aim.

ii) Whether the Means Reasonably Balance the Rights and Freedoms of the Community as a Whole With Those of the Individual

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.³⁰⁹ Nilsson’s three factors provide a contemporary, clear formula which correlates with other academic viewpoints.³¹⁰ Each factor will now be considered.

a) *The Effects of the Policy*

In regard to the effects of the policy, refusing automatic acquisition of PR to unmarried fathers offers some benefits to the community. 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.³¹¹ 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.

306 John Clifton, ‘The Long Road to Universal Parental Responsibility: Some Implications from Research into Marginal Fathers’ (n. 261).

307 *Family Law: Illegitimacy Final Report* (n. 10) para. 4.39.

308 *Re S (A Minor) (Parental Responsibility)* (n. 108) [652-B].

309 Anna Nilsson, ‘Same, Same but Different: Proportionality Assessments and Equality Norms’ (2020) 7(3) *Oslo Law Review* 126, 130.

310 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.

311 *Working Paper No 74: Illegitimacy* (n. 23); *Family Law: Illegitimacy Final Report* (n. 10).

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,³¹² all individuals with PR must give their permission, or at least be notified.³¹³ If the mother does not know who the father is, this task could be near impossible.

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 is that he is unable to exercise PR automatically. As noted in Part One, this scenario can be particularly traumatic for a father who wrongly believes they had PR, but later finds himself powerless to oppose the child's adoption should one with PR make such a decision.³¹⁴ 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.³¹⁵

Negative impacts arising through this policy may also extend to the children involved. 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.³¹⁶ 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.³¹⁷

Accordingly, despite the fact that this policy appears to benefit some in society, it's negative impact upon some unmarried fathers and their children arguably outweighs. However, before concluding on this part of the Nilsson test, whether less restrictive means exist which could be employed to create a better balance will

312 Family Procedure Rules 2010 (FPR), r 14.3.

313 Karen Lennon and Shannon Woodley, 'Termination of Parental Responsibility: Not the Exception but Rare – Should It Be?' [2021] *Fam Law* 1298, 1302.

314 *Re L* (n. 19).

315 *Ibid*; John Clifton, 'The Long Road to Universal Parental Responsibility: Some Implications from Research into Marginal Fathers' (n. 261).

316 Gilmore, 'Parental Responsibility and the Unmarried Father – a New Dimension to the Debate' (n. 99) 26.

317 *Re S (A Minor) (Parental Responsibility)* (n. 108) [657H].

be considered. As mentioned in Part 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 rights and so would no longer be collectively perceived as untrustworthy, but mothers and children could still protect themselves from those who are 'unmeritorious'. Whether this proposal would be practicable in the context of current UK law will now be considered.

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.³¹⁸ 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.³¹⁹ Specifically, removal is favoured should continuing PR leave the mother in an 'intolerable situation,' or if the Article 8 rights of the father conflict with those of the child, the latter overriding.³²⁰ The overall process could be interpreted as beneficial for the applicant, Lennon and Woodley³²¹ pointing out that there is no presumption of continued PR. Accordingly, Mr Justice MacDonald has argued that the threshold for termination is not 'incredibly high'.³²²

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;³²³ in *CW v. SG* removal was due to the father's imprisonment for sexual abuse of his child's half-sisters;³²⁴ and in *Nottingham CC v. Farmer* the removal of PR followed the father receiving a life-sentence for murdering the children's mother.³²⁵ 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.³²⁶ 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'.³²⁷

Moreover, Lennon and Woodley³²⁸ 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.³²⁹ Courts will

318 Children Act, ss 4(2A), 4(3) and 4(4).

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

320 *Yousef v. Netherlands* [2002] ECHR 716.

321 Karen Lennon and Shannon Woodley (n. 313) 1300.

322 *Ibid.*, 1298; *D v. E and another* [2021] EWFC 37 [19].

323 *Re P (Terminating Parental Responsibility)* (n. 319).

324 *CW v. SG* (n. 63).

325 *Nottingham CC v. Farmer* [2022] EWFC 66.

326 *C v. D and another* [2018] EWHC 3312 (Fam).

327 *Re D (Withdrawal of Parental Responsibility)* [2014] EWCA Civ 315.

328 Karen Lennon and Shannon Woodley (n. 313) 1300.

329 Children Act, s 1(5).

usually consider whether restricting PR through orders such as Prohibited Steps Orders (PSOs) or Specific Issue Orders (SIOs) would be more appropriate.³³⁰ 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.³³¹ 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,³³² potentially causing further trauma and risking the possibility that the father use this power to obstruct legal proceedings.³³³

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 in the UK 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*.³³⁴ Although this specific issue has been remedied through the Children Act,³³⁵ other uncertainties remain such as the scope of behaviour which may warrant removal of PR and whether conducting a welfare analysis is necessary in proceedings to remove a non-biological father's PR.³³⁶ 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'.³³⁷ 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 theoretically strike a better balance between the rights of the community and unmarried fathers, without

330 Karen Lennon and Shannon Woodley (n. 313) 1301.

331 *Re A and B (Children: Restrictions on Parental Responsibility: Radicalisation and Extremism)* [2016] EWFC 40.

332 FPR (n436), r 12.8(1).

333 Karen Lennon and Shannon Woodley (n. 313) 1303

334 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. 319); *Re M (Minors)* [1995] EWCA Civ J1011-1.

335 Children Act 1989, ss (2A), 1(6)(a) and 1(7).

336 *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.

337 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>

substantial reform, the current law is arguably unsuitable for this solution. Accordingly, although it appears that UK law regarding unmarried fathers' acquisition of PR confers more negative effects to the individual than it does benefits to the community as a whole, there exist no less restrictive means which it would be practical to implement without significant reform.

b) The Basis of the Discrimination

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.³³⁸ 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 (sex), but its justification relies upon furthering and accepting negative perceptions of unmarried fathers, lending weight to the view that this policy is disproportionate.³³⁹

c) The Social Position of the Group Impacted

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.³⁴⁰ 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.³⁴¹

d) Conclusion on whether a Reasonable Balance Exists

Having considered all three aspects of Clifton's test,³⁴² 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.

iii) The Importance of Proving Social Fatherhood

In the context of unmarried fathers and their acquisition of PR, three additional issues are relevant to proportionality: the first, the importance of proving social fatherhood. 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

338 *Konstantin Markin v. Russia* (n. 174), para. 143.

339 Nilsson (n. 309) 130.

340 Nilsson (n. 309) 131.

341 *Working Paper No 74: Illegitimacy* (n. 23) para. 2.11; *Family Law: Illegitimacy Final Report* (n. 10) para. 3.9.

342 Nilsson (n. 309) 130.

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.³⁴³ 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 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*³⁴⁴ 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'.³⁴⁵ 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 8.³⁴⁶ Crucially, the court found that, although the child had developed emotional and psychological bonds with their foster family,³⁴⁷ 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.³⁴⁸ Margaria, when summarizing the Strasbourg position, stated that, 'When faced with two conflicting father figures,

343 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.

344 *Kroon and Others v. the Netherlands* (n. 173).

345 *Ibid.*, para. 40.

346 *Görgülü v. Germany* App no. 74969/01 (ECtHR, 20 March 2003).

347 *Ibid.*, para. 46.

348 *Söderbäck v. Sweden* (184).

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'.³⁴⁹

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 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.

iv) The interests of mothers and children

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. Firstly, 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.³⁵⁰ Equally, domestic law was judged proportionate in *Nylund* where the mother denied the applicant's paternity and opposed proceedings.³⁵¹ 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'.³⁵² 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'.³⁵³ 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.

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.³⁵⁴ 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

349 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 107.

350 *Kroon and Others v. the Netherlands* (n. 173).

351 *Nylund v. Finland* (n. 178) 15.

352 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 21 (*insertion added*); See also *Paparrigopoulos v. Greece* (n. 288), paras 35-43.

353 Council of Europe Parliamentary Assembly (n. 263), [3] of the draft resolution.

354 Committee of Experts on Family Law (n. 233), principle 19(1).

divorced couples'.³⁵⁵ 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. Thus, 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.³⁵⁶

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.³⁵⁷ 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'.³⁵⁸ 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'.³⁵⁹ Whilst 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, what is clear is that European institutions have expressed opinions that joint parenting is always in the best interests of the child.³⁶⁰ Accordingly, should the child of an applicant in a relevant case currently lack a father figure, this may increase the likelihood that the applicant's inability to acquire PR is held to be disproportionate.³⁶¹

v) Whether Appropriate Safeguards Exist

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.³⁶² This is particularly important within the context of PR since the Strasbourg Court has stated that 'stricter scrutiny' must be exercised when assessing safeguards concerning policies which may effectively curtail relationships between parents and children.³⁶³

355 Council of Europe Committee Opinion, Report on *Equality and Shared Parental Responsibility: The Role of Fathers* (Doc. 13896, 30 September 2015) 15, (*insertion added*).

356 *Kroon and Others v. the Netherlands* (n. 173).

357 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 82.

358 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) 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.

359 *Elsholz v. Germany* [2000] ECHR 371, para. 50.

360 Committee of Experts on Family Law (n. 233), Principle 19(1); Council of Europe Committee Opinion (n. 355) 15, (*insertion added*).

361 *Kroon and Others v. the Netherlands* (n. 173).

362 'Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol No.12 to the Convention' (n. 171) pp 19-20.

363 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 79.

Sommerfeld is an example of a case where safeguards were deemed insufficient.³⁶⁴ 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'.³⁶⁵ 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,³⁶⁶ led to a judgment that the law was disproportionate.³⁶⁷ 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.³⁶⁸ 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:³⁶⁹ even if the mother's refusal was 'completely arbitrary', 'the father had no chance to have that declaration replaced by a court order'.³⁷⁰

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:³⁷¹ marriage to the mother,³⁷² consent of the mother,³⁷³ being appointed guardian³⁷⁴ and judicial decision.³⁷⁵ The fact that unmarried fathers had *several* means through which to acquire PR was key. Since this decision, a further method of acquisition has been introduced: the ability to acquire PR through registration on the child's birth certificate, further undermining the likelihood that a court would find there to be inadequate safeguards.³⁷⁶

An issue which cannot be ignored though is that, should the applicant fall into a group who does not have the mother's consent, but also is not financially healthy, he may find himself without accessible legal recourse due to the expense of PROs and CAO proceedings, as discussed in Part One. Theoretically, this could facilitate a claim under Article 6 of the Convention, but since no precedent exists whereby the expense of a procedure indicated inadequate safeguards under Article 14, this is unlikely.³⁷⁷ Thus, consideration of the presence of inadequate safeguards may go against the applicant in a relevant case.

364 *Sommerfeld v. Germany* [2003] ECHR 341, para. 77.

365 *Ibid.*

366 *Ibid.*, para. 96.

367 *Ibid.*, paras 91 and 94.

368 *Anayo v. Germany* (n. 195); *Zaunegger v. Germany* (n. 171); *Sahin v. Germany* (n. 228); *Paparrigopoulos v. Greece* (n. 288).

369 *Zaunegger v. Germany* (n. 171), para. 58.

370 *Ibid.*, para. 33.

371 *McMichael* (n. 29), para. 98.

372 Children Act 1998 s 2(1).

373 *Ibid.*, s 4(1)(b).

374 *Ibid.*, s 5.

375 *Ibid.*, s 4(1)(a).

376 *McMichael v. United Kingdom* (n. 29), para. 98; Children Act s 4(1) and (1A).

377 *Airey v. Ireland* [1981] ECHR 1.

vi) Conclusion to the Fourth Stage of the Test

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 as disproportionate since this thesis has found that it does not meet the Government's dual aims nor appropriately balance the rights and freedoms of the community with those of unmarried fathers.

B. Conclusion to the Four-Stage Test

Should a case arise in 2024 and beyond, 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 outcome.

1. The Domestic Route

As discussed at the beginning of Part Two, in order to proceed to the Strasbourg Court, domestic remedies must first have been exhausted. Hence, whether an unmarried father is likely to succeed with their application through the UK domestic courts will now be assessed. Two issues will be discussed: the likely judicial approach to the 'discretionary area of judgment' in this context, and the impact of the welfare principle guaranteeing that the child's welfare shall be the court's paramount consideration.

However, before these issues are considered, some preliminary points must be noted. At a domestic court, several admissibility requirements must be met before a hearing can take place. For example, in regard to the standing of the applicant, the HRA provides that the applicant must be a 'victim' of the relevant act.³⁷⁸ Pressure groups are generally excluded from this definition since Article 34 of the Convention holds that the applicant must have been *personally* affected.³⁷⁹ 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'.³⁸⁰ A more detailed examination of these requirements is beyond the scope of this article. Aside from admissibility requirements, another issue which must be noted at the outset 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'.³⁸¹ Despite this, evidence suggests that in practice domestic courts usually treat Strasbourg case

³⁷⁸ HRA 1998 s 7(7).

³⁷⁹ *Ibid.*, s 7(3).

³⁸⁰ *Ibid.*, s 7(5).

³⁸¹ *Ibid.*, s 2.

law as binding and so any precedent in this context is likely to be taken seriously.³⁸² Analysis will now turn to the likely judicial approach to be taken in the context of unmarried fathers' acquisition of PR.

At the Strasbourg Court, the margin of appreciation 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.³⁸³ Despite the central role of the margin at the Strasbourg Court, it is not applicable in domestic proceedings in the UK. Instead, 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.³⁸⁴ 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,³⁸⁵ the court watering down the scope of Article 8 and arguing that the interference complained of did not fall within it.³⁸⁶ 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.³⁸⁷ Such an approach is often taken where cases involve delicate social and political issues seen as best left in the domain of Parliament.³⁸⁸

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 strictly.³⁸⁹ 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.³⁹⁰ Ultimately, which approach is taken in any given case will depend

382 *R (Ullah) v. Special Adjudicator* [2004] UKHL 26; Anne Dennew, *Public Law Directions* (2nd edn, Oxford University Press 2021) 418.

383 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 36.

384 Alisdair Gillespie and Siobhan Weare, *The English Legal System* (9th edn, Oxford University Press 2023) 181.

385 *R (on the application of Gillan) v. Commissioner of Metropolitan Police* [2006] UKHL 12.

386 *Ibid* [28].

387 Helen Fenwick and Gavin Phillipson, *Media Freedom Under the Human Rights Act* (Oxford University Press 2006) 147.

388 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.

389 Helen Fenwick, *Fenwick on Civil Liberties & Human Rights* (5th edn, Routledge 2017) 237.

390 *Ibid.*, 241.

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.³⁹¹ 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.³⁹² 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.³⁹³ 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.³⁹⁴ 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.³⁹⁵ 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.³⁹⁶

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'.³⁹⁷ 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

391 *Ghaidan v. Godin-Mendoza* [2004] UKHL 30 [132]; Also see Harris-Short (358) 321; and Bernadette Rainey, *Human Rights Law Concentrate: Law Revision and Study Guide* (4th 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).

392 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.

393 *R (on the application of Steinfeld and Keidan) v. Secretary of State for International Development* (n. 392) [36].

394 *Ghaidan v. Godin-Mendoza* (n. 391) [24].

395 Harris-Short (358) 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.

396 *Ghaidan v. Godin-Mendoza* (n. 391).

397 David Bonner, Helen Fenwick and Sonia Harris-Short, 'Judicial Approaches to the Human Rights Act' (2003) 52 *The International and Comparative Law Quarterly* 549, 572.

and its jurisprudence, in cases which impinge upon the rights of family members.³⁹⁸

Whilst these comments were published in 2007, recent caselaw suggests that little has changed in this judicial approach in the last 17 years. Indeed, this approach can be identified in the specific context of the law concerning PR through the 2023 cases of *F v. M*³⁹⁹ and *Re A (Parental Responsibility)*.⁴⁰⁰ As discussed in Part 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.⁴⁰¹ 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.⁴⁰²

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.⁴⁰³ 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’.⁴⁰⁴ He went on to state that the judiciary would not rule against Parliament’s differentiating frameworks concerning PR unless there was ‘convincing evidence of a significant adverse impact of the policy’.⁴⁰⁵ 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.⁴⁰⁶ Accordingly, McFarlane’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.⁴⁰⁷ 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

398 *Ibid.*

399 *F v. M* [2023] (n. 28).

400 *Re A (Parental Responsibility)* [2023] (n. 28).

401 *F v. M* [2023] (n. 28) [7].

402 Children Act 1989, s 91(14).

403 *Re A (Parental Responsibility)* [2023] (n. 28).

404 *Ibid.*, [101].

405 *Ibid.*, [102].

406 Siân Bradford and Faiza Mohammad (n. 129).

407 *F v. M* [2023] (n. 28).

increasingly influenced by social science research evidence.⁴⁰⁸ 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 13.⁴⁰⁹ Although this amendment has not yet been decided upon, expected 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’ over time to increase the scope of this power of removal to other fathers convicted of less serious sexual offences.⁴¹⁰

Such developments could suggest that other social 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 *acquisition* of PR by unmarried fathers too.⁴¹¹ 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.⁴¹² Since this is not 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 conceptualizations 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’.⁴¹³ 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’.⁴¹⁴ This greatly differs

408 Stephen Gilmore, Daniel Monk, Ruth Lamont and Jonathan Herring, ‘Reflections on Future Directions in Family Law’ [2023] *Child and Family Law Quarterly* 99, 100.

409 ‘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>.

410 ‘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/>.

411 Clifton, ‘Birth Fathers and Their Adopted Children: Fighting, Withdrawing or Connecting’ (n. 22).

412 *R (on the application of Steinfeld and Keidan) v. Secretary of State for International Development* (n. 392); *Ghaidan v. Godin-Mendoza* (n. 391).

413 Children Act, s 3; *J v. C* [1970] AC 668, (*insertion added*).

414 *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.

to conceptions of the welfare principle at the Strasbourg Court. As mentioned previously, in this context 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.⁴¹⁵ In accordance with the domestic conceptualization, in a case concerning unmarried fathers' acquisition of PR, the judiciary may focus upon the risk to children posed by 'unmeritorious' unmarried 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.

2. *The Strasbourg Court*

Should an unmarried father fail to demonstrate a violation in domestic courts, and have exhausted *all* domestic remedies,⁴¹⁶ they can make an application to the Strasbourg Court under Article 34 of the Convention. Admissibility requirements will, again, need to be fulfilled before a hearing is arranged. In fact, 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.⁴¹⁷ Indeed, the Strasbourg Court has been described as 'slow and cumbersome'.⁴¹⁸ Hence, an applicant should be made aware of these facts before launching an application.

In order to be found admissible the same matter must not have already been examined by the Strasbourg Court or another international body,⁴¹⁹ must be made within 6 months of the final national decision⁴²⁰ and must not abuse the right of complaint. The latter requires that the application is genuine,⁴²¹ is compatible with the Convention (for example, it must concern a contracting state),⁴²² is not manifestly ill-founded (such as there is no obvious violation),⁴²³ and the applicant must have suffered a 'significant disadvantage'.⁴²⁴

415 *Johansen v. Norway* [1996] ECHR 31; Bonner, Fenwick and Harris-Short (n. 397) 579; Nigel Lowe, Gillian Douglas, Emma Hitchings, and Rachel Taylor, *Bromley's Family Law* (12th edn, Oxford University Press 2021) pp 515-518.

416 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 35, s 35(1).

417 'Analysis of Statistics 2022' (*European Court of Human Rights*, January 2023), https://www.echr.coe.int/documents/d/echr/stats_analysis_2022_eng.

418 Fenwick (n. 181) 31.

419 Art. 35 (2)(b) (n. 416).

420 *Ibid.*, 35(1).

421 Fenwick (n. 181) 36.

422 *Ibid.*, pp 36-37.

423 Art 35(3)(a) (n. 416).

424 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.

Whilst most of these requirements are likely to be able to be met by an unmarried father making an application regarding acquisition of PR, an issue may arise in regard to the requirement that the same matter must not have already been examined by the Strasbourg Court or another international body.⁴²⁵ It may be that the court's consideration of relevant UK law in *McMichael*⁴²⁶ and *B v. UK*⁴²⁷ would render a similar application in 2024 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.⁴²⁸ This was developed in *Ekimdzhiev and Others v. Bulgaria*, where changes in domestic law over time were found to qualify as 'new information'.⁴²⁹ 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'.⁴³⁰ Previous cases concerning the acquisition of PR vis à vis unmarried fathers in the UK occurred in 1995 and 2000.⁴³¹ Since it has been over two decades since then, admissibility could be found in line with *Ekimdzhiev and Others v. Bulgaria*.⁴³²

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.⁴³³ 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. 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'.⁴³⁴

Before considering the Strasbourg Court's likely response to the case of an unmarried father in the context of acquisition of PR, it is important to make a couple of final preliminary points. Firstly, 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.⁴³⁵ A *partly* abstract case may be accepted provided that 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

425 Art 35(2)(b) (n. 416).

426 *McMichael v. United Kingdom* (n. 29).

427 *B v. the United Kingdom* (n. 50).

428 *Kafkaris v. Cyprus* [2011] ECHR 1089.

429 *Ekimdzhiev and Others v. Bulgaria* [2022] ECHR 1

430 *Ibid.*, para. 255.

431 *McMichael v. United Kingdom* (n. 29); *B v. the United Kingdom* (n. 50).

432 *Ekimdzhiev and Others v. Bulgaria* (n. 429).

433 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) Art. 55.

434 *Cossey v. United Kingdom* [1990] ECHR 21, para.14.

435 *Klass and ors v. Federal Republic of Germany* (1978) 2 EHRR 214.

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.⁴³⁶ 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. Regardless of whether or not such an approach is taken, should the applicant be an individual, and the court finds there to be a violation of the Convention in regard to his acquisition of PR, it could lead to immense pressure being placed upon the UK Government to change this entire section of law. Specifically, 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. 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'.⁴³⁷ Nevertheless, the specific remedy to be introduced is within the responsibility and freedom of the state.⁴³⁸

Moving to analysis of the substance of the claim, as touched upon previously, the key distinguishing feature at the Strasbourg Court is the margin of appreciation. The margin is a judicial tool used 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-stage test previously considered. 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 the Strasbourg Court will scrutinize the state's justification and the more likely the court is to defer to the principle of subsidiarity. 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.⁴³⁹ 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 predict the width of the margin likely to be imposed in the context of an unmarried father's application regarding his acquisition of PR through a three-stage framework. 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'.⁴⁴⁰ Although writing

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

437 '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.>

438 Fenwick (n. 181) 39-40.

439 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.

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

in 1993, Helfer's characterization has been chosen here due to its clarity and continued compatibility with more recent research.⁴⁴¹

i) Stage One: Contextual Factors

Firstly, various contextual elements of the case may impact the width of the margin. This criterion considers who the interference impacts, the nature of the interference and whether it raises any moral or sensitive issues.

In regard to the first issue, certain social groups are 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.⁴⁴² In fact, impacts identified upon the child are likely to be very 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 interests of the child', which may, ultimately, 'override' those of the parents.⁴⁴³ A narrower margin also generally exists where the nature of the application centres upon the legal relationship between a parent and child.⁴⁴⁴ Indeed, whilst a wide margin is applicable in matters concerning who the child should live with,⁴⁴⁵ stricter scrutiny exists where the relationship between a parent and child may be effectively curtailed.⁴⁴⁶ Since the very focus of a case concerning the denial of automatic PR to unmarried fathers is the legal relationship between fathers and children, analysis here indicates a narrow margin.

The nature of the application, and whether any sensitive issues are raised is often the more complex consideration. The first sensitive aspects relevant to an unmarried father's application regarding acquisition of PR is discrimination and equality. Narrower margins tend to be imposed where these issues are concerned, proving particularly narrow where 'a particularly important facet of an individual's existence or identity' are at stake.⁴⁴⁷ Gerards points out that sex and 'illegitimacy' are examples of such 'facets', characteristics which are intrinsically linked to a case concerning unmarried fathers' acquisition of PR. In fact, according to Gerard, these grounds are so highly protected that an impact upon them in an application will 'immediately raise a suspicion of unreasonableness and prejudice'.⁴⁴⁸ Unsurprisingly,

441 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 Overy: The European Convention on Human Rights* (8th 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.

442 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 82; *C.E. and Others v. France* [2022] ECHR 263, paras 85-90.

443 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 82.

444 *Mennesson v. France* [2014] ECHR 664, para. 80.

445 *Pavel Shishkov v. Russia* (n. 194), para. 78.

446 *Elsholz v. Germany* (n. 359), para. 49; *Sommerfeld v. Germany* (n. 364), 63.

447 *Evans v. United Kingdom* [2006] ECHR 200, para. 77.

448 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.

several cases have already confirmed that a narrow margin specifically exists where a policy treats married and unmarried fathers differently.⁴⁴⁹

Gender equality is another relevant sensitive issue present 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.⁴⁵⁰ 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 that 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.⁴⁵¹ 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.⁴⁵² 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 such as poverty.⁴⁵³ Since the denial of automatic PR to unmarried fathers potentially accentuates these gender inequalities, a narrow margin may be imposed in a related case.

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’.⁴⁵⁴ 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

449 ‘Guide on Article 8 of the European Convention on Human Rights’ (n. 173) 21; *Sahin v. Germany* (n. 228), para. 94; *Zaunegger v. Germany* (n. 171), para. 51; *Paparrigopoulos v. Greece* (n. 288); *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.

450 ‘Guide on Article 8 of the European Convention on Human Rights’ (n. 173) 20 (*emphasis added*).

451 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.

452 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.>

453 Sheldon, ‘Unmarried Fathers and Parental Responsibility: A Case for Reform?’ (n. 20) 107; Also see Shazia Choudhry and Helen Fenwick (n. 314).

454 See Clare Ryan, ‘Europe’s Moral Margin: Parental Aspirations and the European Court of Human Rights’ (2018) 56 *Columbia Journal of Transnational Law* 473.

what types of literature are acceptable in their jurisdiction due to their better knowledge concerning topics which may offend public morals.⁴⁵⁵ However, this widening of the margin is unlikely where ‘a particularly important facet of an individual’s existence or identity’ is at stake.⁴⁵⁶ A father’s ability to care for his child or have a meaningful relationship with them is likely to be encompassed by this category. Therefore, based solely upon the 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.

ii) 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;⁴⁵⁷ and *public* consensus through, for example, public polls.⁴⁵⁸ Since there is no clarity upon which factor holds the most weight in analysis, each must be thoroughly examined.⁴⁵⁹ The combined assessment of all three investigations will determine the overall level of consensus, impacting the level of scrutiny exerted upon state justification. The decision in *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 with more restrained levels of scrutiny being applied to the state’s reasoning and vice versa.⁴⁶⁰ Even more pertinent to this thesis, 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.⁴⁶¹

Before considering this factor in the present context, it is important to note an issue which 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.⁴⁶² 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.⁴⁶³ 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.⁴⁶⁴ Bearing this shortcoming in mind, levels of legal, expert and public

455 *Handyside v. UK* App no. 5493/72 (ECtHR, 7 December 1976).

456 Clare Ryan (n. 454) 473; *Evans v. United Kingdom* (n. 447), para. 77.

457 *F. v. Switzerland* [1987] ECHR 32, para. 17.

458 Helfer (n. 440), 139.

459 *Ibid.*, 140.

460 *X, Y and Z v. the United Kingdom* [1997] ECHR 20, para. 44.

461 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 37.

462 Helfer (n. 440) 154.

463 *Johnston v. Ireland* [1986] ECHR 17, para. 30.

464 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

consensus will now be considered in turn in the context of an application concerning an unmarried father and his 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.⁴⁶⁵ 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.⁴⁶⁶ The report noted that there now exists an uncomfortable situation where almost all European states view discrimination against the *children* born outside of marriage as unconscionable, although they still accept discrimination against the fathers.⁴⁶⁷ 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.⁴⁶⁸

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,⁴⁶⁹ eleven *do* (equating to 42% of the union).⁴⁷⁰ 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

and the Right to Freedom of Thought, Conscience and Religion' (2022) 5(1) *Strathclyde Law Review* 91, 95.

465 Committee of Experts on Family Law (n. 233), principle 5.

466 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.

467 *Ibid.*, 3.

468 *Ibid.*

469 '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.

470 *Ibid.*

issues where a ‘great number’ of states agree.⁴⁷¹ 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.⁴⁷² In contrast, in Italy *both* father *and* mother must acknowledge the child in order to acquire PR. Whoever acknowledges the child first acquires the power to refuse the acknowledgement of the second parent.⁴⁷³ The UK and Slovakia also differ, offering acquisition through registration on the child’s birth certificate.⁴⁷⁴ 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.⁴⁷⁵ In contrast, Estonia requires both unmarried fathers and mothers to submit a declaration of intention, accepting or denying PR, before they can exercise it.⁴⁷⁶ The Commission on European Family Law nevertheless attempted to find common principles in a 2007 publication.⁴⁷⁷ 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.⁴⁷⁸

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.⁴⁷⁹ One of the first

471 *Johnston v. Ireland* (n. 463), para. 30.

472 Marianne Roth, ‘National Report – Austria’ (*Commission on European Family Law*), <http://ceflonline.net/wp-content/uploads/Austria-Parental-Responsibilities.pdf> 17.

473 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.

474 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/parentalresponsibility-forunmarriedfathers.aspx>.

475 ‘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.

476 ‘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.

477 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 Jänterä-Jaraborg, Nigel Lowe, Dieter Martiny and Walter Pintens, *Principles of European Family Law Regarding Parental Responsibilities* (Intersentia 2007).

478 Jens M Scherpe (n. 477) 46.

479 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 9-10.

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.⁴⁸⁰ A more radical proposal 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’.⁴⁸¹ 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.⁴⁸² 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.⁴⁸³ 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.⁴⁸⁴ 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 Part 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.⁴⁸⁵ 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. 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. Indeed, Helfer points out that the impact of *legal* consensus is particularly ambiguous in family law, partly due to this area’s entrenchment in national culture and traditions.⁴⁸⁶ For example, in *F v. Switzerland* the Strasbourg

480 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).

481 Council of Europe Committee Opinion (n. 355).

482 Stephen Gilmore, Daniel Monk, Ruth Lamont and Jonathan Herring (n. 408), 109.

483 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.

484 *Ibid.*, 2.

485 Dey and Wasoff (n. 21) pp 228-229; Anne Barlow, Carole Burgoyne and Janet Smithson (n. 153) 166; Bonnie Gardiner (n. 152).

486 Helfer (n. 440) 154.

Court concluded that, despite being the *last* European state to enforce a waiting period between a divorce and remarriage, Switzerland had not violated the Convention. 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.⁴⁸⁷

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, emphasizing consensus concerning common principles.⁴⁸⁸ Margaria described this as a ‘strategic use of European consensus in order to support a predetermined outcome’ potentially demonstrating judicial activism.⁴⁸⁹ Since there exists considerable international legal consensus in the context of unmarried fathers’ acquisition of PR, there may be a similar activism here. This is supported by the fact that, where cases concern the equal treatment of non-marital and marital relationships,⁴⁹⁰ the Strasbourg Court has consistently argued that ‘weighty reasons’ are required to justify any difference in treatment regardless of specific levels of domestic consensus.⁴⁹¹

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.⁴⁹² 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.⁴⁹³ 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 to consider.⁴⁹⁴ Subsequently, a prediction concerning the impact of the lack of domestic legal consensus in this case can be made.

iii) 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

487 *F. v. Switzerland* (n. 457), paras 16-17.

488 *Zaunegger v. Germany* (n. 171).

489 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 84.

490 Helfer (n. 440) 146.

491 *Sahin v. Germany* (n. 228), para. 94; *Zaunegger v. Germany* (n. 171), para. 51.

492 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.

493 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, 13.

494 Helfer (n. 440) 154.

opinions in Europe with which Austria was praised for modifying their legislation in line with.⁴⁹⁵ Where a legal rule conflicts with the direction of societal evolution, a narrower margin is likely to exist and vice versa.

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.⁴⁹⁶ 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.⁴⁹⁷ 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.⁴⁹⁸

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.⁴⁹⁹ Gerards agrees, stating that the Strasbourg Court is particularly 'cautious' where cases raise complex moral and ethical issues and do not draw a consensus among states.⁵⁰⁰ In these contexts, 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. 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'.⁵⁰¹ 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. With this in mind, societal evolution regarding unmarried fathers' acquisition of PR will now 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 experienced more extramarital births

495 *Petrovic v. Austria* (n221), para. 41.

496 Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (n. 493).

497 Paul Johnson, *Homosexuality and the European Court of Human Rights* (1st edn, Routledge 2013), 66.

498 *Ibid.*, 72.

499 Helfer (n. 440) 142.

500 Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (n. 493) 13.

501 *Ibid.*, pp 13-14.

than within marriage.⁵⁰² Although some states reported opposite statistics, more than 70% of births occurring within marriage in some countries,⁵⁰³ 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.⁵⁰⁴ Similar results have been reported in the UK, more children now being born outside of marriage than within.⁵⁰⁵ This demographical change is potentially significant. Since the denial of automatic PR to unmarried fathers now affects a 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;⁵⁰⁶ and 'new fatherhood', encompassing those who do not meet the description of 'conventional'.⁵⁰⁷ Margaria has argued that family life has recently faced 'unpredictable societal and technological shifts', potentially encompassing a shift towards 'new fatherhood' in Europe.⁵⁰⁸ 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)⁵⁰⁹ or financial obligations (for example, the requirement to pay maintenance as a biological father),⁵¹⁰ the social role of fathers has recently become increasingly important.⁵¹¹ The Committee of Experts on Family Law's suggestion that the marital presumption be extended to cohabiting couples is pertinent here,

502 '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>.

503 *Ibid.*

504 *Ibid.*

505 Siân Bradford and Faiza Mohammad (n129).

506 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.

507 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 15.

508 *Ibid.*, 22.

509 Committee of Experts on Family Law (n. 233), principle 3.

510 Convention on the Rights of the Child (adopted 20 November 1989) UNGA Res 44/25, Arts. 6 and 1.

511 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.

showing a recognition that these relationships can be just as committed as those formalised within marriages.⁵¹²

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.⁵¹³ 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).⁵¹⁴ 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.⁵¹⁵ 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.⁵¹⁶ 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 paradigms.⁵¹⁷ 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.⁵¹⁸ Furthermore, Margaria

512 Committee of Experts on Family Law (n. 233), Principle 5.

513 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 49; Claire Fenton-Glynn, (n. 178) 251.

514 Gilmore and Glennon (n. 68) 3.6.

515 ‘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-benefitting-the-child-surrogate-and-intended-parents/>.

516 *Re TT and YY* [2019] EWHC 2384 (Fam) [279]; Gilmore and Glennon (n. 68) 3.1.1. See also Claire Fenton-Glynn, (n178) 250; and *X, Y and Z v. the United Kingdom* (n. 460).

517 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 26.

518 *Anayo v. Germany* (n. 195).

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’.⁵¹⁹ Traditionally, the Strasbourg Court appeared to implicitly reject generalizations as justifications for differences in treatment,⁵²⁰ however, recently, the court has begun to explicitly name and criticise stereotypes embedded in national legislation.⁵²¹ One such stereotype is that unmarried fathers are irresponsible and uninterested in their children, expressly rejected by the Strasbourg Court in *Sahin*.⁵²²

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.⁵²³ Specifically, the Strasbourg Court justified their decision based on a ‘special’ social and biological bond between mother and child, simultaneously undermining fathers’ social role.⁵²⁴ *Chavdarov v. Bulgaria* is another relevant example here. The Strasbourg Court found no violation where a father who had cared for his children for twelve years complained of his inability to acquire PR due to the mother’s husband’s acquisition of PR through marital presumption.⁵²⁵ Since the father was still able to access his children, the court found there to be no real need for his acquisition of PR.

The influence of the ‘conventional model’ is also evident through the legal requirements of Article 8. Specifically, though this is perhaps becoming a less important factor, when determining the existence of a personal tie between an unmarried father and his child, the court still considers 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,⁵²⁶ particularly when it opposes ‘conventional’ ideas.⁵²⁷ Draghici has recently revived this criticism, stating that the continuing focus upon the

519 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 34.

520 *Zaunegger v. Germany* (n. 171), paras 56–57.

521 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 34.

522 *Sahin v. Germany* (n. 228), para. 58.

523 *Alexandru Enache v. Romania* (n. 216).

524 *Ibid.*, para. 71.

525 *Chavdarov v. Bulgaria* App no. 3465/03 (ECtHR 21 November 2010).

526 Ursula KilKelly, ‘Protecting Children’s Rights Under the ECHR: The Role of Positive Obligations’ (2010) 61(3) *Northern Ireland Legal Quarterly* 252, 254.

527 *Ibid.*, 251–253.

relationship with the mother demonstrates that the Strasbourg Court 'is out of step with the realities of present-day family life'.⁵²⁸

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, in other words, the violation was focused upon shortcomings in the *means* through which these fathers can acquire PR.⁵²⁹ 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'.⁵³⁰ 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.

iv) Overall Prediction of the Margin

This section has considered several factors: contextual issues, expert consensus, legal consensus, public consensus and evolution. It is a *balance* of the above 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 this instance.⁵³¹ 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.'⁵³² This may not prove to be the outcome in other contexts, however. Despite this, tentative predictions can be made in the context of a case concerning unmarried fathers and their acquisition of PR.

In this context, each of the preceding assessments indicated different widths of the margin. Whilst contextual considerations, expert consensus and

528 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.

529 *Sommerfeld v. Germany* (n. 364); *Zaunegger v. Germany* (n. 171).

530 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 160.

531 Gerards, 'Margin of Appreciation and Incrementalism in the Case Law of the European Court of Human Rights' (n. 493), 8.

532 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 38.

international legal consensus indicated a narrow margin, assessment of evolution pointed towards a wide margin. Since lack of evidence for public consensus led to exclusion of this factor in the present analysis, the issue which remains is what impact the lack of domestic legal consensus may have. Two approaches were found to exist in this regard. Firstly, lack of domestic legal consensus may be disregarded where the subject is one viewed as particularly entrenched in national culture and traditions or where there exists international legal consensus. Alternatively, relying on the principle of subsidiarity, the lack of domestic legal consensus may be capitalised upon to justify a wider margin. Based on the finding that 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 approach the court is likely to take is the second. In other words, the court is likely to push for a wider margin by using the lack of domestic legal consensus to argue that this issue is embedded in cultural traditions and values and so, per the principle of subsidiarity, national authorities should be awarded greater discretion.⁵³³ Therefore, although contextual issues, expert and international legal consensus indicate a narrower margin, the Strasbourg Court's apparent moral aversion to further pushing forward unmarried fathers' rights to acquiring PR at present is likely to override, a wide margin materializing.

C. Conclusion to Part Two

Part Two has assessed whether an unmarried father is likely to be successful should they bring an application concerning their denial of automatic PR under Articles 8 and 14 of the Convention in 2024.

The four-stage test applicable when determining applications under Articles 8 and 14 was first 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 research found 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.

Whether this would, in reality, lead to a violation depends upon the lens through which the specific court views this issue. Thus, since domestic remedies must have been exhausted before an application is admissible at the Strasbourg Court, these conclusions were then assessed within the 'discretionary area of judgment' applicable in UK domestic courts. It was found that a claim is more likely to trigger an 'minimalist', as opposed to 'activist', response from the UK judiciary, making the finding of a violation unlikely and pushing such an application into the realms of the Strasbourg Court.

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'. Part Two subsequently analysed the likely width of the margin in this context in 2024 through consideration of contextual factors, consensus, and evolution. Such

⁵³³ Brems (n. 492) 885-888.

considerations led to the conclusion that a wide margin of appreciation is likely to be imposed owing to the Strasbourg Court's seemingly reluctant attitude towards pushing forward change in this context. Accordingly, it is predicted that an incompatibility would *not* be found should a relevant case arise in the near future. Specifically, the court may hold that, despite issues arising in stages three and four of the four-stage test, the UK falls within a wide margin of appreciation and so there exists lenience for 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, nevertheless, detected within European political and legislative bodies.⁵³⁴ Should this shift continue and consensus towards this viewpoint strengthen, the margin of appreciation is likely to narrow in the future as the Strasbourg Court modifies its interpretation of the Convention in line with its characterization as a 'living instrument'. As a result, this may set the scene for a future finding of incompatibility should a relevant case arise in the somewhat more distant future.

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.⁵³⁵ Such a standard would align with proposals from 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 2015.⁵³⁶ Part Three 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.

4. Part Three: Alternative Strategies for Recognizing the Rights of Unmarried Fathers

Part Two 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, Part Three 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.⁵³⁷

534 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30).

535 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 20 (*emphasis added*).

536 Council of Europe Parliamentary Assembly (n. 297), para. 5.3.

537 'The Supervision Process' (n. 437).

Part Three 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.

A. 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.

1. 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.⁵³⁸ Part 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 the 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.⁵³⁹ 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,

⁵³⁸ Children Act s 4(1) and (1A).

⁵³⁹ 'Making Child Arrangements If You Divorce or Separate' (GOV.UK), <https://www.gov.uk/looking-after-children-divorce/if-you-agree>.

the court may contact the father to ensure he agrees to this outcome. Three underlying safeguards within this framework will now be considered.

2. *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 Part One, for example through the *Re H* criteria, have proven misleading in some circumstances.⁵⁴⁰

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.⁵⁴¹ 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.

3. *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. Essentially, this father would not only be prevented from acquiring PR for any child resulting from the rape, but would also lose existing PR for their other child/children. The reason for the addition of this second category is

⁵⁴⁰ *Re H (Minors) (Local Authority: Parental Rights) (No 3)*3 (n. 86).

⁵⁴¹ French Civil Code, Art. 372.

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.⁵⁴² 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, namely 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 unmarried fathers who lived with the mother 'as husband and wife' at the time of the child's birth.⁵⁴³ 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'.⁵⁴⁴ 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.⁵⁴⁵ 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.⁵⁴⁶

However, the Government's defence here may prove unconvincing, the strength of this model's exclusion clause being that it would *immediately* prevent

542 FPR (436) r 12.8(1).

543 New Zealand Guardianship Act 1968, s 6.

544 *Family Law: Illegitimacy Final Report* (n. 10) 36.

545 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>.

546 *Ibid.*

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 episodes⁵⁴⁷, with 75% of victims whose case goes to trial suffering additional mental distress.⁵⁴⁸ 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.

4. *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 Part Two, several issues have been identified with the current UK framework governing this issue, most notably the high threshold of evidence it requires.⁵⁴⁹ 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.⁵⁵⁰ 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'.⁵⁵¹ 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.⁵⁵² 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.

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

547 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,heath%20problems%20are%20life%20threatening>).

548 Hamish Armstrong, 'Three in Four Rape and Sexual Assault Survivors' Mental Health Harmed During Police Investigation, Research Reveals' (City University of London, 21 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>.

549 Karen Lennon and Shannon Woodley (n. 313) 1300.

550 Frédérique Ferrand, 'National Report – France' (Commission on European Family Law), <http://ceffonline.net/wp-content/uploads/France-Parental-Responsibilities.pdf> para. 51.

551 French Civil Code, Arts. 378-1 and 1.

552 *Nottingham CC v. Farmer* (n. 325).

UK framework in Part Two.⁵⁵³ 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.⁵⁵⁴ 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 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 delays in the UK 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.⁵⁵⁵ 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.

553 Stephen Gilmore, ‘Withdrawal of Parental Responsibility: Lost Authority and a Lost Opportunity’ (n. 334), 1053; Lauren Stocks (n. 377).

554 Gillian Douglas and Stephen Gilmore (n. 91) 90.

555 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>.

5. *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 Part Two. Whether this model would meet the Government's legitimate aim to facilitate acquisition by 'meritorious' fathers whilst preventing acquisition by the 'unmeritorious' will be assessed first. Subsequently, how effectively this model would balance the rights and freedoms of the community with those of unmarried fathers will be considered. Lastly, whether this model fits within the relevant margin of appreciation will be determined.

i) 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 are through signing the birth certificate⁵⁵⁶ or making a statutory agreement with the mother.⁵⁵⁷ However, both require the mother's consent. As discussed in Parts One and Two, 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.⁵⁵⁸ 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 Parts One and Two 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 Part Two 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.⁵⁵⁹ Since *this* model allows unmarried fathers to acquire PR without the mother's consent, fewer 'meritorious' fathers would be

⁵⁵⁶ Children Act s 4(1) and (1A).

⁵⁵⁷ *Ibid.*, 4(1)(b).

⁵⁵⁸ *Re L* (n. 19).

⁵⁵⁹ *Re S (Parental Responsibility: Jurisdiction)* (n. 85).

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.⁵⁶⁰ *Re H* supports this point.⁵⁶¹ Here, 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 make situations like this more dangerous, the mother not being able to as 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.⁵⁶² 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, Part Two 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.⁵⁶³ 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.⁵⁶⁴ In the context of this model, it would be applicable

560 Julie Wallbank, 'Clause 106 of the Adoption and Children Bill: Legislation for the "Good" Father?' (n. 75) 285-287.

561 *Re H (Parental Responsibility)* (n. 106).

562 Department for Work and Pensions (n. 59) 7.

563 Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (n. 20) 110.

564 Spanish Civil Code, Art 111.

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 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.⁵⁶⁵ 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.⁵⁶⁶ 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.⁵⁶⁷

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.⁵⁶⁸ An important issue remains though. By placing the burden upon 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

⁵⁶⁵ *Family Law: Illegitimacy Final Report* (n. 10) 35.

⁵⁶⁶ *Ibid.*, 36.

⁵⁶⁷ *Ibid.*

⁵⁶⁸ *Nottingham CC v. Farmer* (n. 325).

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 Part 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.⁵⁶⁹ A similar issue may arise in regard to this model. Mothers may prompt fathers to sign the certificate, not realizing that this would lead to his acquisition of PR. Options would exist for such a mother under this model, however. 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 Part 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 Part Two, 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 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'.⁵⁷⁰ Never before has simplifying this system become more important with the judiciary facing an unprecedented backlog of family law cases.⁵⁷¹

ii) 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.⁵⁷² 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.⁵⁷³

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

569 Children Act s 4(1) and (1A); Department for Work and Pensions (n. 59) 7.

570 Nigel Lowe (160) 205.

571 '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>.

572 *Belgian Linguistic case (No. 2)* (n. 301), para. 10.

573 Nilsson (n. 309) 130.

which the Law Commission have described as facilitating some ‘unmeritorious’ fathers who are skilled manipulators.⁵⁷⁴ 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 termination of the unmarried father’s PR. However, it is unlikely that many unmarried fathers will know the law in such detail.⁵⁷⁵

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 Part One, would support such an argument.⁵⁷⁶ 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’⁵⁷⁷ and that, following this event, ‘normative devices’ will become activated which encourage socially and legally expected standards of care of the child.⁵⁷⁸ Accordingly, by requiring that fathers acknowledge their child by signing the birth certificate, more fathers may feel contractually bound to care for their child. As mentioned in Part One, this outcome is not certain though, the social contract theory simply being a *theory*.

Moreover, it was noted in Part Two 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,⁵⁷⁹

574 *Family Law: Illegitimacy Final Report* (n. 10) para. 4.39.

575 Department for Work and Pensions (n. 59) 7.

576 Celeste Friend (n. 65).

577 Vopat (n. 66) 58-59.

578 *Ibid.*, 59.

579 Gilmore, ‘Parental Responsibility and the Unmarried Father – a New Dimension to the Debate’ (n. 99) 26.

and Ward LJ found that it led to children suffering from identity issues.⁵⁸⁰ 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,⁵⁸¹ 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, namely by 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.⁵⁸² 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,⁵⁸³ or, with the mother's permission, start proceedings to establish paternity themselves.⁵⁸⁴ Essentially, this system attempts to avoid 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.⁵⁸⁵ 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.⁵⁸⁶ 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

580 *Re S (A Minor) (Parental Responsibility)* (n. 108) [657H].

581 Family Law Act 2009 (Estonia), para. 89.

582 Family Law Act 2015 (Croatia), Arts. 67(1) and 84(4).

583 *Ibid.*, Art. 68(1).

584 *Ibid.*, Art. 68(2).

585 Welfare Reform HC Bill (n. 146).

586 *Joint Birth Registration: Promoting Parental Responsibility* (n. 140) 3.

result of conception following donor insemination'; 'she has reason to fear for her own or her child's safety if the father is contacted'.⁵⁸⁷

Nevertheless, this proposal was met with overwhelming criticism.⁵⁸⁸ In particular, the DWP stated that a coercion of mothers into providing details of the father is 'intrusive for vulnerable mothers'.⁵⁸⁹ 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.⁵⁹⁰ The latter response is debatable. Indeed, case law discussed in Part 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 the father's merit.⁵⁹¹ 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 Part Two.⁵⁹² 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 gatekeepers, preventing the access of 'meritorious' fathers to their children.⁵⁹³

It is also noticeable that the same issue, 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

587 Welfare Reform HC Bill (n. 146), cl 2B(4).

588 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.

589 Department for Work and Pensions (n. 59) 4.

590 Family Justice Council, *Response to the DWP Consultation on Joint Birth Registration* (2007).

591 *Re L* (n. 19).

592 Siân Bradford and Faiza Mohammad (n. 129).

593 Human Tissue Act 2004, ss 3 and 2(3).

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.⁵⁹⁴ Furthermore, simply because a child is 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.⁵⁹⁵ 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.⁵⁹⁶ 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.⁵⁹⁷ 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.⁵⁹⁸ 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.⁵⁹⁹ Under this model, such a couple would be able to do so and hence represents a potential improvement upon the current UK framework.

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 may not discover the existence of his child within a year of its birth should the mother be actively withholding this information from him. In this scenario, their ability to acquire PR automatically through acknowledging paternity

594 '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>.

595 Children Act, s 2(1); Gilmore and Glennon (n. 68) 2.1.

596 Jan Pryor and Brian Rodgers, 'Children in Changing Families: Life After Parental Separation' [2009] *Social Policy Journal of New Zealand* 35.

597 Andrew Bainham, 'What Is the Point of Birth Registration?' [2008] 20 *Child and Family Law Quarterly* 449, p. 449.

598 'Press notice 201/98' (n. 136).

599 Sheldon, 'Unmarried Fathers and Parental Responsibility: A Case for Reform?' (n. 20).

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.⁶⁰⁰ 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.⁶⁰¹ 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.⁶⁰² Fundamentally, since 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.⁶⁰³ 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 who 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.⁶⁰⁴ The latter issue is also key when considering the social position of the group. The Strasbourg Court emphasizes that any differences in treatment must

600 '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.

601 '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.>

602 Nilsson (n. 309) 130.

603 *Ibid.*

604 *Konstantin Markin v. Russia* (n. 174), para. 143.

not be based upon stereotypical beliefs about the group since this could enhance the group's social exclusion.⁶⁰⁵

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.⁶⁰⁶

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.⁶⁰⁷ As mentioned in Part Two, the Strasbourg Court has previously found safeguards to be inadequate where the mother's lack of consent cannot be overridden,⁶⁰⁸ and where litigation to do so incorporates a starting presumption that the father's involvement is not in the child's best interests.⁶⁰⁹ 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.

iii) The Margin of Appreciation

Part Two found that the margin of appreciation in this area was currently wide, the Strasbourg Court remaining loyal to 'conventional' understandings of fatherhood.⁶¹⁰ 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

605 Nilsson (n. 309) 131.

606 '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>.

607 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 79.

608 *Zaunegger v. Germany* (n. 171), para. 33.

609 *Sommerfeld v. Germany* (n. 364), para. 77.

610 Margaria, *The Construction of Fatherhood: The Jurisprudence of the European Court of Human Rights* (n. 30) 15.

considerably in the future as the Strasbourg Court modifies its judgments accordingly.⁶¹¹ 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.⁶¹² This could indicate the acceptance of the Conditional Automatic Acquisition Model within a future narrower margin since it follows this very structure.

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.⁶¹³ 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.

iv) 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 article will instead advocate for an alternative model which it has termed the 'Equality Model'.

B. *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 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

611 *Ibid.*

612 Council of Experts on Family Law (n. 466) 52.

613 'Guide on Article 8 of the European Convention on Human Rights' (n. 173) 20 (*emphasis added*).

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.⁶¹⁴

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.⁶¹⁵ 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.

1. *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 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, recognizing that this description can characterise mothers and married fathers too.⁶¹⁶ 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

614 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>.

615 Frédérique Ferrand (n. 550) 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.

616 John Flatley (n. 71); *F v. M* [2023] (n. 28).

would better meet their aforementioned aims and potentially evade the possibility of future litigation at the Strasbourg Court.

2. *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 article will first holistically consider the impact upon children, mothers and fathers.⁶¹⁷ This model represents a better framework for protecting those at the centre of PR, the 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 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'.⁶¹⁸ 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'.⁶¹⁹

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.⁶²⁰ 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

617 Nilsson (n. 309) 130.

618 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,\)

619 Pryor and Rodgers (n. 596).

620 Vopat (n. 66).

Acquisition Model encompass this motivating factor since these frameworks do not allow for mothers and married fathers to have their PR removed.

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.⁶²¹ 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.⁶²² 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.⁶²³

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 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,

621 Jill Marshall, 'Secrecy in Births, Identity Rights, Care and Belonging' [2018] *Child and Family Law Quarterly* 167.

622 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).

623 Meerum Terwogt, Meerum Terwogt-Reijnders, and Van Hekken, 'Identity Problems Related to an Absent Genetic Father' (2002) 14(3) *Zeitschrift für Familienforschung* 257.

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.⁶²⁴ 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.⁶²⁵ 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.⁶²⁶

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 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

624 'Surrogacy: Legal Rights of Parents and Surrogates' (n. 594).

625 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' (n. 594).

626 'Surrogacy: Legal Rights of Parents and Surrogates' (n. 594).

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.⁶²⁷ 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.

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.⁶²⁸ 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.

3. *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 of gender is a 'necessary

⁶²⁷ Nilsson (n. 309) 130.

⁶²⁸ Gilmore and Glennon (n. 68) 453.

step in order to progress towards a fully egalitarian society'.⁶²⁹ 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.⁶³⁰ This report further encouraged states to 'remove from their laws any difference based on marital status between parents who have acknowledged their child'.⁶³¹ 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 modernizing 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.⁶³² 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.

4. *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 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, namely 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

629 Council of Europe Parliamentary Assembly (n. 297).

630 Council of Europe Parliamentary Assembly (n. 263) 4.

631 *Ibid.*, para. 5.3.

632 Siân Bradford and Faiza Mohammad (n. 129).

retained because it was viewed as a ‘measure that underlines the importance of marriage’.⁶³³ This opinion endured even when respondents to the consultation for reform suggested that an exception should be made for those suffering from domestic abuse.⁶³⁴ 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’.⁶³⁵ 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.⁶³⁶ 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.⁶³⁷ 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.

C. Conclusion to Part Three

Although Part Three 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

633 ‘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.

634 *Ibid.*, 33.

635 *Re A (Parental Responsibility)* [2023] (n. 28) [101].

636 *Family Law: Illegitimacy Final Report* (n. 10).

637 Welfare Reform HC Bill (n. 146); Welfare Reform Act 2009; Department for Work and Pensions (n. 59) 4.

truly place them on equal footing with other parents and prove compatible with a potentially narrowing margin of appreciation. Although there may currently be 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.

5. Overall Conclusions

This article 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.

Part 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, the distinction between ‘meritorious’ and ‘unmeritorious’ fathers, is ambiguous. It is curious that legislators would base an entire framework upon such an uncertain foundation, 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*.⁶³⁸ The article, from this point, investigated the compatibility of this framework with Articles 8 and 14 of the Convention in 2024.

Part Two applied the applicable legal 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, Part Two found 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 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

638 *Re L* (n. 19).

their ‘discretionary area of judgment’ was predicted 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 years time, a finding of incompatibility may result should a case concerning unmarried fathers’ acquisition of PR in the UK arise.

Part Three 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.⁶³⁹

Two novel models were discussed: the Conditional Automatic Acquisition Model and the Equality Model. Both models are 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, harmonizing 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 is instead being recommended by this article. 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 aligns more

639 ‘The Supervision Process’ (n. 437).

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 article only intends to consider reform in a broad-brush manner, future research being necessary in order to refine possible alternative legal frameworks. What this article makes 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.