THE SUPREME COURT

Appeal No: 263/2013

IN THE MATTER OF AN APPEAL PURSUANT TO SECTION 60(8) OF THE CIVL REGISTRATION ACT, 2004 AND IN THE MATTER OF THE CONSTITUTION OF IRELAND AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT, 1964 AND IN THE MATTER OF THE STATUS OF CHILDREN ACT, 1987 AND IN THE MATTER OF M.R. AND D.R. (CHILDREN)

BETWEEN:

M.R. AND D.R. (SUING BY THEIR FATHER AND NEXT FRIEND O.R.) AND O.R. AND C.R.

APPLICANTS/RESPONDENTS

And

AN t-ARD CHLARAITHEOIR, IRELAND AND THE ATTORNEY GENERAL

RESPONDENTS/APPELLANTS

And

LL

NOTICE PARTY

And

THE HUMAN RIGHTS COMMISSION and

THE EQUALITY AUTHORITY

AMICUS CURIAE

SUBMISSIONS ON BEHALF OF THE HUMAN RIGHTS COMMISSION

1. Introduction

1.1 The Fourth Named Applicant/Respondent (hereinafter "*the Fourth Named Respondent*) is married to the Third Named Respondent. Although she can produce healthy ovae, she is not able to carry a pregnancy herself. The Third and Fourth Named Respondents therefore entered into an agreement with the Notice Party, sister of the Fourth Named Respondent, pursuant to which the Notice Party agreed to act as a surrogate, with the genetic material

being provided by the said Respondents. Such an agreement, although not necessarily legally enforceable, does not breach any provision of Irish law. Thereafter, a fertilised egg was produced by means of IVF procedure, and implanted in the womb of the Notice Party who gave birth in due course to twins, the First and Second Named Respondents. In accordance with the agreement between the adult Respondents and the Notice Party, the care of the children passed to the said Respondents within a short time of their birth.

1.2 The Notice Party and the Third Named Respondent were initially registered as the parents of the children pursuant to the requirements of the *Civil Registration Act, 2004*. However, the adult Respondents thereafter applied to the First Named Appellant seeking to have the name of the Fourth Named Respondent placed on the children's birth certificates in place of the Notice Party, alleging that it was an error which was capable of correction pursuant to Section 63 of the Act of 2004. That application was refused by the First Named Appellant, who having sought legal advice, claimed that the maxim *"mater semper certa est*" applied. That refusal ultimately gave rise to the proceedings herein.

1.3 M.R., D.R, O.R. and C.R. sought various reliefs in the High Court and in his judgment of the 5th day of March 2013, the learned trial Judge concluded that they were entitled to the first two reliefs sought, being;

> 1. A declaration that CR is the mother of MR and DR pursuant to section 35(8)(b) of the Status of Children Act, 1987 or otherwise pursuant to the inherent jurisdiction of this Honourable Court;
>
> 2. A declaration that the continued failure to recognise and acknowledge CR and OR as parents of MR and DR is unlawful, and fails to vindicate and protect the constitutional rights of the Applicants, in particular pursuant to the provisions of Articles 34, 40.4.1 and 40.3.2 and 41 of the Constitution;

1.4 Thereafter, by Order of the 16th day of May 2003, the learned trial Judge declared;

1. that the Fourth Named Respondent is the mother of MR and DR, the First and Second Named Respondents;
2. that she is entitled to have particulars of her maternity entered on the certificates of birth of the two children; and
3. that the two children are entitled to have the Fourth Named Respondent recorded on their certificate of birth as their mother.

1.5 The four Respondents contend that the law as it currently stands in this jurisdiction permits CR to be recognised as mother of the two minor Respondents. In so arguing, the Respondents rely *inter alia*, upon the procedure established in Part IV and V of the *Status of Children Act, 1987* for the grant of a declaration of parentage, such parentage being determined by tests which rely upon inheritable or blood characteristics. They also allege that the failure of the First Named Appellant to recognise the Fourth Named Respondent as the mother of the two minor Respondents violates a number of constitutional provisions, including the rights of the minor Respondents pursuant to Article 40.3, Article 41 and 42 of the Constitution. It is therefore apparent that the Respondents' contention is that the problem stems from the refusal of the First Named Appellant, and not from the system itself; while the Respondents did plead in the alternative that if an tArd Chlaraitheoir did not (contrary to their own submissions) have jurisdiction to place the names of the Fourth Named Respondent as mother on the Respondent children's birth certificates, then the Civil Registration Act, 2004 was unconstitutional and/or incompatible with the European Convention on Human Rights but this alternative, "systemic" challenge was not thereafter pursued on the Respondents' behalves[1].

1.6 On the 1st November 2013, the Commission made an application to this Honourable Court pursuant to Section 8(h) of the *Human Rights Commission Act, 2000* for liberty to appear as *amicus curiae* in the appeal herein. The Commission made that application, having formed the view that the proceedings raised certain important human rights issues in respect of which it wished to make submissions to this Honourable Court. In forming that view, the Commission had regard solely to the judgment of Abbott J of the 5th day of March 2013, as, owing to the *in camera* nature of the proceedings, it had not had sight of the pleadings nor the written submissions filed by the parties before the High Court. The Court acceded to the request, and in so doing provided that the Commission's submissions should be within the parameters of the pleadings and the submissions of the parties[2].

1.7 The term "human rights" is defined in the *Human Rights Commission Act, 2000* as meaning:

> "(a) the rights, liberties and freedoms conferred on, or guaranteed to, persons by the Constitution, and

[1] Thus, the approach adopted herein differs from that adopted by the applicant in *Foy v an t-Ard Chlaraitheoir*, who contended that the absence of a provision within the legal system for legal recognition of her acquired gender identity constituted a violation of her rights pursuant to the Convention and/or rendered her entitled to a Declaration of Incompatibility pursuant to Section 5 of the *European Convention on Human Rights Act, 2003.*

[2] Per Order of the Supreme Court of the 1st November 2013.

(b) the rights, liberties or freedoms conferred on or guaranteed to, persons by any agreement, treaty or convention to which the State is a party."

1.8 The Commission wishes to make submissions in relation to certain human rights of the children MR and DR, the First and Second Named Respondents, as it is of the view that the proceedings raise important issues of a human rights nature in relation thereto. Having particular regard, however, to the undertaking given on behalf of the Commission not to duplicate matters addressed by others in the proceedings, the Commission does not propose to address the rights of the children to equal treatment and/or their entitlement to freedom from discrimination as the Commission understands that the Equality Authority shall address same in the submissions to this Honourable Court. The Commission's submissions focus upon aspects of the Respondent children's rights pursuant to Articles 40.3, 41 and 42 of the Constitution, as pleaded by the Respondents. In particular, the Commission wishes to address issues pertaining to the Article 41 rights of the Respondent children, and the correlative rights of the adult Respondents, to be considered as members of a family comprising all four persons and to have that family unit recognised and protected. Likewise, the Commission wishes to address certain rights of the Respondent children pursuant to Article 40.3, being specifically the right of those children to respect for their identity as members of the Respondent family.

1.9 In that regard, bearing in mind the obligation upon the Commission to make submissions which fall within the parameters set in the pleadings and the submissions of the parties, the Commission notes that the Respondents have alluded in both the pleadings and their submissions to their Article 41 and Article 42 rights. In the Special Indorsement of Claim, the parties now the Respondents claimed that the Third and Fourth Named Respondents enjoy a right, and the First and Second Named Respondents enjoy a correlative right, deriving from Article 41.1.1 to the recognition of their family unit as a Family under the said Article[3]. In their Submissions to this Honourable Court, the Respondents make the similar claim that they have a right to be considered as a family and to enjoy protection of their family unit pursuant to Articles 41 and 42. The Commission wishes to address those issues in these submissions. As far as the Commission's desire to make submissions regarding the rights of the Respondent children pursuant to Article 40.3 of the Constitution to recognition of their identity vis-à-vis the Third and Fourth Named Respondents is concerned, it is noted that in their Special Indorsement of Claim the Respondents claimed that the First and Second Named Respondents are entitled to have the particulars of their relationship with the Fourth Named Respondent recorded on their Certificates of Birth as their mother and sought a Declaration to that effect[4]. In the particulars of their constitutional challenge within the Special Indorsement of Claim, the Respondents contend that the First and Second Named Respondents enjoy a right to know and

[3] Particular (a) of the Particulars of Breach of Constitutional Rights.
[4] Point 2 in the Applicant's Claim.

to ascertain the identity of their mother and to have such identity publicly acknowledged[5], and also claim that the said Respondents have an unenumerated right to have the Fourth Named Respondent acknowledged and recognised by the State as their mother, claiming that "the right of the children in this regard is an inherent feature of human personality and as such merits and enjoys Constitutional protection[6]." In the Points of Claim, such allegations were repeated and the Respondents sought and obtained a Declaration that the continuing failure to recognise and acknowledge the adult Respondents as parents of the Respondent children is unlawful and fails to vindicate their constitutional rights, and the Commission refers to the reliance upon Articles 40.3.2 and Article 41 of the Constitution. While the Respondents allude to the violation of the personal rights of the Respondent children pursuant to Article 40.3 in their Submissions to this Honourable Court, they do not address this aspect of the right therein. Nonetheless, it is respectfully submitted having regard to the terms of the Order of this Honourable Court that, such claims having been made within the pleadings, it is appropriate for the Commission to make submissions in relation thereto.

2. Interpretation of the Constitution in Light of International Standards

2.1 While the proposition espoused in *Re O Laighleis*[7] that international conventions which have been ratified but not incorporated into domestic law do not have the force of domestic law has long been accepted in this jurisdiction, the Superior Courts have also long shown a willingness to refer to non-binding international instruments in order to inform the understanding of constitutional provisions, where the international provision is not inconsistent with the constitutional guarantee in question. Having regard to that jurisprudence, the Commission submits that it is entirely appropriate to use relevant international instruments to which the State is a party as a guide to understanding the content of constitutional rights and guarantees and seeks to do same herein. However it should be noted that whilst the Commission believes it appropriate for this Honourable Court to have regard to such international instruments for the purpose outlined above, it also submits that the constitutional provisions in issue are capable of supporting the fundamental rights of the Respondent children even if they are considered only in a purely domestic legal context. Nonetheless the Commission is of the opinion that both the European Convention on Human Rights and the UN Convention on the Rights of the Child can offer guidance in relation to the current proceedings, and while the facts of the case may raise issues which are addressed by the UN Convention on the Rights of Persons with Disabilities, such issues are not addressed herein as they more properly arise for consideration in the context of equality/non-discrimination arguments which the Equality Authority proposes to address.

[5] Particular (b) of "Particulars of Constitutional Challenge".
[6] Particular (d) of "Particulars of Constitutional Challenge".
[7] [1960] I.R. 93.

2.2 Thus, for example, in *The State (Healy) v O'Donoghue*[8], the Supreme Court had regard to Article 6 ECHR when considering the scope of the right to legal aid under the Irish Constitution and relied upon that Article to inform its understanding of the Article 38 right to a fair trial and of the guarantees set out in Article 40.3[9]. More recently in *McCann v The Judge of Monaghan District Court and Others*[10], Laffoy J took account of both the ECHR and the International Covenant on Civil and Political Rights when declaring unconstitutional legislation which regulated the enforcement of civil debt. In the yet more recent High Court decision of *MX v Health Service Executive*[11], MacMenamin J noted that;

> "*The interpretation of the Constitution [s]hould be informed by, and have regard to, international conventions. This principle of interpretation, of course, applies a fortiori in relation to the regard which ,as a matter of law, must be had to decisions of the European Court of Human Rights (see ss 2- 5 of the European Convention on Human Rights Act, 2003*).[12]"

2.3 The learned judge also acknowledged therein that the understanding of the;

> "*broader range of constitutional "personal capacity" rights [under consideration in the case before the learned Judge] should be informed by "the United Nations Convention on the Rights of Persons with Disabilities as well as the principles enunciated in the judgments of the European Court of Human Rights". He added that, in an appropriate case and context, the principles established in international conventions can, where they are consistent with the Constitution itself, provide helpful reference points for the identification of "prevailing concepts and ideas" to which regard shall be had for the purpose of interpreting the Constitution as a living document.*"

2.4 The Courts have also shown a willingness to refer to the jurisprudence of the European Court of Human Rights in relation to EHCR rights for the purpose of obtaining guidance on the analysis of comparable constitutional provisions. In that regard, reference is made to the judgment of Denham J in *O'Brien v Mirror Group Newspapers Limited*[13] to the effect that:

---

[8] [1976] IR 325.

[9] Likewise, in *O'Leary v Attorney General*[9], the High Court considered the parameters of the constitutional status of the presumption of innocence in the context of the guarantee of a fair trial in due course of law pursuant to Article 38 of the Constitution, in the light of Article 6(2) ECHR, Article 11 of the Universal Declaration of Human Rights, Article 8(2) American Convention on Human Rights and Article 7 OAU Charter of Human Rights.

[10] [2009] 4 I.R. paragraph 97 at p.234.

[11] Unreported, 23rd November 2012.

[12] S*upra,* p 31.

[13] [2001] 1 IR 1 at 33.

"The European Convention for the Protection of Human Rights and Fundamental Freedoms is not part of the domestic law of Ireland: In re Ó Laighléis [1960] I.R. 93. However, decisions of the European Court of Human Rights on the said European Convention may be persuasive authority in the analysis of similar constitutional rights in the same way as decisions of other constitutional courts; Norris v. The Attorney General [1984] I.R. 36 (per Henchy J. at p. 69)".[14]

3. ***The Meaning of the term "Mother" in Irish Law***

3.1 There is no definition in any international instrument of the word "mother". The United Nations Convention on the Rights of the Child, to which the Commission will refer in the course of these submissions, does not offer any guidance on the meaning of that term, nor on what constitutes a "parent". The recent *A Comparative Study on the Regime of Surrogacy in EU Member States* (May 2013)[15] conducted on behalf of the European Parliament concluded that not only was there no Europe-wide consensus regarding issues surrounding surrogacy itself or surrounding the legal issues regarding how parenthood, and in particular motherhood, is to be assigned in such circumstances, there was not even a discernible pattern on either issue amongst the various member states. Interestingly, the study concluded that;

"it is impossible to indicate a particular legal trend across the EU. [H]owever all Member States appear to agree on the need for a child to have clearly defined legal parents and civil status".

3.2 The parties have fundamentally different views regarding the meaning of the term "mother" in Irish law, a term which is central to the proceedings herein. The Appellants assert that the word has a constitutionally-fixed meaning by reason of Article 40.3.3 which guarantees the right to life of the unborn alongside the equal right to life of the mother, and that the term must therefore be understood to mean women who give birth and such women only. If that argument is accepted, then the other arguments mounted by the Respondents regarding the impact upon their constitutional rights of the approach taken by the Registrar cannot succeed. The Respondents have rejected the State's assertion that the word "mother" was fixed for all purposes by Article 40.3.3 and contend that the word must be capable of embracing persons such as CR who is both a genetic parent of the children and their primary caregiver. The learned trial Judge rejected the Appellants' contention.

[14] This d*ictum* was also cited by Hanna J in *Cosma v The Minister for Justice, Equality and Law Reform* [2006] IEHC 36 in which the learned Judge took account of relevant jurisprudence of the European Court of Human Rights when determining whether the threatened ministerial action violated certain core personal rights of the applicant.

[15] Directorate General for Internal Affairs; Policy Department; Citizen's Rights and Constitutional Affairs, (Study, 2013).

The Commission is of the opinion that the view adopted in relation to this issue by the Abbott J. as espoused by the Respondents, is correct and endorses same accordingly, for the reasons outlined below.

3.3 It is clear that the mother referred to in Article 40.3.3 of the Constitution is indeed the person who carries the unborn in the womb. It is submitted, however, for the reasons set out below, that the constitutional order does not deny other women the status of mother after the child is born. In those circumstances, and in the absence of definition in statute or case law, having regard to other constitutional standards the term "mother" may be understood to embrace persons in the position of CR. In that regard, reference is made to the Respondents' submissions in relation to *Roche v Roche*[16], which the Commission endorses. It is the opinion of the Commission that the judgments of the Court therein suggest that the meaning of the word "mother" used in Article 40.3.3 can be understood in the context of the issues arising in that case and thus that the Article pertains only to the period of time in which the gestational mother carries the unborn in her womb, up to and including the time of birth; thus understood, Article 40.3.3 does not provide an authoritative or binding interpretation of the word for all purposes and must be read in light of the protections under Articles 40.3, 41 and 42 (discussed further below).

3.4 This view is supported by the fact that the only other reference to mothers in the Constitution must, it is submitted, be understood to extend the meaning of the term beyond the gestational mother. Article 41.2 provides;

> 1° In particular, the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.
>
> 2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.

3.5 This Article, which contained the only reference to mothers at the time of the adoption of the Constitution in 1937, clearly envisages a full-time mothering role being provided by women in the home in the interests of their children. At that time, there was no lawful facility for the regularisation of adoption in the State, nor any prospect of the advances now made via assisted human reproduction. Nonetheless, it is submitted that since the enactment of the *Adoption Act, 1952* which introduced lawful adoption in the State for the first time, the Article must embrace adoptive mothers too. While its sentiment may now appear somewhat outdated, it is surely inconceivable that if Article 41.2 were invoked today, it would not apply equally to adoptive mothers, whose children must be entitled to

[16] [2010] 2 I.R. 321.

the same mothering as those being reared by their natural mothers. Thus, it is submitted that the meaning of the word "mother" in this Article has, at least since 1952, embraced categories of women not necessarily envisaged when the Constitution was initially adopted and includes women other than those who give birth, a submission which also adds support to the contention that the parameters of Article 40.3.3 are time-limited to the gestational period.[17]

3.6 It is therefore submitted that, , the Constitution does not demand that only women who give birth to their children may be regarded as mothers. The legal parameters of the word "mother" changed in 1952 and, viewing the Constitution as a living document, it is submitted that there is no bar to permitting it to reflect the realities that are created by assisted human reproduction. Therefore, although as a matter of reality such motherhood would not have been envisaged in 1937, no interpretation of the words in "the Constitution is intended to be final for all time. It is given in the light of prevailing ideas and concepts"[18]per Walsh J in *McGee v Attorney General* . In this particular case, the meaning of the word can be up-dated to take account of scientific developments in the sphere of assisted human reproduction which permit of a new category of mother. Thus, it is submitted that the term "mother" is not at present limited to women who give birth but has, for over 60 years, embraced women – adoptive mothers – who become mothers at some point after the gestational mother gives birth. Thus, there is already in our jurisprudence recognition of a form of "split motherhood" in the sense that motherhood is transferred from the woman who gives birth to the woman who assumes that mantle once the Adoption Order is made.

4. <u>The Human Rights of MR and DR</u>

(I) <u>Right to recognition of the family in a surrogacy context</u>

4.1 The Commission has not to date adopted an overall position in relation to the issue of surrogacy and the submissions herein do not contain any statement of policy regarding *the manner* in which this most complex and sensitive area touching upon the needs, vulnerabilities and rights of the surrogate woman, the child born to her and the persons hoping to carry out the parental duties in relation to that child, ought to be addressed and regulated. Nonetheless, it is the Commission's opinion that the area must be regulated in order to bring the necessary clarity to the parties, not least to children born through

[17] Although not addressing the equality aspect of the case in this submission, it may be noted that the argument that the definition of "mother" has a wider meaning over and above gestational mother may derive support from Article 40.1; to be held equal before the law as human persons, when viewed from the standpoint of the child and her/ his right to the family under Article 41.

[18] [1974] IR 81. Reference is also made in this regard to the judgment of Murray CJ in *Sinnott v The Minister for Education* in which he alludes to the views of the late Professor Kelly regarding the appropriate parameters of the "present tense" interpretation of the Constitution.

surrogacy . It further appears that the issues requiring regulation may loosely be categorised under two inter-related headings, albeit with many sub-headings within each category: first of all, there are issues pertaining to the regulation of the practice of surrogacy (the *ex-ante* questions) and, secondly, the regulation of parenthood of the children born as a result (the *ex-post* questions). In other words; the ex ante questions concern whether and to what extent the legal framework authorises or prohibits the practice of surrogacy. If surrogacy is permitted and a child is born to a surrogate who transfers the care of the child to the persons intending to carry out the parenting duties, *ex-post* questions arise regarding the person who shall be regarded by the law as the mother of that child – is it the bearer/gestational mother, the genetic mother or (if not one and the same as the genetic mother[19]), the intended mother? *Please note that the Commission has chosen to use the terminology employed by the learned trial Judge herein, describing the surrogate woman as the "gestational mother" and referring to the woman who provides the ovum/ova which contribute to the creation, via IVF procedure of the child born to the surrogate as the "genetic mother".*

4.2 While the heads of a Bill entitled the *Children and Family Relationships Bill 2013* have been drafted, which if enacted will purport, *inter alia*, to regulate issues pertaining both to surrogacy arrangements and to the manner in which parentage is to be assigned in cases of surrogate births, there is as yet no law enacted which expressly regulates either what we have termed the *ex-ante* or the *ex-post* questions in Ireland. Thus, as noted above, surrogacy arrangements of the type entered into by the adult Respondents in this instance and the Notice Party, while most likely unenforceable, are not illegal. The State has not taken any steps to prevent the adult Respondents from entering into this agreement which they have done in an attempt to have the opportunity to rear their genetic child. In so doing, it would appear that they, as a married couple are taking steps to exercise their rights pursuant to the Constitution to have children.

4.3 In that regard, reference is made to the judgment of Costello J in *Murray v Ireland*[20], in which the plaintiffs, a married couple both of whom were serving sentences of penal servitude, alleged that, by virtue of Article 41 of the Constitution, they had a right to beget children and claimed that they were entitled to have facilities provided within the prison for its exercise. The learned Judge concluded that there was indeed a right to beget children, but based it in Article 40.3 of the Constitution. Such a right could, however, be validly

[19] The Commission acknowledges that different legal issues may arise where the intending mother is not a genetic parent of the child born through surrogacy and that yet again different and potentially more complex legal issues may arise where the surrogate mother is also the genetic mother of the child. Those issues do not arise on the facts of this case and necessarily fall outside the scope of the case as pleaded. Consequently they have not been addressed by the Commission.

[20] [1985] IR 532. In the Supreme Court, Counsel for the Murray's acknowledged that the rights claimed by their clients could be validly restricted in certain circumstances.

curtailed by the State and the learned Judge added that such restriction would also be permissible had he found the right to found a family to be based in Article 41[21].

4.4 As there is no law in this jurisdiction restricting the rights of persons to enter into arrangements of the sort at issue herein, nor to prevent effect being given to those arrangements, and the adult Respondents were exercising their right to found a family based on their genetic input in the only way open to them to do so, it is submitted that it would not be appropriate for the State to deny such Respondents any parental status *vis- a-vis* the resulting children. A right to found or beget a family is not the end in itself – it is a right designed to enable people to become parents and to engage in the rearing of their children once those children are born. Thus, persons such as the adult Respondents may, in the absence of legal mechanisms preventing them from doing so, enter into surrogacy arrangements and avail of assisted reproductive techniques as the vehicle by which they commence the process of founding a family and by which, in the event that a child is ultimately born to the surrogate, they become parents. In other words, it would appear that the failure to regulate the *ex-ante* phase of the surrogate process (i.e., by stating that arrangements of the sort at issue herein shall be unlawful or only lawful provided certain conditions, requirements and/ or procedural safeguards are observed) has a knock-on effect on the manner in which the second stage – that in which the status of parent is assigned to the resulting child – may be regulated. While the Oireachtas clearly has the capacity to regulate that area too, it must do so in a manner consistent with the constitutional right to found a family and the *prima facie* right to rear that family thus founded.

4.5 It is submitted, in that regard, that a number of relevant decisions of the European Court of Human Rights may inform the above constitutional argument and support the contention that although States may legislate to prohibit or to regulate surrogacy or certain forms thereof, if they do not do so – as in this jurisdiction - and a couple exercise their right to conceive children and to avail of artificial methods for that purpose, then the State must afford that couple an appropriate lawful status *vis-à-vis* the children born to them and thereafter reared by them. In that regard, the European Court of Human Rights has also had occasion to recognise the right of a couple to become parents and the corresponding power of the State to regulate that right. In *SH v Austria*, for example, the relevant Austrian legislation prohibited the use of certain forms of surrogacy. The Court acknowledged that this legislation engaged the terms of Article 8(1) ECHR which confers a "right to respect for private and family life". That right may lawfully be curtailed if done in accordance with the terms of Article 8(2) ECHR which provides that;

[21] Costello J noted that although "no reference is made in Article 41 to any restrictive power [i]t is clear that the exercise by the Family of its imprescriptible and inalienable right to integrity as a unit group can be severely and validly restricted by the State."

> "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others"

4.6 The Court in *SH v Austria* found that Article 8(1) protected the "*right of a couple to conceive children and to use artificial methods to assist them*" as such a choice is an expression of private and family life. The Court concluded, however, that the Austrian provisions were permissible under Article 8(2) as, in the absence of any Europe-wide consensus on the issue, the individual member states enjoyed a wide "margin of appreciation" as to how they could regulate the area and the medical and ethical justifications proferred by the Austrian state were proportionate ones on valid Article 8(2) grounds. Of interest also are the comments of the European Court of Human Rights in *Dickson v. the United Kingdom*, which concerned the refusal to provide the applicants – a prisoner and his wife – with facilities for artificial insemination. The Court again found that Article 8(1) was engaged as the refusal of artificial insemination facilities concerned their private and family lives which notions incorporated "the right to respect for their decision to become genetic parents."

4.7 Also of interest is Article 12 ECHR which protects the right of men and women of a marriageable age "to marry and found a family, according to the national laws governing the exercise of that right." This article has attracted relatively little attention of relevance from the European Court of Human Rights which has tended instead to address issues relating to decisions to have children under the auspices of Article 8. This may be explained at least in part by the fact that Article 12 does not offer any protection to unmarried persons who claim a right to found a family – their concerns, as in *SH v* Austria, must be addressed solely by reference to the Article 8 guarantees. While the breadth of the article may seem to be further restricted by the phrase "according to the national laws governing that right", those words are actually understood to permit of restriction on the right to marry and found a family if the national measures restricting same are for a legitimate purpose and seek to achieve that purpose by reasonable and proportionate means[22].

4.8 Thus, in light of all of the above, it is submitted that, the State not having restricted the right of persons such as the adult Respondents to found a family in the way availed of herein the State cannot deny to such persons parental status *vis-à-vis* the children once born nor, of more concern from the Commission's perspective, prevent the children from

[22] See, Jacobs and White, The European Convention on Human Rights, (4th edition), p 251.

being members of that family and thus to fail to vindicate the correlative Article 41 and 42 rights of the said children v*is-a vis* the adult Respondents to have a family relationship with them. The rights thus enjoyed may be regarded as those described by Finlay CJ in *In re JH (An Infant)*[23] as follows;

> *"(a)the right to belong to a unit group possessing inalienable and imprescriptible rights antecedent and superior to all positive law (Article 41, s..1) (b) to protection by the State of the family to which it belongs (Article 41, s.2); and (c) to be educated by the family and to be provided by its parents with religious, moral, intellectual, physical and social education (Article 42, s.1) "*

(ii) The Respondent children's right pursuant to Article 40.3 to respect for their identity as members of the family comprising the four Respondents

4.9 It is submitted that a fundamental consideration in securing the vindication of the rights of such children is the provision of certainty *vis-à-vis* their familial status. It is submitted that it cannot be in the best interests of such children that there be any uncertainty as to their familial status in the eyes of the law. The parties herein have differing understanding of who is the mother of the children, with the learned trial Judge endorsing the approach adopted by the parties who are now the Respondents to the effect that the Fourth Respondent enjoys that status in Irish law.

4.10 The Commission supports the need for legal certainty in relation to the familial identity of the children and is also of the opinion that, in order to vindicate the various human rights of the children, the family recognised by the law ought to correspond with the family known to them. As surrogate arrangements such as those availed of herein have not been restricted by legal measures to date, and parties have entered into such arrangements in an attempt to give effect to their right to found a family, an unknown number of children have been born in circumstances akin to those of the Respondents and, it is assumed, that most of those children are being reared by the persons whom the agreement envisaged would do so. In other words, lives are being lived by children in which they are being treated as members of the family comprising those genetic parents and any siblings that they may have in the family unit. Their legal status, however, as embodied in the refusal of the Registrar to register CR as their mother, does not reflect their day-to-day reality. It must also be queried whether such a fundamental divergence between their life-experience of family life and their legally recognised familial status is in the best interests of the children involved.

[23] [1985] 2 IR 375

4.11 The Respondents contend that such a divergence creates considerable practical difficulties for persons in their position as, not being the parents of the children in the eyes of the law, the adult Respondents (and certainly the Fourth Named Respondent) cannot, for example, give valid consents for the purpose of medical treatment, for schooling purposes or for their passports. Equally, difficulties arise in relation to the inheritance rights of the child Respondents – and potentially for the children of the Notice Party if the child Respondents are to be regarded as potentially having an entitlement to the Notice Party's estate. Such difficulties stem from the refusal to afford parental status to OR and CR who are the persons providing the parenting to MR and DR and who "provided" the genetic material which ultimately caused their creation. There are many points of contact between the State and a child's parents during the course of a childhood but, in the case of children born through surrogacy, the State interacts with the surrogate and, if he is the child's guardian, the father of the child.

4.12 The extent to which such a state of affairs impacts upon the sense of self and of identity of the children involved must also be queried. Likewise, the issue arises of whether or not their sense of and need for "belonging" is unmet. What of the impact upon the sense of the children's identity and the confusion engendered by the fact that, the children of the person they regard as their aunt, are their brothers and sisters in the eyes of the law? It must be queried whether it is in their best interests that such a divergence exist between the legal position and their day-to-day realities.

4.13 As the Report of the Commission on Assisted Human Reproduction (AHR) makes clear[24], the psychosocial interest of a child born through AHR is;

> "…manifested as the need of each individual to develop a sense of identity in combination with other prerequisites for personal security and stability. The quest for identity is the process by which offspring become aware of who they are and where they "belong" both socially and culturally. This "need" for identity may or may not become a right depending on whether it becomes enforceable."

4.14 It is necessary to consider whether the Irish constitutional order, as informed by the international instruments to which the State is a party, does regard this need as an enforceable right to recognition of their identity inhering in children such as MR and DR, which, in practical terms in this particular type of situation, involves a right on the part of MR and DR to have the Fourth Named Respondent recognised as their mother. "The right to an identity" is often understood to mean the right to know about and to secure information pertaining *to* one's personal and/or familial background. Thus, for example, in *I O'T v B*[25], as alluded to at Paragraph 54 of the Respondents submissions to this Honourable Court, the

[24] Page 138/9.
[25] [1998] 2 I.R. 321.

Supreme Court recognised the right of an adopted person "to know the identity of one's natural mother", although this "basic right" was stated by Hamilton CJ., to flow not from any form of privacy right but from "the natural and special relationship which exists between a mother and her child"[26]. What is at issue herein, is not, it is submitted, a right to information about identity but rather a right to respect for and recognition of one's identity – both genetic and social in the sense that OR and CR have assumed parental responsibility for these children throughout their childhood. While clearly there is no enumerated right in the Constitution in the above terms, there is a right to the person under Article 40.3.2.[27] In any event such a right may also be protected as an unenumerated right within the constitutional order, as informed by the international human rights conventions to which Ireland is a party.

4.15 As noted above, the Respondents have alluded in the Special Indorsement of Claim to the right of the Respondent children to have the Fourth Named Respondent recognised by the State as their mother and guardian. The Respondents continue by stating that that right "is an inherent feature of human personality" and as such merits constitutional protection, language which has long been employed by the Superior Courts when determining whether a putative right ought indeed be afforded constitutional protection as an unenumerated right pursuant to Article 40.3; per, for example, the judgments of Henchy J in *McGee v Attorney General* and *Norris v Attorney General*[28].

---

[26] Similarly , in the context of a proposed adoption of a child of a traveller background by adoptive parents who were not themselves members of the travelling community, the Courts have alluded to a need to show respect for the child's ethnic identity; per Denham J, as she then was in *Sothern Health Board v An Bord* Uchtala[26];

> "There is no doubt that it is a matter of great importance to take care in placing a child of different cultural or ethnic background – to ensure that the child' interests are served. These interests may include knowledge of his social, cultural and ethnic background."

[27] See Judgment of the Divisional Court of the High Court in *Fleming v DPP* [2013] IEHC 2 where it considered the plaintiff's constitutional right to her "person" under Article 40.3.2.

[28] The dissenting judgment of Henchy J in *Norris v The Attorney General* [1984] IR 36 is most instructive in relation to the parameters of the doctrine of unenumerated rights. A principal ground of challenge to the constitutionality of s.61 and s.62 of the Offences Against the Person Act 1861, which had the effect of making criminal sexual acts carried out between consenting male adults, was the assertion that the provisions were an impermissible invasion of a personal right of privacy. Henchy J said at pp. 71 to 72:-

> "*That a right of privacy inheres in each citizen by virtue of his human personality, and that such right is constitutionally guaranteed as one of the unspecified personal rights comprehended by Article 40, s. 3, are propositions that are well attested by previous decisions of this Court..... [t]here is necessarily given to the citizen, within the required social, political and moral framework, such a range of personal freedoms or immunities as are necessary to ensure his dignity and freedom as an individual in the type of society envisaged. The essence of those rights is that they inhere in the individual personality of the citizen in his capacity as a vital human component of the social, political and moral order posited by the Constitution. Amongst those basic personal rights is a complex of rights which vary in nature, purpose and range (each necessarily being a facet of the citizen's core of individuality within the constitutional order) and which may be compendiously referred to as the right of privacy.*

4.16 In the recent decision of *Fleming v DPP*[29], Denham CJ, delivering judgment on behalf of this Honourable Court noted that the words employed by Henchy J in the above judgments "provide valuable guidance" to Courts in their task of identifying unenumerated rights, adding that:

> "The test for the identification of an unenumerated right, or the determination of the extent of an enumerated right, is a test necessarily lacking in precision, and there are irreducible areas of choice. It is all the more important therefore that the reasoning be as explicit as possible. *The approach that any right inheres in a citizen by virtue of his or her personality and should be fundamental to the personal standing of the individual in the context of the social order envisaged by the Constitution provides a useful structure and focus for analysis*. (*italics inserted*)."

4.17 It is submitted that a right in the nature of a right on the part of the minor Respondents to respect for and recognition of their familial identity can satisfy these standards. A child's (and indeed an adult's) right to an identity and recognition and respect for that identity goes to the core of his or her person. It is also fundamental to his or her personal standing or "place" in the society created by the Constitution, which envisages that a child's parents enjoy the fundamental rights, duties and responsibilities vis-à-vis the rearing of the child (pursuant to Article 42) and, where the marital family (of which MR and DR's genetic family is an example) is regarded as the fundamental unit group in society.

4.18 An argument to the effect that the Constitution guarantees a right to respect for one's identity in the form of providing a facility for the recognition of one's genetic parents as parents in the eyes of the law[30], may be helpfully informed by reliance upon the right to

---

The above passage echoes a central portion of the same judge's judgment in *McGee v The Attorney General* [1974] IR 284 at 325:

> "As has been held in a number of cases, the unspecified personal rights guaranteed by sub-s. 1 of s. 3 of Article 40 are not confined to those specified in sub-s. 2 of that section. It is for the Courts to decide in a particular case whether the right relied on comes within the constitutional guarantee. *To do so, it must be shown that it is a right that inheres in the citizen in question by virtue of his human personality*. The lack of precision in this test is reduced when sub-s. 1 of s. 3 of Article 40 is read (as it must be*) in the light of the Constitution as a whole and, in particular, in the light of what the Constitution, expressly or by necessary implication, deems to be fundamental to the personal standing of the individual in question in the context of the social order envisaged by the Constitution*. The infinite variety in the relationships between the citizen and his fellows and between the citizen and the State makes an exhaustive enumeration of the guaranteed rights difficult, if not impossible.(*italics inserted*)

[29] [2013] IESC 19.

[30] Contrary to the argument which the Appellants seek to rebut in their submissions, the Commission does contend that in all cases the First Named Appellant must be satisfied that the woman who seeks to be registered as the mother of a child to whom she has given birth is in fact the genetic parent of that child. Assisted Human Reproduction has given rise to many potential scenarios which were not heretofore possible and there may not be a single solution to the need to respect the identity of a child conceived with the assistance of artificial means. What is important is that there should be a facility for the recognition of the

respect for private and family life as guaranteed by Article 8(1) ECHR, a right which appears to neatly encapsulate the issues arising herein, and upon the case law of the European Court of Human Rights in relation thereto.

4.19 The jurisprudence of the European Court of Human Rights has consistently made it clear that the term "private life" is of wide import. In the words of the Court in *Mikulic v Croatia,* the term

> "…includes a person's physical and psychological integrity and can sometimes embrace aspects of an individual's physical and social identity. Respect for "private life" must also comprise to a certain degree the right to establish relationships with other human beings (see, mutatis mutandis, Niemietz v. Germany, judgment of 16 December 1992, Series A no. 251-B, pp. 33-34, § 29)…….
>
> The Court has held that respect for private life requires that everyone should be able to establish details of their identity as individual human beings and that an individual's entitlement to such information *is of importance because of its formative implications for his or her personality* (see Gaskin v. the United Kingdom, judgment of 7 July 1989, Series A no. 160, p. 16, § 39)."(*italics inserted*)

4.20 In the *Gaskin* case, the Court first acknowledged the importance to a person's well-being of being able to establish details of his or her identity. It concluded that the Article 8 rights of the Applicant, who had spent his childhood in care and who wished to learn details regarding his family, were violated by the absence of an independent procedure pursuant to which he could apply to the social services for records retained regarding his family history.

4.21 The *Gaskin* case thus involved the right to access information regarding identity whilst the *Mikulic* case develops the notion towards a right to certainty as to one's identity. In *Mikulic*, the infant applicant and her mother had instituted civil proceedings before the Croatian courts for the purpose of determining the applicant's paternity. The putative father was ordered by the domestic court to attend for DNA testing and failed to do so on six distinct occasions over a four year period. There was no mechanism to compel the putative father to attend for such test nor to punish him for his failure to do so. Almost five years after the proceedings were instituted in the Croatian courts, proceedings were commenced on behalf of the child before the European Court of Human Rights alleging, *inter alia*, that her right to respect for private and family life had been violated as the

---

resulting familial relationships which respects the identity of the child as part of the family of which s/he is psychologically and socially a member regardless of whether the child's connection to the mother is genetic or gestational.

domestic courts had been inefficient in deciding her paternity claim and had therefore left her uncertain as to her personal identity.

4.22 The Court agreed with the applicant's argument, concluding that the inefficiency of the Croatian courts had left the applicant

> " *in a state of prolonged uncertainty as to her personal identity*. The Croatian authorities have therefore failed to secure to the applicant the respect for her private life to which she is entitled under the Convention."(*italics inserted*)

4.23 It may be argued that the children in the MR case are in a similar state of uncertainty as to their personal identity – the law creates a situation whereby their legally recognised parents are not those whom they identify as their parents.

4.24 Perhaps the most instructive judgment, as far as the rights under consideration herein is concerned, is that of McKechnie J in *Foy v an t-Ard Chlaraitheoir and others*[31] *(No.2)* in which the applicant sought, *inter alia*, a Declaration of Incompatibility pursuant to Section 5 of the *European Convention on Human Rights Act,2003* arising from the failure of the State to provide any legal mechanism for recognition of the acquired gender of the applicant, a post-operative transsexual. Clearly that case, unlike the proceedings herein, involved a challenge to the system which the applicant argued was flawed by reason of its failure to afford respect for her private life, yet as the arguments raised addressed the failure to recognise the applicant's acquired identity, a number of the *dicta* of Mc Kechnie J are of interest for present purposes. In the following extract, the learned Judge alluded to the occasional practical difficulties encountered by Ms. Foy and the impact thereof upon her dignity and privacy:

> "*Dr. Foy has been described as 'female' bearing her chosen name of Lydia Annice in documents such as her passport, driving licence, car registration records, medical card, medical card records and tax and social security documents. On the Electoral Roll she is entered in her acquired sex and name. However, whether legally entitled to or not, there are occasions, although few and infrequent, in which she is still asked for her birth certificate. Since 2002, I have been informed by her counsel that this has happened six times. In addition there remains some uncertainty as to how she would be treated if she had to endure a prison sentence or how insurance companies would react to a claim, given that where relevant, her cover is based on being female. The evidence with regard to social security and pension is not clear cut… I am satisfied that there are still a limited number of occasions on which she has been asked to*

[31] [2007] IEHC 470

produce her birth certificate. This causes her distress and embarrassment and in the process she suffers a loss of dignity and privacy."

4.25 Having considered the relevant case-law of the European Court of Human Rights, the learned Judge concluded that by reason of the absence of any provision which would enable the acquired identity of Dr. Foy to be legally recognised in this jurisdiction, the State was in breach of its positive obligations pursuant to Article 8 ECHR. Having thus concluded, he added;

" *For those persons affected with this condition [gender dysphoria], and in particular those who have undergone gender reassignment surgery, there seems to be a burning desire to have their new sexual identity recognised, not only socially but also legally. This urge to have that identity fully and in all respects accepted by the law is at the core of the transsexual's plight. This explains why so many, often after painful surgical procedures, are still driven to publicly embark on a fight for legal identity which frequently is humiliating and unsuccessful. Those at the forefront of such a quest many years ago, faced a public and a legal system which was much less sympathetic and must less understanding than hopefully what it is today. Everyone as a member of society has the right to human dignity, and with individual personalities, has the right to develop his being as he sees fit; subject only to the most minimal of State interference being essential for the convergence of the common good. Together with human freedom, a person, subject to the acquired rights of others, should be free to shape his personality in the way best suited to his person and to his life."*

4.26 It is submitted that much of the above sentiment applies with equal if not greater force to children living in circumstances akin to the minor Respondents. Bearing all of the above in mind, it would appear that best interests considerations point to the desirability of affording legal recognition, in the surrogacy context, to the familial identity of the child. Indeed, the observations of Fennelly J in *N v HSE*[32] appear to be most apposite in relation to the lack of desirability of a divergence between legal status and the realities of the children's lives. The Court was therein considering whether the child the subject of the proceedings, referred to as "Baby Ann", ought to be returned to her birth parents, who had married, or whether she ought to remain with her prospective adopters. The learned Judge commented that;

"*Ann cannot be adopted. She is registered as a child of the Applicants. She bears their name. If she stays with the second and third Respondents, the relationship must*

[32] [2006] IESC 60.

be that of long term fosterers. In addition, the Applicants remain her lawful parents and guardians, retain rights and obligations in respect of her health, education and general welfare. This situation can, at best, be described as anomalous. It is a long way from a completed adoption. I cannot regard it as being in the long term interests of An[n]."

4.27 The United Nations Convention on the Rights of the Child (CRC) may also offer some assistance to the Irish courts when assessing the existence and parameters of the unenumerated right of children such as MR and DR[33]. In September 1992, Ireland ratified the CRC which contains a comprehensive compilation of child-specific rights, many of which have already been identified by the superior courts as unenumerated rights under the Constitution[34]. The Convention, however, gives express recognition to a child's identity rights. Article 7 thereof provides that;

> 1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, the right to know and be cared for by his or her parents[35].
>
> 2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

6.18 Article 8 adds that;

> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
>
> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity[36].

---

[33] In *Nwole v Minister for Justice*, Finlay-Geoghegan J, (Unreported, High Court, 31st October 2003) in granting leave to apply for judicial review held that there were substantial grounds for contending that the CRC had expanded upon the asylum application procedures which applied to children pursuant to the Refugee Act, 1996 The substantive application was refused in the High Court and the Applicants' appeal was allowed by the Supreme Court in a judgment which did not invoke the CRC.

[34] They include the right to education, freedom of religion, expression, assembly and association.

[35] It is noted that the Convention does not define the term "parent". The term does not appear to be defined in any international convention

[36] Commentary on these articles[36] has pointed to four different facets of identity which those two articles protect serve to protect; familial, biological, tribal and political. For present purposes, the first two forms of identity are of significance and may assist in informing the view of the rights protected under Article 40.3 of the Constitution. [36] See, for example, George Stewart, *Interpreting the Child's Right to Identity in the UN Convention on the Rights of the Child* (1992) 26 Family Law Quarterly 221

4.28 It is noted that the 1996 Report of the Constitution Review Group, (which did not specifically address issues arising from assisted human reproduction) alluded to Article 7 CRC and recommended thereafter that a child ought to have an *express* constitutional right as far as practicable to his or her own identity. That would include a right to have a knowledge and history of his/ her own birth parents. A child, the Review Group felt, was entitled to this information "not only for genetic and health reasons but also *for psychological reasons*." (*italics inserted*)

4.29 This statement represents yet another example of recognition of the detrimental psychological impact upon a child's sense of identity if he or she does not have core information which will help him or her to develop an understanding of his or her place in the world. It is submitted that a similar impact will be felt by a child born though surrogacy who is aware of his birth circumstances, and aware that the person that he or she regards as his mother is not in fact his mother in the eyes of the law.

5. Conclusion

5.1 As a matter of law, CR is a stranger to the children. While it is true that she may apply to be appointed as guardian, it is submitted that this may not adequately vindicate the children's identity rights in a number of respects and may fail to protect their best interests. The facility for the appointment of a biological mother in locus parentis as guardians does not allow for recognition of their input into the creation of the children, it does not alter the position that the person that they regard as their aunt is in fact, in the eyes of the law, their mother and that rights and duties of motherhood are actually vested in her. The identity issues of the Respondent children are therefore not addressed by this approach. Likewise, the possibility that in some limited circumstances, children such as the minor Respondents children could be adopted by their genetic parents does not, it is submitted, meet needs of such children vis-a-vis the recognition of their own past nor of their present circumstances.

5.2 Thus, it is submitted on behalf of the Commission that the failure of the State to allow for the recognition of the familial relationship between persons in the situations of the Fourth Named Respondent and the children herein does not uphold the rights of such children pursuant to Article 40.3 and 41 of the Constitution. The Respondents contend that that this failure is not systemic and can be rectified by recourse to Section 35(8) of the *Status of Children Act, 1987.* The Commission has not expressed an opinion in relation to this question, which is essentially one of statutory interpretation in the belief that the question in itself does not *per se* involve human rights principles, despite the knock-on impact on human rights in terms of the judicial conclusions reached. Should the Court, however, conclude that the flaw is a systemic one, then it is the hope of the Commission

that appropriate legislative steps are taken in a timely fashion to vindicate the human rights of MR, DR and other children in similar circumstances. Of interest in that regard may be the proposal of the Commission on Assisted Human Reproduction in its 2005 Report to the effect that there ought to be a presumption in law that the child born through surrogacy is the child of the commissioning couple. In other jurisdictions, such as England and Wales, parliament has intervened to make specific legislative provision for the transfer of the parental relationship from the woman who performed the surrogate role to the person whom we have referred to as the "genetic mother"; per Section 54 of the *Human Fertilisation and Emybrology Act, 2008*[37], a measure which allows for recognition of the various aspects of the child's developmental and familial history.

13th January 2014

NUALA EGAN B.L.

NUALA BUTLER S.C.

[37] Section 54 of the Human Fertilisation and Embryology Act, 2008 is headed "Parental orders". It provides that;
(1)On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if—
(a)the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
(b)the gametes of at least one of the applicants were used to bring about the creation of the embryo, and
(c)the conditions in subsections (2) to (8) are satisfied.
(2)The applicants must be—
(a)husband and wife,
(b)civil partners of each other, or
(c)two persons who are living as partners in an enduring family relationship and are not within prohibited degrees of relationship in relation to each other.